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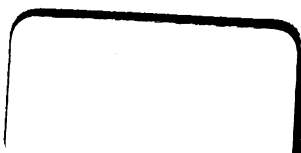
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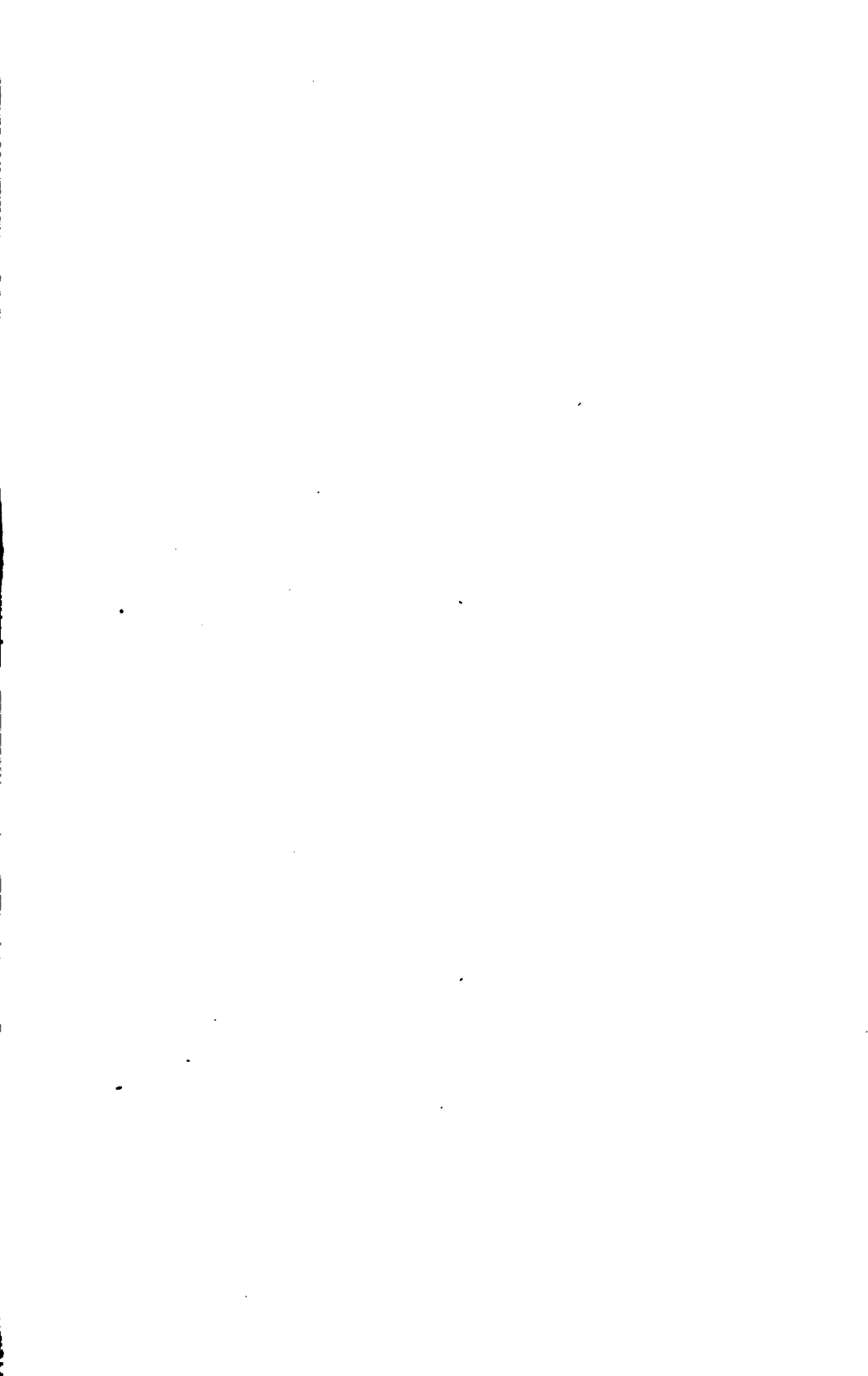
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English August







A NEW
ABRIDGMENT OF THE LAW.

BY MATTHEW BACON,
OF THE MIDDLE TEMPLE, ESQ.

WITH
LARGE ADDITIONS AND CORRECTIONS,
BY SIR HENRY GWYLLIM,
AND
CHARLES EDWARD DODD, ESQ.

AND WITH
THE NOTES AND REFERENCES MADE TO THE EDITION PUBLISHED
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TO WHICH ARE ADDED
NOTES AND REFERENCES TO AMERICAN AND
ENGLISH LAW AND DECISIONS
BY JOHN BOUVIER.

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LEGACIES AND DEVISES.

[A WILL and testament may be considered in two very distinct lights, according to the different subjects upon which it operates, either as it disposes of real, or of personal property. A will of lands is a conveyance or donation *mortis causâ*, a limitation of the testator's estate by a revocable act: it constitutes no heir, creates no representation, but passes the estate merely of itself without any further act. On the contrary, the constitution of an heir is essential to a will of personal estate; for if there be no heir constituted, the instrument is not strictly and properly a will; and as no testamentary disposition of personal property can be administered without the interposition of the representative, the law, upon the deceased's omitting to appoint a representative, or the appointee's refusing to act, takes upon itself, to nominate one.(a) The instrument in the latter case was borrowed from, and is framed upon the Roman law: the instrument in the former case has no reference to that law; and, not having the form of a will properly so termed, it has therefore been called a devise. However, as the restraint which the feudal law imposed upon testamentary alienations of lands, and which occasioned the above distinctions, is now taken off; and as the statutes of H. 8 have enabled mankind to dispose of real estates by will and testament, the term "will" seems now sufficiently comprehensive to be used in a general sense; and therefore the word "devises" may rather be applied to those parts or clauses of the will which convey a title to real estate, whilst those parts which relate to personal chattels may be distinguished by the name of "bequests." Not that, though it be now allowed to convey both species of property by an instrument nominally the same, the old distinctions are therefore entirely obliterated; for the will is still in effect a distinct instrument, as it relates to the one or to the other species. To a bequest or legacy the assent of the representative is required; not so to a devise, for a devise creates no representative. So far as respects the personality there is a probate of the whole instrument; and the probate is evidence for every legatee: but as to the real estate there is no probate, the spiritual court having no cognisance of the instrument as a devise; the will may be void as to one devise, and good as to the others; and every several devisee must make out his title in a distinct cause. Nay, so distinct and independent on

. It was the intention of the editor of the fifth edition of this work to reduce the whole doctrine relating to wills under the head of "Wills and Testaments;" and with that view, the learning of Devises was omitted in the second volume. But it has since occurred to him, that an objection might possibly be made to this change in the arrangement, inasmuch as it would be blending that part of the book which is generally attributed to the Chief Baron Gilbert with the labours of later compilers. He therefore thought it better to abandon the scheme he had formed. It was proper, however, to take notice of it here, in order to account for the introduction of the Law of Devises under the head of Legacies.

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each other are the several parts of the will considered with reference to these different kinds of property, that a person may affirm the will as to one, and disaffirm it as to the other; he may impeach the will *quoad* the devises, and yet insist upon taking a benefit under it *quoad* the personalty. Again, the will, as to personals, does not speak till after the testator's death; whilst, as to real estate, it refers to the date. Hence, it will pass after-gotten property of the former sort, but not of the latter.

(a) Domat, lib. 3, § 1.

We shall first treat of Devises, and under that head we shall consider,]

(A) Who may devise Lands, and to whom.

(B) Of what Estate or Interest in the Devisor he may dispose.

(C) What Words pass a Fee in a Will.

|| I. Expressions which are equivalent to the word "Heirs."

II. Word "give" or "devise" not requisite.

III. Devises which carry the Fee by Implication.

1. *To Trustees for Purposes which require the Fee.*

2. *Where the Devisee is described as an Heir.*

3. *Where the Devisee is in respect of the Premises devised charged with the Payment of a Sum of Money.*

4. *Expressions which are considered as sufficient to pass a fee, as "Estate," "Property;" &c.||*

(D) What Words create an Estate-Tail or for Life.

(E) Of Terms for Years, and uncertain Interests by Devise.

(F) Of Devises for Payment of Debts.

(G) Of Devises by Implication.

|| (G g) When Words of Recommendation, Desire, &c., raise a Trust. See *Legacies*, (B) 1, *post.*||

(H) Of the Disposition of Goods and Chattels by Will, by what Description, and to whom good.

(I) Of Executory Devises of Lands of Inheritance: And herein of contingent Remainders, and cross Remainders as far as they relate to this Place.

(K) Of Executory Devises of Leases for Years: And herein of the Limitation of the Trust of a Term, as far as it relates to and agrees with a Devise thereof.

(L) Of void Devises: And herein,

1. *By devising what the Law already gives, or what the Policy of the Law will not admit.*

2. *By Incertainty in the Description of the Thing devised.*

3. *By Incertainty in the Description of the Person to take.*

4. *By the Devisee's dying in the Lifetime of the Devisor.*

85. *By the Birth of a Child.*

6. *Miscellaneous Cases of void Devises.*

(M) Of void Conditions in a Devise.

What Circumstances are necessary by the 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5, and 29 Car. 2, c. 3. What shall be a Revocation and a new Publication. Vid. tit. *Wills*.

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|| See Com. Dig. *Devise* (G) (H) (I) (K).||

THE (a) statutes of 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5, give this power to all persons, except infants, idiots, *femes covert*, and persons of (b) *non*

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sane memory; and every person may be a devisee within these statutes, except bodies politic and corporate; and these were excepted because they never answered the feudal services, and were restrained from purchasing any lands by the statute of *mortmain*.

6 Co. 16 b; Roll. Abr. 608. (a) A conveyance by will was a privilege anciently allowed by the civil law only to persons *in extremis*, who had not time or assistance necessary to make a formal alienation, and was chiefly intended for military men, who were always supposed to be under those circumstances, and therefore the ceremonies and number of witnesses required of others were dispensed with as to soldiers, though now the rules for military testaments are allowed in most cases; but as to lands and houses, our law gave no liberty of disposing thereof by will, except in certain boroughs and places where such custom had obtained time out of mind. Show. P. Cases, 147, Sir Edward Hungerford v. Nosworthy. (b) That it is not sufficient that they be able to answer to familiar and usual questions. Cro. Jac. 497; 6 Co. 23 a.

Yet, since the (c) statute of charitable uses, it has been held, that a devise to the principal, fellows, and scholars of Jesus College in Oxford, and their successors, for maintenance of a scholar, is good, though such devise had been *mortmain* by the statute of *wills*.

(c) 43 Eliz. c. 4, for which vide head of *Charitable Uses and Mortmain*, Hob. 136; Flood's case, Lev. 284, S. P.

Although a wife, by reason of the subjection she is under to her husband, cannot make a will; yet a woman, whose husband is banished for his life by act of parliament, may make a will, and act in every thing as a feme sole.

|| 2 Br. C. C. 385; || 2 Vern. 104, Countess of Portland and Progers; for this vide tit. *Baron and Feme*.

Also, a husband may bind himself by covenant or bond to permit his wife, by will, to dispose of legacies, &c.; and this will be such an (d) appointment as the husband will be bound to perform.

Cro. Eliz. 27; Cro. Car. 219, 376, 597; 1 Vern. 244, 245; 2 Vern. 329; 2 Ves. 141. [When a feme covert is empowered to make a writing in the nature of a will, a writing executed during the coverture will operate as such. Cotter v. Layer, 2 P. Wms. 624; Oke v. Heath, 1 Ves. 139; Duke of Marlborough v. Lord Godolphin, 2 Ves. 75; Southby v. Stonehouse, Ibid. 612.] (d) But it does not operate as a will, neither ought it to be proved in the spiritual court; for the property passeth from him to her legatee, and it is his gift. 1 Mod. 11. [But although it may not operate strictly as a will, but as an appointment, yet it is of a testamentary nature, and therefore must be proved in the spiritual court, else the legatee cannot entitle himself to the bequest in a court of law. || Stevens v. Bagwell, 15 Ves. 139, 154; || Stone v. Forsyth, Dougl. 707; Ross v. Ewer, 3 Atk. 156; Jenkin v. Whitehouse, 1 Bur. 431; Cothay v. Sydenham, 2 Br. C. C. 392;] Pre. Ch. 84. {A feme covert, who is also an executrix, makes a will with her husband's consent, and survives him. A general probate of her will is not to be granted, but only a limited probate (or administration *cum scripto annexo*) quoad the husband's effects and those of her testator; but not as to her effects acquired subsequent to her husband's death. His assent could not give her a power of disposing of them, but only of property over which he had himself a disposing power. 2 East, 552, Scammell v. Wilkinson.} If he once assents, he cannot after dissent; and where he is bound by agreement to let her make a will, his consent shall be implied till the contrary appears; and what shall be sufficient evidence of an assent, vide 2 Mod. 172, 173; Eq. Cas. Abr. 66.

|| But though a feme covert survive her husband, her will made during the coverture with his assent will only pass such personal estate as he could dispose of, not such as is acquired after his death.

Stevens v. Bagwell, 15 Ves. 139; 2 East, 552.||

A feme covert executrix cannot devise any of the goods which she hath as (e) executrix without the (g) assent of the husband, or his agreement after.

Roll. Abr. 608. (e) Of things in action, or of what she hath as executrix, by her husband's consent, she may make a will; and this is properly a will in law, and ought

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to be proved in the spiritual court. 1 Mod. 211, 212. ¶ If she died in the lifetime of her husband, she might, with his consent, bequeath choses in action. 2 Br. C. C. 543. ¶ (g) That a feme covert executrix may make an executor without his assent, vide Moor. 340; 2 And. 92; Roll. Abr. 608, 912; 1 Mod. 211, 212; ¶ 2 East, 556.¶

¶ If personal estate of any kind is settled upon a feme covert, whether by a contract to which her husband is a party, or by the settlement or gift of other persons, she has the same power over it in equity as if she were a feme sole; she takes it with all its incidents, of which the *jus desponendi* is one. And where she has this power over the principal, she by consequence has it over its produce and accretions.

Fettiplace v. Gorges, 1 Ves. jun. 46; S. C. 3 Br. C. C. 8; Gore v. Knight, 2 Vern. 535; Slanning v. Style, 3 P. W. 338; *sed vid.* 5 Ves. 79; 2 Swanst. 62; 1 Freem. 304.¶

If a feme covert makes and publishes her will, and devises land by it, and her husband dies, and then she dies, the devise is void, because the consummation is founded upon the making and publishing, which are void acts.

Plow. 344; 11 Mod. 157.

¶ But if a feme covert before marriage reserve a power to dispose of real estate by her will,—either by a power over a use, which is effectual at law, or through the medium of a trust, or even by an agreement in her marriage articles,—it will be enforced by a court of equity: and this reservation may comprise not only the real estate she then has, but all that may devolve upon her during the coverture. *After* marriage, a feme covert can only acquire a power to devise her real estate by levying a fine, or suffering a recovery thereof.

Peacock v. Monk, 2 Ves. sen. 191; Wright v. Cadogan, 1 Br. P. C. 486; S. C. 2 Eden, 239; Doe v. Staple, 2 T. R. 684; S. C. nom. Hodsdon v. Lloyd, 2 Br. C. C. 532; Rippon v. Dawding, Amb. 565; Dillon v. Grace, 2 Sch. & Lef. 456; Roper, *Husb. and Wife*, vol. i. 179.¶ {There is no difference in this respect between a legal and an equitable interest. A feme covert may make a will disposing of her real estate, when articles have been executed before marriage, by which the husband covenants that she shall have full power to dispose of it by deed or will during coverture, though the estate is not conveyed to a trustee, but remains vested in her. Amb. 565, Rippon v. Dawding; 2 Dall. 199, Barnes's Lessee v. Irwin.}

[It is said by Lord C. B. Comyns, that, by the custom of London, a feme covert may devise to her husband, but without citing any authority.

Com. Dig. tit. *Devise*, (H. 3.)]

A wife may be a devisee, though not a grantee to the husband, for as the grant had been void, because the husband and wife are but one person in law, so the devise is good, because it does not take effect till after the death of the husband, and then they are no more one person.

Co. Lit. 119; Roll. Abr. 610. [This was allowed for settled law so early as the time of Ed. 2. 4 Ed. 2; Fitz. tit. *Devise*, pl. 23.]

¶ A devise made to husband and wife and their heirs vests the property in the devisees as tenants in common.

Sergeant et ux. v. Steinberger et al., 2 Ohio, 306. See Lithgow v. Kavenaugh, 9 Mass. 161.g

An infant cannot devise his (a) lands; and therefore if one under the age of 21 makes his will, and thereby devises his lands, and after attains the age of 21 years, and dies without making any new publication thereof, this devise is void.

Sid. 162, Herbert and Forbale, agreed *per Cur.* on a trial at bar. 11 Mod. 157; for this vide Dyer, 143, Raym. 84; 1 Ves. 299; 3 Atk. 695. ¶ But a special custom in a

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particular place for an infant to devise lands is good. Perk. 231, § 504; 3 Atk. 711; Rob. Gav. 225.¶ (a) An infant male at the age of 15, or female at 12, if proved to be of discretion, may make a will, and dispose of personal estate. 2 Vern. 469.—Other books mention 17 or 18, at which years an infant may make his testament and constitute his executors for his goods and chattels. Co. Lit. 89 b.—But as the common law has appointed no time, and as this is a matter properly cognisable in the spiritual court, which proceeds according to the civil law, by which law a will at 14 is good, it seems agreed, that a will made by an infant at the age of 14 of his personal estate will not be controlled in Chancery, or the temporal courts. 2 Mod. 315; 2 Jon. 240. See tit. *Infancy and Age*, A.

If there be two joint-tenants of lands, and one of them devise that which belongs to him, and die, this is a void devise, and the devisee takes nothing; because the devise does not take effect till after the death of the devisor; and then the surviving joint-tenant takes the whole by a prior title, viz. from the first feoffment. But in this case if the devisor survive (a) the other joint-tenant, then the devise is good for the whole, because he being the surviving joint-tenant has the whole by survivorship; and then the words of the will are sufficient to carry the whole estate: besides, at the time of making the will, though he was not sole tenant, yet he was seised *per my et per tout*; and it is impossible to fix upon any particular part which he meant to devise, because he could not then call one part of the land more his own than another, and the most genuine construction seems to give the whole land, since he was seised *per tout* of it at the time of the devise.

Lit. § 287; Perk. § 500. [(a) But it is now settled, that a subsequent determination of the jointure, whether by partition or by the death of the companion, will not effectuate a devise made during the jointure; for the statute of 34 & 35 H. 8, c. 5, § 4, requires that a devisor should have a sole estate in fee-simple, or should be seised in fee in coparcenary or in common, at the time of making the will, in order to be capable of devising. Even at common law such a will would have been bad; for before the statute a man could only devise lands which he was then seised of: and a will cannot operate as a severance of the jointure. *Swift v. Roberts*, 3 Burr. 1488; ¶ 1 Bl. Rep. 476; ¶ *Butler and Baker's case*, 3 Co. 30 b; Poph. 87, S. C.]

It has been much doubted, whether a devise to an infant *in ventre sa mère* be good, because it is not in being to take at the time of the death of the devisor; and since by the devise the person is to take (b) immediately after the death of the devisor, the freehold cannot be put in abeyance by the act of the parties.

That such a devise is not good seems to be supported by the following authorities: Dyer, 303; 11 H. 6, 13; Bro. *Devise*, 30; Salk. 231, pl. 10; Moor. 637; 12 Mod. 278. (b) It is said by Finch, Lord Keeper, that at common law, without all question, a devise to an infant *in ventre sa mère* is good of lands devisable by custom; but the doubt arises upon the statute, which enacts, that it shall be lawful for a man by will in writing to devise to any person or persons. 2 Mod. 9.—*Posthumous children are now enabled to take a contingent remainder which hath no trust-estate to preserve it. See 10 and 11 W. 3, c. 16.

Others, (c) of as good authority hold, that such devise is good, though the infant be not *in esse* at the death of the devisor, and that the freehold shall not be in abeyance, but shall descend to the heir at law in the mean time.

(c) As Moor. 177; Lev. 135; Sid. 153; Raym. 163; Keb. 851; 2 Bulst. 273; Freem. 244.

But all agree in this, that a devise to an infant, *when he shall be born*, or when God shall give him birth, is a (d) good devise, and that the freehold shall descend to the heir at law in the mean time.

Sid. 153, Snow and Cutler; Lev. 135, S. C.; Raym. 162; Freem. 244. [The universal concurrence in this point must close the question; for a devise to an infant *in ventre sa mère* necessarily implies a future disposition to take effect at its birth, as much

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as if the words "*when he shall be born*" were added; for surely it cannot be imagined, that the child should take the estate before it was born. *Fearne's Conting. Rem.* 428. And that a devise to an infant *in ventre sa mère* is good, see *Taylor v. Bydal*, 1 *Freem.* 243; *Anon.* *Ibid.* 293; *Gulliver v. Wicket*, 1 *Wils.* 106; *Chapman v. Blissett*, *Ca. temp. Talb.* 145. And that an infant *in ventre sa mère* is within the description of "*children living at the time of the testator's decease*," see *Doe v. Clark*, 2 *H. Bl.* 399.] || And the statute 10 & 11 *W.* 3, c. 16, has been said to put posthumous children upon the same footing, to all intents and purposes, with children actually born. 4 *Ves.* 334; 1 *T. R.* 634.] (d) So of a devise to an infant *in ventre sa mère*, with a new publication of the will after his birth. *Cro. Eliz.* 423.

So, it is out of doubt, that if land be devised for life, the remainder to a posthumous child, that this is a good contingent remainder, because there is a person in being to take the particular estate; and if the contingent remainder vests during the continuance of the particular estate, or *eo instanti* that it determines, it is sufficient.

Moor. 637, *Church and Wiat*; 3 *Lev.* 408; 4 *Mod.* 359; *Salk.* 297; *Carth.* 309, *Reeve and Long.* *Vide* 10 & 11 *W.* 3, c. 16; 8 *Vin. Abr.* 87, pl. 12, tit. *Remainder and Reversion.*

|| A bastard cannot be a devisee until he has gained a name by reputation, or can be otherwise certainly described. The term children *primâ facie* means legitimate children.

1 *Mer.* 141; 2 *Mer.* 419, and cases cited.]

A devise to an alien, (a) so to the heir of an alien, is void, because an alien, according to the policy of our law, can have no heir, either to (b) inherit or take by purchase.

[(a) The devise to an alien, it seems, would not be void; for there does not appear to be any rule of law to prevent an alien from taking by devise: the only consideration would be for whose benefit he may take. *Knight v. Du Plessis*, 2 *Ves.* 360; *Godfrey v. Dixon*, *Godb.* 276; *Noy*, 137;] *Lev.* 59. (b) A bastard may be a devisee of land, though he cannot take by descent. *Dyer*, 323. But a monk cannot be a devisee of land. *Ibid.* *Ibid.* As to religious persons who are disabled from making a will, or taking by devise, *vide* *Roll. Abr.* 608.

[The will of a *felo de se* (though void as to his personal estate, because that is forfeited to the king) seems to be effectual as to lands.

Plowd. 261; *Swinb.* 106. At Rome, suicide did not invalidate a will; and it was common with those who were apprehensive of being exposed to capital punishment, to prevent the confiscation of their property by a voluntary death. "*Eorum qui de se statuabant, humanantur, corpora, manebant, testamenta, pretium festinandi.*" *Tacit. Annal.* lib. 6, § 29. But this *pretium festinandi*, this temptation to suicide, was taken away by the laws of the later emperors, and the will was allowed to be good only where the party destroyed himself from impatience of pain, or derangement of mind. *Quod si futuræ pænæ metu voluntariâ morte supplicium antevertit, ratam voluntatem ejus conservari leges velant.* *Cod. l. 2. Qui testam. fac.*]

(B) Of what Estate or Interest in the Devisor he may dispose.

By the common law, no lands or tenements were devisable, except by particular custom; neither could they be transferred from one to another but by solemn livery and seisin, or matter of record: the (c) true reason hereof seems to be owing to the nature of the feudal tenures; for by these, though the lord had given lands to his tenant and his heirs, which were words of limitation, and appropriated to measure out the length and continuance of the estate, yet as they were understood the heirs of the present tenant who came in by the donation of the lord, the tenant could not devise them even to his own heir, thereby to make him a purchaser, and so deprive the lord of the profits of wardship, marriage, and relief, which were incident to the feudal tenure;

(B) Of what Estate or Interest in the Devisor he may dispose.

much less could he devise them to a stranger, who, perhaps, might not have ability of mind, or strength of body, though the one was requisite to assist his lord in his courts, and the other to defend his person in the field.

Co. Lit. 111; Abr. Eq. 174. (c) Because it was presumed that the testator would do that in *extremis* which he would not do in his health; that it proceeded from the distemper of his mind by the anguish of his disease, or by sinister persuasions, to which he was more liable in his illness than at other times. Roll. Abr. 608.

But an estate for years might have been devised at common law; for this, as now, was only considered as a chattel, and formerly was of a very short duration.

50 Ass. 1 Roll. Abr. 609.

The statute of 32 H. 8, c. 1, which first introduced this disposition of lands by will, requires that the devisor should have a proper title and interest in them for that purpose; and therefore if a man devises land in which he has nothing, and after purchases them, such a devise is void, not being within the statute of *wills*, for he is not a person *having* (a) as the statute speaks.

Plow. 343. {See 1 Wash. 75, Turpin v. Turpin.} [(a) The rule of law in this case does not depend upon the word "*having*;" but upon the will's being in nature of a conveyance; an appointment of the specific estate. 2 Ves. jun. 427; 13 Ves. 222; 9 Cowp. 90.]

So, where a man devised to his wife all such sums of money, lands, tenements, and estate whatsoever, whereof at the time of his decease he should be possessed, and after the making of the will he purchased lands in gavelkind, and died without making any new publication, it was holden that those new purchased lands did not pass; for they were not *sua* at the time of making the will, and the constant form of (b) pleading is, that the testator was seised, and being so seised, &c., which at least is an evidence of the law: and there is no difference as to lands devisable by custom, or by statute. But such devise of things personal is good, though the testator had them not at the time of making his will, because they go to the executor, to whom the will is only directory.

Salk. 237, pl. 16; Holt, 248, pl. 14; 11 Mod. 129; Fitzgib. 231, Bunter and Cook, adjudged in C. B. and affirmed in B. R.; {Gilb. Dev. 126, S. C.; Ibid. 138, Arthur v. Bockenham, S. P.} [In this case of Bunter v. Cook, the Court of King's Bench doubted, whether a chattel real, acquired after the making of the will, would pass by it; but that doubt seems to have been since done away; for in Wind v. Jekyll, P. Wms. 575, Lord Parker held, that such an interest would clearly pass, and stated the difference between freehold and personal interests, acquired subsequent to the making of the will, to be "that with regard to the real estate, bought after the making of the will, supposing *that* not to pass, still there is one in law capable of taking it, viz. the heir; but with regard to the personal estate, if the executor, though made before the acquiring thereof, does not take it, it is uncertain who shall."] (b) That in pleading a devise, it must be shown of what estate the devisor was seised at the time of making the will; Cro. Eliz. 530; and that he died seised of that estate. Mod. 217; [3 Burr. 1496;] [8 Ves. 282.]

¶ If a husband possessed of a chattel real in right of his wife dispose of it by his will made during the coverture, and then survive his wife, the chattel will pass by such will. But if he do not survive, and he makes no other disposition of the chattel, the wife will have it by survivorship.

1 Rob. on Wills, 30, 3d edit.

The statutes of wills do not extend to copyholds; but the uses to which they shall go may be directed by a will. And it has been decided that copyholds purchased after the making of a will, will not pass thereby, though it contain a general devise sufficient to comprise them, unless they be surrendered by the purchaser in such terms as to republish the will, and make it speak from the date of the surrender. Since this has been so decided, the

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stat. 55 G. 3, c. 192, has removed the necessity of a surrender to the use of a will; in ordinary cases at least.

Attorney-General v. Vigor, 8 Ves. 284, and cases cited; 5 Barn. & A. 492.¶

If A makes his will, and thereby devises lands, and is afterwards disseised and dies (a) before re-entry, the devise is (b) void.

39 H. 6, 18 b; Mod. 217, S. P. [Qu. Whether this point would not be differently determined since the reasoning of the court in Jones v. Perry, 3 Term Rep. 93!] (a) But if he re-enters, the devise shall be good, for he was seised *ab initio*. Salk. 238. (b) But if the father devises lands to his youngest son, and the eldest son knowing thereof enters into the land, and disseises the father, and so continues till the death of the father, by which the will is void, yet because it was made void by deceit and covin, it shall be made good in Chancery. Roll. Abr. 378, *per* Lord Chancellor, in the case of Boswell and Emery. β A person who has been disseised of lands cannot devise them, except to the disseisor. Poor et al. v. Robinson, 10 Mass. 131. See Miruse v. Cox, 5 Johns. Ch. R. 450. But in Pennsylvania, the rule seems to be different. Humes v. M'Farlane, 4 S. & R. 435.γ

β Lands purchased by the testator, after he had made his will, do not pass, although the words of the will may include them.

Hays v. Jackson, 6 Mass. 149; Kemp's executors v. M'Pherson et al., 7 Har. & John. 320; Burke v. Young, 2 S. & R. 367; Girard v. The Mayor, &c. of Philadelphia, 4 Rawle, 323; Scott v. Semple, 5 Watts, 53; but the law has been altered in Pennsylvania by statute.γ

¶ Whether a right of entry to avoid a fine be devisable, is not quite settled; but if it be, it is clear the devisee must enter within the time within which the devisor must have entered.

8 East, 566; 1 Taunt. 600, 604.¶

A agrees with B for the purchase of copyhold lands, which were surrendered out of court to the use of A, but before admittance A dies: A was seised of other copyhold lands, and after the said contract with B had made his will, and devised all his copyhold lands to J S. It was ruled, that the copyhold lands agreed for passed by the will; for after the agreement, the purchaser might, in equity, recover the land, and oblige B to execute a conveyance, and till such conveyance executed, the vendor stood seised in trust for the purchaser, as he should appoint; and therefore if, after articles agreed on for a purchase, the purchaser devises the land, and dies before a conveyance executed, yet the land passeth in equity; for though according to the strict notions of law the devisor has not lands within the statute till a conveyance be executed, and he thereby become seised of them, yet after articles of purchase, the purchaser only is considered as master of the land, and therefore in (c) equity will be allowed to dispose of them.

Chan. Ca. 39, Ca. Darcy and Beardsham; 2 Chan. Ca. 144, Prieux v. Gibben; ¶ 3 Atk. 73, Car v. Ellison.¶ [This point, that lands contracted for at the time of making the will, will pass by the will, and under general and sweeping words, is established by several cases. Milner v. Mills, Mosel. 123; Allen v. Allen, *Ibid*. 262; Potter v. Potter, 1 Ves. 437; Gibson v. Lord Montfort, *Ibid*. 424; ¶ 10 Ves. 613; ¶ 9 Ves. J. 510; 10 Ves. J. 605, 613; 11 Ves. J. 550, Rose v. Cunynghame; 12 Ves. J. 107, Gaskarth v. Lord Lowther.} Nor will it make any difference, though the day agreed upon for the execution of the contract be subsequent to the date of the will, Greenhill v. Greenhill, Pre. Ch. 320, if the articles were actually entered into before the making of the will, 2 P. Wms. 629, and they be such as a court of equity would enforce in specie. Potter v. Potter, 1 Ves. 437.] {The price must be paid out of the personal estate, though there is no particular direction for that purpose. If the title of the vendor proves defective, so that the vendee would not have been bound to complete the contract, the devisee is not entitled to claim either that the purchase money shall be paid to him, or that another estate shall be purchased, or that the purchase shall be completed notwithstanding the defect of the title. 10 Ves. J. 597, Broome v. Monck.

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But if the vendor can make a good title, and the contract is therefore binding at the death of the vendee, but is afterwards rescinded, because, from the embarrassed state of his affairs, it cannot be completed within a reasonable time as required by the vendor, though the assets are eventually sufficient, the purchase money shall not sink into the personal estate, but shall be laid out in other lands to the uses for which the land contracted for was devised. 4 Bro. C. C. 31; *Whittaker v. Whittaker*, cited and explained in *Broome v. Monck*. And see 1 Atk. 572, *Green v. Smith*.} (c) That an equitable interest is as well devisable as a legal estate. 2 Vern. 679, adjudged. [*Potter v. Potter*, 1 Ves. 437.] || Thus an equity of redemption in copyholds. 3 P. W. 359; 1 Br. C. C. 481.]

Again, a treaty of marriage articles was entered into, whereby the sum of 700*l.* being the wife's portion, and 700*l.* more added to it on the part of the husband, in all 1400*l.*, was agreed to be laid out in the purchase of lands, to be settled on the husband for life, remainder to the wife for life, remainder to trustees, to support contingent remainders, &c.; the marriage took effect, the husband died without issue, and before any purchase made pursuant to the articles; having first devised all his personal estate to the defendant, who was his wife, and all his real estate to the plaintiffs, who were his nephews, and one of them his heir at law, and made his wife executrix, but having taken no manner of notice of the 1400*l.* On a bill brought by the plaintiffs to have this 1400*l.*, as they would have the land if the purchase had been made pursuant to the articles, (for the wife took more by the devise than she would be entitled to under the settlement, had it been made,) it was argued, that if it were to be considered as lands, she could not have both; the devise of the personal estate being more than an equivalent, and therefore a satisfaction; and it was holden by my Lord Chancellor, that, as this case is, if a purchase had been made even after making the will, though at law such lands would not pass, yet in this court there could be no question but the plaintiffs would have the benefit thereof by the relation to the articles; and though no purchase was made, yet by the agreement the 1400*l.* is to be looked upon in a court of equity as real estate, and as such must go to the plaintiffs.

Abr. Eq. 175, pl. 5; *Gilb. Eq. Rep.* 91; *Pre. Ch.* 400; *Will. Rep.* 172, pl. 42; 2 *Eq. Abr.* 353, pl. 7; 10 *Mod.* 39, 528; *Lingen and Souray*, decreed by Lord Harcourt, and affirmed by Lord Cowper, || 1 *Ves. jun.* 201; 8 *Ves.* 256.]

A guardian by knight's service might have devised the ward of the body and land; so, of a guardian in (a) socage.

26 *E.* 3, 65; *Fitz. Gard.* 159; *Roll. Abr.* 609. (a) But a special guardian appointed pursuant to the statute 12 *Car.* 2, c. 24, cannot transfer the custody of the ward, by deed or will, to any other. *Vaugh.* 179.

Tenant (b) in tail to him and the heirs of his body, with reversion expectant in fee, (c) cannot devise the land in fee to another, though he dies without issue, because it is but a mere (d) possibility, and not grantable or assignable. (e)

(b) But tenant in tail may devise to a charity, and such devise shall be good by the statute of charitable uses, by way of appointment. *Duck. Charitable Uses*, 110; 2 *Vern.* 453. (c) 31 *Ass.* 3, adjudged, but a *Q. rationem* added. — Whether such a reversion could be devised by parol within the custom. *Styl.* 409, 410, *dubitatur*. (d) But a remainder after an estate-tail may be devised. 2 *Ass.* 60; *Bro. Devise*, 49; *Fitz. Assise*, 259. || (e) It is now quite clear, that a reversion after an estate-tail may be devised. *Badger v. Lloyd*, 1 *Salk.* 232; *Sanford v. Irby*, 3 *Barn. & A.* 654; 8 *Ves.* 256.]

A man seised in fee devised his lands in trust, to sell part for payment of his debts, and, till his debts were paid, to pay 100*l.* *per ann.* to his natural daughter M, and after the debts paid, 300*l.* for her life; and if she have children, to convey successively to those children; but if she die without

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issue, then to convey to the eldest son and heir of J S, his nephew, and the heirs of his eldest son; but if he claim any thing during the life of M, then both father and son to be excluded from having any thing out of his estate. The eldest son of J S was A, who had two sisters, B and T. A died, leaving issue J, who in the life of M devised the lands in question to J S and died without issue, and after the death of M without issue, the trustee conveyed to the sisters of A and their heirs; and it was held, that this being but a mere possibility during the life of M the devise was void, and the lands well conveyed to the sisters of B.

3 Lev. 427, Bishop and Fountaine decreed in Chancery by the assistance of Treby, C. J., and Power, J. [This case of Bishop and Fountaine is now not law: It seems to be finally settled, that a possibility clothed with an interest is not only descendible, but devisable. ¶ So also contingent and executory estates are devisable. ¶ Selwin v. Selwin, 2 Burr. 1131; 1 Bl. Rep. 222, 251, 605; ¶ Moor v. Hawkins, 2 Eden, 342; ¶ Roe v. Jones, 1 H. Bl. Rep. 30; 3 Term Rep. 88; ¶ 1 Ves. jun. 251; 7 Ves. 300; 17 Ves. 173. ¶ The person designated must be certain. 2 Maul. & S. 165. But a bare possibility or hope of succession is not devisable. 3 T. R. 93.]

[An estate that is turned to a right, as a reversion discontinued, is not within the purview of the statutes of wills. Thus A being tenant in tail, the reversion to B, they joined in a lease for life by deed: B afterwards, during the lease for life, devised the reversion, and died, and then tenant in tail died without issue. The question was, Whether this devise were good or not?—and this depended upon, Whether, if tenant in tail join with him in reversion in a lease for life, not warranted by the statute, so that it be a greater estate than tenant in tail can make, it be a discontinuance of the tail only, or a discontinuance of the reversion also? It was holden to work a discontinuance in both, and then, the devisor having nothing more than a right in the reversion, the devise was void. (a)]

Baker v. Hacking, Cro. Car. 387, 403. {8 East, 552, Goodright v. Forrester; 8 Ves. J. 282; 1 Johns. Ca. 33, Jackson v. Rogers; 2 Cain. Er. 314, S. C.} ¶ (a) But see 1 Taunt. 600, 604; ¶ Abr. Eq. 175, 176, Drew and Merry, decreed.]

J S, who was to have had a considerable advantage by a will, was drawn in by fraud and false suggestions to make a composition for his interest, and to give a release; afterwards J S, being sensible of the fraud, makes his will, and thereby (after other legacies) he devises all the rest of his goods and chattels whatsoever to his wife, upon condition that she paid all his debts, and made her sole executrix: and it was held that his right to set aside the lease was devisable, and the words proper for that purpose.

β Where the testator had a lien on land he had sold for a part of the purchase money, and while the legal title remained in him, he devised the debt due to him, the devisee had a right to the lien.

Tiernan v. Beam, 2 Ohio, 286. See Livingston v. Newkirk, 3 Johns. Ch. 312; Carrol v. Norwood, 4 Har. & M'Hen. 287.γ

(C) What Words pass a Fee in a Will: And herein,

¶ I. Expressions which are equivalent to the word "Heirs."

II. Word "give" or "devise" not requisite.

III. Devises which carry the Fee by Implication.

1. *To Trustees for Purposes which require the Fee.*

2. *Where the Devisee is described as an Heir.*

3. *Where the Devisee is in respect of the Premises devised charged with the Payment of a Sum of Money.*

4. *Expressions which are considered as sufficient to pass a fee, as "Estate," "Property," &c.¶*

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[I. Expressions which are equivalent to the word "Heirs."]

ALTHOUGH a set form of words, and the word *heirs* particularly, are necessary in deeds to convey an inheritance, yet may they be dispensed with in last wills, at which time it is presumed that the testator is *inops consilii*. Hence great regard is paid to the intention of the testator, and such intention is to govern in all cases where it can square with the rules of law: therefore, if a man devises lands to another *in perpetuum*, or in *feodo simplici*, or *to him and his assigns for ever*, or *to him and his*, or that *such a one shall be universal heir*; in all these cases, a fee passes by the will; for it is evidently the devisor's intention that the gift should continue beyond the life of the devisee.

Co. Lit. 9 b; Bulst. 223; Bendl. 11; Moor. 57; [11 East, 524;] Vide tit. *Estates in Fee-simple*; [Com. Dig. *Devise*, (N. 4.)] β Words of inheritance are not necessary in a will to devise and carry a fee-simple. Den v. Bowen, 3 Har. 210. See Butler v. Little, 3 Greenl. 239; Den v. Gifford, 4 Halst. 46; Beall's lessee v. Holmes, 6 Har. & Johns. 208; Fogg v. Clark, Adams, 163; Sargeant v. Town, 10 Mass. 303; Cook v. Holmes, 11 Mass. 528; Brown v. Wood, 17 Mass. 68; Jackson v. Staats, 11 Johns. 337; Neide v. Neide, 4 Rawle, 74; Dice v. Sheffer, 3 Watts & Serg. 419; Saylor v. Kocher, 3 Watts & Serg. 133; Frame v. Stewart, 6 Watts, 433; Scholfield v. Zehmer, 6 Watts, 101.g

[So the following expressions will carry a fee, if their meaning be not abridged or restrained by other words in the will: *e. g.* to a person "and his heirs for their lives;" to a man "and his executors;" to a man "and his heir" (in the singular number); to a man "or his heirs."

Doe v. Stenlake, 12 East, 515; Rose v. Hill, 3 Burr. 1881; Co. Lit. 8 b; Harg. note 4; 2 Atk. 645.] β The word *heir* may be *nomen collectivum*, as well in deeds as wills, and operate in both in the same manner as the word *heirs* in the plural number. Hall v. Vandegrift, 3 Binn. 374.g

So, if A devises land to B *to give, sell, or do what he pleases with it*; these words by the intent of the devisor convey a fee to B.

Roll. Abr. 834; [2 Wils. § 6;] [11 Leon. 256, Whiskon v. Clayton; Moor. 57; 2 Atk. 102, Timewell v. Perkins; 2 Johns. Rep. 391, Jackson v. Coleman. A devise of an estate expressly for life, with power to dispose of it by will, does not give the absolute interest, but only an estate for life with a power. 3 Leon. 71; 4 Leon. 41; 10 Ves. J. 370, Reid v. Shergold. See vide 2 Wils. 6, Goodtitle v. Otway; 1 Wash. 266, Shermer v. Shermer's Ex'rs.]

[So any expressions which show that the testator intended that the devisee might dispose of the fee, and where no express estate is given to him; *e. g.* "to sell and dispose for payment of debts;" "to be at his discretion;" and "to such uses as he shall appoint." So if the words were "to B or *sanguini suo*," they would pass a fee, because the blood runs through the collateral as well as lineal line.

13 Ves. 445; 10 East, 438; 8 Vin. Abr. 236; 8 Vin. Abr. 235, and see 11 East, 220; 3 Ves. 470; 16 Ves. 135. As to the expressions stock, family, or house, which would, it appears, carry a fee, see Hob. 33; 17 Ves. 257; 1 Turn. & Russ. 156; but a devise to one *et semini suo*, or, it seems, to his posterity, would create an estate-tail. Co. Lit. 9 b; 2 Freem. 268; 1 H. Bl. 461.]

β A devise of all the testator's "estate, real, personal, and mixed, goods and chattels whatsoever, or wheresoever they may be found, belonging unto me for any cause whatsoever," carries a fee in the real estate of the testator.

Brown v. Wood, 17 Mass. 68. See Morrison v. Semple, 6 Binn. 94.

A devise without words of inheritance may pass a fee, if, taking the whole will together, such appears to have been the intent of the testator.

Cook v. Holmes, 11 Mass. 528. See 9 Mass. 161; Kennon v. McRoberts, 1 Wash. 96; Shermer v. Shermer's Executors, 1 Wash. 266; Johnson v. Johnson, 1 Munf.

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549; *Fraser v. Hamilton*, 2 Desaus. 573; *Clark v. Mikell*, 3 Desaus. 168; *Waring v. Middleton*, 3 Desaus. 249.

In a devise of real estate, the words, "I give such estate to A," or "A shall have such estate," or "such estate shall be equally divided between A and B," are sufficient, without other words, to vest a fee-simple in the devisee or devisees.

Hungerford v. Anderson, 4 Day, 368.

A devise of lands to A for life, remainder to her heirs, and their assigns for ever, vests a fee-simple in A.

Bishop v. Selleck, 1 Day, 299.g

A devise to a man and his successors carries a fee; for by the word *successors* is intended *heirs*, *quia hæres succedit patri*.

Cro. Jac. 416; *Roll. Abr.* 835; || 8 *Vin. Abr.* 209.||

¶ In a devise to one and his heirs, the heirs cannot be considered as deriving any interests from the devise, although the testator might have contemplated such interest; the word heirs merely limited the fee-simple in the devisee.

Hawley v. The Inhabitants of Northampton, 8 Mass. 3. See *Bishop v. Selleck*, 1 Day, 299.

Testator devised lands to his wife, and, after her decease, to one of his sons, without expressing the nature or duration of the son's title; and bequeathed a legacy to another son as "his proportion of the estate." Held, that the devisee of the remainder, after the death of the wife, took a fee.

Butler v. Little, 3 Greenl. 239.||

|| II. Word "give" or "devise" not requisite.||

If a devise be in these words, viz. *I release all my lands to A and his heirs*, A has a fee-simple; for where the (a) intention of conveying appears, the law dispenses with a form in a will.

Bendl. 30. (a) *I appoint that J S shall have my inheritance, if the law allows it*, or that *J S shall be heir of my lands*; these words are sufficient to convey a fee. *Hob.* 2.

¶ A devise of the income of lands is the same in effect as a devise of the lands.

Reed v. Reed, 9 Mass. 372. See *Anderson v. Greble*, 1 Ashm. 136.g

|| III. Devises which carry the Fee by Implication;—1. *To Trustees, for purposes which require the Fee.*||

If lands are devised to trustees, without any words of limitation to support the trust of estates of inheritance, they, by implication, must have an estate of inheritance sufficient to support the trust; for there is no difference between a devise to a man for ever, and to a man upon trust, which may continue for ever.

Abr. Eq. 176, adjudged in the case of *Shaw and Wright, Pasch.* 1 Geo. 2; [*Str.* 798, S. C. by the name of *Shaw v. Weigh, Fitzg.* 7, S. C.]

{But if the purposes of a trust may be answered by giving the trustees a less estate than a fee, no greater estate shall pass to them by implication than is sufficient for those purposes.

5 East, 162, *Doe v. Simpson*.

If an estate be given to A to be sold for payment of debts and legacies, the purpose to be answered makes it a fee without words of limitation. And

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wherever any thing is directed to be done, or any intention of the testator is to be accomplished, for which, strictly speaking, an estate for life only may be insufficient, a fee will pass.

Cowp. 356, *Loveacres v. Blight*; Willes, 650, *Jenkins v. Jenkins*; 8 East, 141, *Doe v. Clayton*.

An estate being devised to trustees and their heirs in trust for A B, without any limitation of the estate of the *cestui que trust*, he takes the beneficial interest in fee.

8 Term, 597, *Challenger v. Sheppard*. See 2 P. Wms. 194, *Newland v. Sheppard*; Ambli. 387, *Peat v. Powell*;}.

|| But if an express estate be limited, though improper for the purposes of the trust, that estate cannot be made larger merely because the testator ought to have given a larger interest.

Preston's arguments in *Warter v. Warter*, 1 Barn. & C. 747; *Doe v. Fyldes*, Cowp. 841; *Wright v. Pearson*, 1 Eden, 119.

An estate of inheritance may be implied without any words of limitation.

Oates v. Cooke, 3 Burr. 1684; 1 W. Bl. 543, S. C.; *Gibson v. Lord Montfort*, 1 Ves. sen. 491; *Jenkins v. Jenkins*, Willes, 653. See 3 Bing. 3.

If the devise be to trustees and their heirs, or to them and the survivors and survivor of them, and the heirs of such survivor, upon trust, the extent of the legal estate vested in the trustees is determined by the nature of the trust.

If the trust be merely to receive the rents until A attain 21, and to provide for his maintenance, and then to A for life, &c., the trustees take a chattel interest only, during the minority or life of A, which shall first determine.

Trodd v. Downes, 2 Atk. 304; *Goodtitle v. Whitby*, 1 Burr. 228; *Morant v. Gough*, 7 Barn. & C. 206.

If the trust authorize a sale, the trustees must have the whole legal estate.

Bagshaw v. Spencer, 2 Atk. 570, 577; *Gibson v. Lord Montfort*, 1 Ves. sen. 491; *Wall v. Bright*, 1 Jac. & W. 494. See *Hawker v. Hawker*, 3 Barn. & A. 537.

So if trustees are directed to convey or yield up.

Roberts v. Dixwall, 1 Atk. 607; *Stanley v. Stanley*, 16 Ves. 491, 505; 15 Ves. 369; *Smith v. Frederick*, 1 Russell, 174.

But to *transfer* (which may be considered as applicable to the land, and not to the estate) does not require the legal estate.

Doe v. Nicholls, 1 Barn. & C. 336.

If there be any thing for trustees to do beyond merely receiving rents, and paying them over to persons entitled to premises devised, they take a legal estate. Thus, if the trust be to pay life-annuities out of annual rents, the trustees have a legal estate during such lives; or to pay taxes, repairs, &c.

Doe v. Simpson, 5 East, 162; *Shapland v. Smith*, 1 Br. C. C. 75, S. C.; 2 T. R. 446, *cited*.

So a trust to receive rents, and pay or apply them for the maintenance of A, trustees have legal estate during A's life.

Silvester v. Wilson, 2 T. R. 444; *Tenny v. Moody*, 3 Bing. 3.

So to make leases, and receive and pay rents to a married woman and children.

Doe v. Willan, 2 Barn. & A. 84.

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But it has long been settled beyond all question, that a devise to trustees to permit one to receive the profits of land, does not give them a legal estate.

Kinch v. Ward, 2 Sim. & Stu. 417.

If a gross sum of money is to be raised, the words of the will must be looked to, to see *how* it is to be raised: if by sale, then the trustees take an estate in fee, unless an express estate be limited to them; if out of the *annual* rents and profits, the trustees will have a chattel interest only.

Glover v. Monkton, 3 Bing. 13; Warter v. Warter, 1 Barn. & C. 721; Carter v. Barnardiston, 1 P. & W. 505; 1 Eden, 119; Doe v. Simpson, 5 East, 162.

If there be trusts for the separate use of *femes covert*, though not immediately following each other, yet the trustees will take the whole fee.

Harton v. Harton, 7 T. R. 652; 2 Swanst. 391, n.

If there be a joint devise of freehold, copyhold, and leasehold to trustees, and they must take the absolute interest in the latter estates, they will therefore take the fee in the freehold.

Houston v. Hughes, 6 Barn. & C. 403, 421. See 5 East, 172.¶

¶2. Where the Devisee is described as Heir.¶

If a man devises land to his wife for life, and after her death to his three daughters, equally to be divided, and if one dies before the other, then one to be heir to the other, equally to be divided; this last clause gives a fee to the daughters, for the word *heir* is *nomen operativum*, and chiefly in a will shall be taken in its full extent, and then it reaches the most remote heir.

Roll, Abr. 833. ¶ See Spark v. Parnell, Hob. 75.¶

A devises land to his son and heir, and if he dies before his age of 21 years, and without issue of his body then living, the remainder over; he survives the 21 years, and sells the land: the sale was adjudged good, for he had a fee-simple presently, the estate-tail being to commence upon a subsequent contingency.

Sid. 148. ¶ If I appoint that J S shall be heir of my land, he shall have it in fee. Hob. 75.¶

β Testator directed his lands to be sold, and the proceeds "divided among his heirs not heretofore mentioned;" held that the land should be considered as money, and that the words *heirs* meant those entitled under the statute of distribution, and that the words "not heretofore mentioned" applied to those taking a beneficial interest under the will, and not to a legatee in trust.

M'Cabe v. Spruill, 1 Dev. Eq. R. 189.g

¶ 3. Where the Devisee is in respect of the Premises devised charged with the Payment of a Sum of Money.¶

If A devises land to B for life, the remainder to C, paying several sums in gross, C hath a fee, though all the sums together do not amount to the annual rent of the land; for the devise shall be intended for his benefit; and if he had only an estate for life, he might die before he would receive the legacies out of the land, and consequently be a loser, which could never be the intention of the testator; (a) and therefore, wherever there is a sum in gross to be paid, the devisee hath a fee, though the sum be not to the value of the land.

6 Co. 16, Collier's case; Cro. Eliz. 378, S. C.; Spicer v. Spicer, Cro. Jac. 527; Ansley

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v. Chapman, Cro. Car. 158; Co. Lit. 9 b. ¶ See Kennon v. M^rRoberts, 1 Wash. 96; § [Wellock v. Hammond, Cro. El. 204;] ¶ Cowp. 841; 4 East, 496; 5 East, 87.] [(a) Yet even in this case C shall not have the fee, if a contrary intention manifestly appear. Bacon v. Hill, Cro. El. 497.] ¶ A devise of land accompanied with a personal charge upon the devisee, manifests an intention to give a fee. Lithgow v. Kavenagh, 9 Mass. 161. See Cook v. Holmes, 11 Mass. 528; Jackson v. Merrill, 6 Johns. 185; Jackson v. Martin, 18 Johns. 31; Burkart's Lessee v. Bucher, 2 Binn. 464; Harner's Lessee v. Sheetz, 2 Binn. 532; Evans v. James, 2 Hayw. 152; Lindsay's heirs v. M^cCormack, 2 Marsh. Kty. R. 229. §

¶ A devise to one and his wife, and the heirs of her body, to be disposed of by him among his children, as he shall think proper, on condition that he and his heirs and assigns pay to the wife of the devisor a certain sum yearly during her natural life, does not create a fee-simple in the husband, the devisee.

Lithgow v. Kavenagh, 9 Mass. 161.

A legacy "to be paid out of my estate" is charged, by those words, upon the land which passed by the will.

Bray v. Lamb, 2 Dev. Eq. 372.

Testator devised to his son Henry "all his real and personal estate, subject to the following bequests," the first of which is in these words: "I will and bequeath to my grand-daughter, B C, the sum of one thousand dollars, to be paid to her at the age of eighteen years, in land, at such place as my son Henry can buy for her, at its real value." Held, that this devise does not create a charge on the devisor's real estate in the hands of a *bona fide* purchaser from the son Henry, the devisee, that the estate devised to Henry passed an estate in fee, and that while the lands remained in the hands of Henry, they were chargeable with the grand-daughter's legacy.

Conrood v. Conrood, 6 Ohio, 114.

When the payment by the devisee of a sum in gross is annexed to a devise of land in general terms, without expressing any estate, the devisee takes a fee.

Burkhart v. Bucher, 2 Binn. 464. See Lobach's case, 6 Watts, 171. §

So, if A devises to B in consideration that B will release 100*l.* due to him to the executors of A, B has a fee-simple upon his release of the debt; for the devise shall be intended for his benefit, and an estate for life might be determined before he could receive 100*l.* out of the land.

Bendl. 15.

If a man devises 100*l.* in legacies, to be paid within a year to several persons out of land to the value of 10*l.* yearly, and then devises the land to another, the devisee has a fee in the land; for though the devise be not to him, paying 100*l.*, yet since he must take the land subject to the charge of the legacies, he must have a fee to have any benefit by the devise.

2 Lev. 249; 2 Salk. 685.

¶ Two principles have been relied upon in the determination of these cases:—First, That where an indefinite estate is given to a person in lands, and that *person* is charged with the payment of debts or legacies, he must take a fee; for otherwise, if he take only for life and pay the charges, and die soon after, he may be a loser, which the devisor could not have intended. Second, That where the devisee is to pay the charge *out* of the land, he must first take a sufficient interest therein, i. e. a fee. For to direct an act to be done which cannot be accomplished, unless the devisee have more

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than estate for life, is, in wills, in the absence of words of express limitation, equal to a declaration that the person to perform the act should have the fee. "I give my freehold house and all the furniture to E G, whom I make executrix of this my will, she paying all my debts and the legacies before mentioned, twelve months after my death." Held, that E G took a fee.

5 East, 96; 5 T. R. 337; Cowp. 841; Willes, 140; 3 Maul. & S. 325; 5 East, 93. See Chief Justice Mansfield's observations on this rule, 2 N. R. 350; 2 Prest. on Est. 207; Doe v. Holmes, 8 T. R. 1.

"All the rest, residue, and remainder of my messuages, lands, hereditaments, goods, chattels, and personal estate whatsoever, my legacies and funeral expenses being thereout paid, I give and devise unto J D, and do constitute her executrix and residuary legatee." J D took a fee.

Doe v. Richards, 3 T. R. 356. See 5 East, 93.

"All the rest I have in the world, both lands, goods, and chattels, I give to my wife, my executrix, so that she shall sell my stock in trade and household goods, and if these will not pay my debts, she shall sell next the house of fee in Penzance, and not Prospednick, so that my executrix shall pay in good time all lawful debts." The wife took a fee.

Goodtitle v. Maddern, 4 East, 496.

"I give to G S and Sarah his wife, all that my messuage and lands in B; also all my goods and chattels and personal estate, of what nature and kind soever, as I shall die seised and possessed of, or entitled unto, after having thereout first paid and discharged all my debts; also subject to the payment thereout of all the aforesaid legacies. I nominate G S executor, whom I charge with the payment of all my just debts and legacies." G S and wife took a fee.

Doe v. Snelling, 5 East, 87.]

But if A devises lands to B, paying so much or such sums out of the profits of the lands, the devisee takes but an estate for life; for although he takes the land charged, yet he is to pay no farther than he receives, and so can be no loser.

6 Co. 16; 2 Mod. 25; || 3 Burr. 1623; 8 East, 141.] Whether the word *paying* out of lands in general, and not mentioning any certain time, so that the loss may appear, passes a fee-simple, *qu.* and vide Hawker v. Buckland, 2 Vern. 106, [from which case it appears that it would not pass a fee-simple.]

|| So where the words were, "all the rest of my lands and hereditaments, and also all my goods, chattels, and personal estate, after the payment of my just debts and funeral expenses, I give, devise, and bequeath the same unto S C, and I appoint her executrix." S C took an estate for life only.

Moor v. Denn, *ex dem.* Mellor, in Error, Dom. Proc. 2 Bos. & P. 247. See 5 East, 93; 2 Atk. 341; 3 Maul. & S. 516.

So by a devise to M and E, except 20*l.* to be paid out of E's part of the lands to M, M and E took for life only.

Roe v. Daw, 3 Maul. & S. 518.

But where a testator devised certain estates to his wife and other persons for life, and directed other parts of his property to be sold to pay debts; and after his debts were paid, he gave his wife 20*l.* *per annum* to be issuing out of the whole estate that should remain unsold: and then devised the residue of his goods and chattels, lands and tenements not before given, *his debts being paid*, subject and charged as aforesaid to R S, if living at the testator's death, if not to his children, to be divided between them, but that

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Catherine should have 200*l.*, Thomasine 300*l.*, and Elizabeth 200*l.* more than any of the rest:—it was held that the children took in fee.

Gully v. Bishop of Exeter, 4 Bing. 290.¶

So, if the devise had been to B, paying an annual sum to another, this had been an estate for life, for he may pay this out of the yearly profits without any loss to himself.(a)

Cro. Car. 158; Jon. 211; Bulst. 194. ¶ (a) This proposition is not now law: it would be an estate in fee. 3 Burr. 1542.¶ [But notwithstanding words to the effect in this and the preceding passage in the text, if there are circumstances in the will from which it can be collected, that the deviser intended that the devisee should take a larger estate, such intention shall prevail. Webb v. Hering, Cro. Jac. 415; Moore, 852, S. C.; Baddely v. Leppingwell, 3 Burr. 1533; Frogmorton v. Holliday, Ibid. 1618; Doe v. Woodhouse, 4 Term Rep. 89; Lee v. Withers, Sir T. Jones, 107. And so, on the other hand, where lands are charged with a gross sum, yet such charge will not carry an estate in fee without any words of limitation, if an express estate for life, or an express estate-tail is given in terms by the will. Doe v. Fyldes, Cowp. 840; Denn v. Slater, 5 Term Rep. 337.]

[But a devise of a house to A, "paying yearly, and every year, out of the said house, the sum of 1*5s.* to B," will pass a fee.

Goodright v. Stocker, 5 Term Rep. 13.

So, a devise of testator's lands to W, and all his interest in the estates of J C deceased, to L A for life, and after L A's decease, to E S, charged with an annuity to J T for life, gives a remainder in fee to E S.

Andrew v. Southouse, 5 Term Rep. 292.

So, a devise of all the rest, residue, and remainder of the deviser's lands, hereditaments, goods, chattels, and personal estate, "his legacies and funeral expenses being *thereout* paid," conveys the fee to the devisee, by reason of the words *THEREOUT paid*.

Doe v. Richards, 5 Term Rep. 356. {See 2 Bos. & Pul. 252; 5 Bos. & Pul. 349; 5 East, 93.}

A having a fee-simple in a light-house, and a term for 99 years in lands adjoining to it, devised to his son H, and his assigns, all his estate and interest in the light-house, messuages, lands, and tenements, and appurtenances thereunto belonging, upon trust, that he pay out of the rents and profits of the term, during the remainder thereof, 200*l. per annum*. H takes a fee-simple in such parts of the premises wherein the testator had a fee, and a term in the other part.

Villiers v. Villiers, Barnard. Can. 307.

Where the words of a will were, "all the rest, residue, and remainder of my messuages, lands, or hereditaments, whatsoever or wheresoever unbequeathed, after my just debts, legacies, and funeral expenses are fully satisfied and paid, I give to my executors, in trust for my daughters;" it was adjudged that the executors took only an estate for life; the words "*all the rest*," &c., comprehending the particulars only, not the estate; and the subsequent words amounting to no more than a charge in equity; that the court were not necessarily called upon to enlarge the estate to the trustees; for the trust being only for daughters, it may be understood to be only for the lives of the trustees.

Canning v. Canning, Mosel. 240.

So, where the words were, "all the rest of my lands, tenements, and hereditaments, either freehold or copyhold, whatsoever, and wheresoever, and also all my goods, chattels, and personal estate, of what nature or kind

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soever, after payment of my just debts and funeral expenses, I give, devise, and bequeath the same unto my wife S C; and I hereby nominate and appoint her my said wife sole executrix of this my will," it was adjudged, that the wife took an estate for life only; for though the real estate be charged with the payment of debts and funeral expenses, if the personalty be insufficient for that purpose, yet there are no words charging the estate in the hands of the wife with the payment of those debts.

Denn v. Mellor, 5 Term Rep. 558. The parties being dissatisfied with this decision, another ejectment was brought, and a special verdict found, in order that the case might go up to the House of Lords. But the facts being the same, the court of K. B. gave judgment as here, without argument. 6 Term Rep. 175. {The judgment in the King's Bench was reversed in the Exchequer Chamber, but not on this point, that court concurring in opinion with the King's Bench upon it. 1 Bos. & Pul. 558. And in the House of Lords, the judgment of reversal was reversed, and the first judgment affirmed. 2 Bos. & Pul. 247.}

So where a testator gave "all his lands, tenements, and messuages whatsoever, after debts and legacies paid, and funeral expenses were discharged, to his brother-in-law," it was holden, that only an estate for life passed; for though it be true, that where a gross sum is to be paid out of lands, it gives a fee to the devisee of those lands; yet, here the debts are not in all events charged upon the real estate, but only contingently, if the personal estate should be deficient; and therefore it does not come up to those cases where a gross sum is to be paid out of land, and, consequently, gives no more than an estate for life to the devisee.

Merson v. Blackmore, 2 Atk. 341; [8 Term, 497, 503, *Doe v. Allen*, *acc.*]

{ But under a devise as follows—"I give my house and furniture to A, whom I make my executrix, *she paying all my debts and funeral expenses and the legacies before mentioned* twelve months after my death: I likewise leave to her all the rest and residue of my personal estate."—A takes a fee in the house. She is bound to pay the debts and legacies at all events; and the charge is thrown on her in respect of the real estate; the personalty is given to her by the next clause in the will.

8 Term, 1, *Doe v. Holmes*; 4 East, 496, *Goodtitle v. Maddern*; and 5 East, 87, *Doe v. Snelling*, *acc.* A general charge of legacies on the whole estate will not give a fee to the devisee of any particular part of that estate. 5 Bos. & Pul. 343, *Doe v. Clarke*. See 1 Wash. 96, *Kennon v. M'Roberts*. }

|| A devise of two tenements to Sarah B, she paying thereout 40s. a year to her sister Elizabeth B. Sarah took a fee.

Baddeley v. Lappingwell, 3 Burr. 1533, S. P.; *Goodright v. Stocker*, 5 T. R. 13, and see *Randall v. Tuchin*, 6 Taunt. 410.

"I devise all my lands at W, late the estate of C, and all other my interest in the estates of C, unto L A for life; and after her decease, I devise the same unto E S, charged and chargeable with the payment of one annuity of 20*l.* to J T for his life." E S took a fee.

Andrew v. Southouse, 5 T. R. 292.||

¶ A devise of "all my real estate" to five nephews, was held to carry a fee.

Wilson v. Wilson, 2 Binn. 20. See *Busby v. Busby*, 1 Dall. 226; *Caldwell v. Ferguson*, 1 Yeates, 250; *Doughty v. Browne*, 4 Yeates, 179.

Testator devised a lot with the houses upon it to his son A, "as his own property," and he then gave him certain specific legacies, which he was not to have till he became of age; and in case he died before lawful age, or after such age without issue, "then all and singular the above legacies or

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what shall be left thereof, shall be sold, and divided among the rest of my children," passes a fee-simple to A in the houses and lots.

Stoever v. Stoever, 9 Serg. & Rawle, 434.*g*

If a man devises to his younger brother all his lands, tenements, and hereditaments, and all his personal estate, and whatever else he hath in the world, and makes him executor, desiring him to pay his debts and legacies; the devisee hath a fee-simple by these words.

Ackland v. Ackland, 2 Vern. 687; *Salk*. 239, pl. 18, S. C. by the name of *Hopeswell* and *Ackland*. [*Spicer v. Spicer*, Cro. J. 527, S. P. In the case of *Hopewell v. Ackland*, it was settled, that the word *hereditaments* will not pass a fee in a will, for that in the statute of wills it is evidently opposed to an estate of inheritance, the words of the statute being "any person having manors, lands, tenements, and *hereditaments* of estate of inheritance." See *acc.* *Canning v. Canning*, Mosel. 242; *Denn v. Mellor*, 5 Term Rep. 558;] {6 Term, 175; 1 Bos. & Pul. 558; 2 Bos. & Pul. 247, S. C.; 8 Term, 503, *Doe v. Allen*.}

§ A devise to a man with power to sell the premises in fee-simple, for his own use, is in reality a devise to him to authorize a third person to make such sale, and in either case, by construction and inevitable implication, it invests him with the whole estate.

Den v. Thibault, 1 Har. 25.*g*

§ 4. *Expressions considered sufficient to pass a Fee, as "Estate," "Property," &c.*§

If a man devises 50*l.* to be paid in three months, and all the rest and residue of his real and personal estate whatsoever he gives to his dearly beloved wife, whom he makes sole executrix; by these words, the wife has a fee-simple in the lands.

2 Vern. 564, *Murray and Wyse*; Pre. Ch. 264; *β* *Archer et al. v. Deneale et al.*, 1 Pet. 585; *Beall's lessee v. Holmes*, 6 Har. & Johns. 208; and see 3 Cranch, 97; 3 Yeates, 187; 6 Binn. 97; 2 Binn. 20; 6 Johns. 185; 1 Wash. 96; 1 Call, 127; 3 Call, 306; 2 Nott & McCord, 380; *Jackson v. De Lancey*, 11 Johns. 365; S. C. 13 Johns. 537; *Winchester v. Tilghman*, 1 Har. & M'H. 452; *Frazer v. Hamilton*, 2 Deaus. 578; *Den v. Wood*, Cam. & Norw. 202.*g*

So, where the testator, being seised of copyhold and freehold lands, devised all the rest of his estate, whether freehold or copyhold, to his wife and children, equally to be divided between them; it was holden that the word *estate* must signify the interest he had in the land, and so pass a fee.

4 Mod. 89; *Show*. 348; S. C. Eq. Abr. 177, pl. 16. [The words "*all my tenant-right estate*" pass a fee. *Wilson v. Robinson*, 2 Lev. 91; 1 Mod. 100; 3 Keb. 180, 245. So, all the rest of his estate. *Cliffe v. Gibbons*, 2 Ld. Raym. 1324.] If a man devises lands to A for life, and after his decease, the whole remainder of these lands to B, these words pass a fee in remainder to B by the manifest intention of the testator. *Lutw.* 762.—A devise of all a man's real and personal estate passes a fee in the real estate, adjudged between the Countess of Bridgewater and Bolton, *Salk*. 236, pl. 15. 6 Mod. 106, S. C. adjudged, and largely debated. [And the opinion of the court in this case of *Bridgewater v. Bolton*, that the word "estate" in a will of itself passes a fee, has been confirmed by several subsequent cases. So far, indeed, from its being necessary to insert words of inheritance in order to give it this operation, words of restraint must be added in order to carry a less estate; for it is *genus generalissimum*. *Barry v. Edgworth*, *infra*; *Ibbetson v. Beckwith*, Ca. temp. Talb. 157; *Tanner v. Morse*, *Ibid.* 283; 3 P. Wms. 295, S. C. by the name of *Tanner v. Wise*; *Tuffnell v. Page*, *Barnard*, 9; 2 Atk. 57; *Ridout v. Pain*, 3 Atk. 486; 1 Ves. 11, S. C.; *Bailis v. Gale*, 2 Ves. 48; *Scott v. Alberry*, Com. Rep. 337; *Macacree v. Tall*, *Ambl.* 181; *Stiles v. Walford*, 2 Bl. Rep. 938; *Hurst v. Earl of Winchelsea*, 2 Burr. 879; *Holdfast v. Marten*, 1 Term Rep. 411; *Fletcher v. Smiton*, 2 Term Rep. 656; *Doe v. Chapman*, 1 H. Bl. 223; {7 East, 259, *Roe v. Wright*; 8 East, 141, *Doe v. Clayton*; 7 Ves. J. 541, *Pettiwand v. Prescott*; 3 Cran. 97, *Lambert's Lessee v. Payne*; 1 Dall. 226, *Busby v. Busby*. See 1 Wash. 96, *Kennon v. McRoberts*.} And the word "estates" is equivalent to "estate." *Fletcher v. Smiton*, 2 Term Rep. 656; *Tilley v. Simpson*,

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Ibid. 659, n. Under a sweeping clause of "all the remainder and residue of the testator's effects, both real and personal," a fee in lands will pass. *Hogan v. Jackson*, Cowp. 299; 5 Bos. & Pul. 343, *Doe v. Clarke*. Vide *Denn v. Mellor*, *ubi supra*, and 11 Ves. J. 205, *Wilson v. Major*. So it will under a devise of the residue of my slaves and other property; 1 Wash. 45, *Seekright v. Carrington*: unless property be connected with other words which show an intention to restrain it. 5 Bos. & Pul. 214, *Roe v. Yeud*.—In *Hogan v. Jackson*, the fee in the real estate passed under the word *effects*, on account of the addition of the term *real*, and of the introductory words *as to all my worldly substance*. But that word standing alone, without any thing added to alter its usual signification, includes only personal property. 3 East, 516, *Camfield v. Gilbert*; 1 East, 33, *Doe v. White*.} So, a devise of "all I am worth" will carry a fee. *Huxtep v. Brooman*, 1 Br. Ch. Rep. 437. {And a devise of all my right in certain lands. 2 Cain. 345, *Newkerk v. Newkerk*: or of all my interest in them. 8 Term, 502.—In 3 Dall. 477, *Anonymous*, a devise to testator's son of "the improvement whereon I now live" was decided by the Supreme Court of Pennsylvania to give a fee, the lands being held by warrant. But it seems that at the date of the will on which that case arose, (1745,) and till about the year 1758, a title to lands by warrant only was considered as personal estate in Pennsylvania. Per C. J. Tilghman, 2 Bin. 18, *French v. McIlhenny*.}

A, a young lady, who was in eight days' time to be married to the defendant, being taken ill, made her will, and after several specific and pecuniary legacies, devises in these words: "*Item, I give and bequeath all my land and estate in Upper Catesby in Northamptonshire, with all their appurtenances, to William Edgworth of St. Margaret's, Esq.,*" and made him and Mrs. Rudge executors and residuary legatees, and died seised of a real estate of the value of 200*l.* per ann. and possessed of about 3000*l.* personal estate, leaving the plaintiff's wife, who was her sister and heir. The only question was, whether the defendant had an estate in fee, or only for life? It was agreed, that a devise of all her estate would have passed a fee; but a difference was endeavoured between such a devise of all her estate generally, and a devise of all her estate at such a place, that this was only a description of the place where the estate lay, and no devise of the interest which she had in that estate, farther than for life; and it was agreed clearly, that a devise of all her lands would pass only an estate for life, and not the estate in fee which she had in those lands. But the master of the Rolls was clearly of opinion that defendant had an estate in fee, because the lands passed by the first words, and the interest in those lands by the second; and if the word *estate* meant nothing more than the lands it would be useless: but if the devise had been of all her lands or estate at such a place, (a) he thought that would not have passed the fee, but would have been taken according to the common acceptance for her lands at such a place: but as this was, it must be a fee, and decreed accordingly.

Abr. Eq. 178, *Barry and Edgworth*; Pach. 1729, decreed at the Rolls; 2 P. Wms. 524, S. C. [(a) Lord C. Talbot said, he remembered this case very well, and that no such distinction as this was made in it. Ca. temp. Talb. 160. See 1 Ves. 226.]

But where a man seised of Black Acre in fee by mortgage, which was forfeited, and of White Acre, as his own inheritance, devised White Acre to his brother, and then devised all the residue of his goods, leases, mortgages, estates, debts, ready money, and other goods whereof he was possessed, after debts and legacies paid, to his wife, and made her executrix and died; it was holden, that this was no devise in fee to the wife, of the mortgaged land; for the word *estate* is coupled here with chattels, which shows that he meant only estates for years, and the rather, because the words *whereof he was possessed* show, that he intended only to give her chattels, and the mortgage-money, and not the inheritance of the land.

Cro. Car. 447; *Wilkinson and Merryland*, Roll. Abr. 831; *Jones*, 380.

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[So where a devise was in these words, "All those my freehold lands and hop-grounds, with the messuages or tenements, barns, &c., now in the tenure or occupation of the widow L, and all other the rest, residue, and remainder of my estate, consisting in ready money, plate, jewels, leases, judgments, mortgages, &c., or in any other thing whatsoever, or where-soever, I give unto A H and her assigns for ever:" Lord Hardwicke held, that the word *estate* in this clause would not pass the residue of the real estate, for that being coupled with things that are personal, it must be restrained to personals.

Timewell v. Perkins, 2 Atk. 102; Dally v. King, 1 H. Bl. 2, S. P. Semb. However, where a testator has already mentioned both real and personal property, a devise "of all the rest and residue of his estate, of what nature or kind soever," will include real as well as personal estate, though accompanied with limitations peculiarly applicable, and usually applied to the latter only. Doe v. Chapman, 1 H. Bl. 223. {The word *estate*, unless restrained by other words, passes both real and personal estate. 8 Ves. J. 604, Barnes v. Patch; 9 Ves. J. 137, Woolam v. Kenworthy.}

A testator wills that his lands shall go to his two younger brothers R and M, to be divided between them, and if R should have no issue male, then his whole lands and estate shall go to M in tail male, he paying 200*l.* to the daughters of R after the same estate shall fall to him; and if M shall have no issue male, then his lands shall go to his nephew T and his heirs, he paying 200*l.* to the daughters of R and M respectively after the estate shall fall to him: and if T have no issue male, then "*his said estate*" shall go to the daughters of R and M: and if they have none, then to the daughters of T; and if he have none, then to the testator's heirs. An estate for life only passes to the daughters of R and M, the word "*estate*" being here descriptive only.

Rogers v. Briggs, Andr. 210.

{ A devise to the testator's wife for life, and afterwards to her son, "and if he die before he comes to the age of 21 years" then to the testator's own heirs, gives the son a fee. If he was barely to take an estate for life, the time of his death must be immaterial to the devise over. Limiting it over only on the contingency of his dying in his minority, shows an intention that if he attained 21, he should have an absolute fee.

2 Saund. 388; Willes, 138, Moone v. Heaseman; 1 Burr. 234, Tomkins v. Tomkins, cited; 3 Burr. 1618, Frogmorton v. Holyday; 9 East, 400, Doe v. Cundall.}

|| If the word "*estate*" or "*estates*" be used in a devise, and it does not appear that the testator used it only with reference to chattels, or merely to *describe* the property devised, an estate in fee will pass, unless a less estate is expressly limited, or must by clear inference be implied.

Roe v. Harvey, 5 Burr. 2638; 1 T. R. 414; Barnes v. Patch, 8 Ves. 603; Nicholls v. Butcher, 18 Ves. 193. See 2 Prest. on Estates, 87 *et seq.*; 8 Vin. 227; 4 Den ex dem. Sutton v. Wood; Conf. R. 202; Den ex dem. Mabby v. Stainback, Mart. R. 75.*g*

§ Testator devised in these words: "I give and bequeath all that I possess, in doors and out of doors;" held sufficient to pass real estate.

Tolar v. Tolar, 3 Hawks, 74.

The words "*temporal goods*," in the preamble of a will, may be coupled with the devising clause, to enlarge a life-estate into a fee-simple.

Goodrich v. Harding et al., 3 Rand. 280.

Words which only describe the object devised give but a life-estate; when the words comprehend the quantum of the estate, they pass a fee.

Morrison v. Sample, 6 Binn. 97.*g*

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In the following cases it was held that the testator contemplated personal estate only:—

“All the rest of my *estate* and effects I give to C, his executors or administrators in trust, to add the interest thereof to the principal, so as to accumulate the same.”

Doe v. Buckner, 6 T. R. 612. See Woollam v. Kenworthy, 9 Ves. 137; and Doe v. Chapman, *infra*, and other cases there cited.

So, a devise that “all my real and personal estate be divided according to the statute of distribution in that case made and provided.”

Thomas v. Thomas, 3 Barn. & C. 125.

If a sale of the devised property be directed, and the expenses of the funeral to be thereout paid, a remainder in fee, after an estate-tail, will not pass by “my estate and effects.”

Roe v. Avis, 4 T. R. 605.

So a devise of the residue of my estate and effects to trustees to manage a farm, and afterwards to sell such residue or such effects as shall be upon the farm, was held not to pass a fee.

Doe v. Hurrel, 5 Barn. & A. 18.

So, a devise of the residue of my estate, consisting in money, jewels, leases, &c., or in *any other thing*.

Timewell v. Perkins, 2 Atk. 102. See Doe v. Rout, 7 Taunt. 79.

Real estate does not pass by will by the words “all my property and possessions, consisting of both personal and perishable,” with the further expressions “that they should pay my debts out of it, and the residue to be equally divided between them, to have and to hold to them, their heirs and assigns for ever.”

Clark v. Hyman, 1 Dev. 382. *g*

But a devise of the residue of my money, goods, chattels, and *estate whatsoever*, may pass a fee.

Tilley v. Simpson, 2 T. R. 659, note. See Jongsma v. Jongsma, 1 Cox, 362.

So also, “all my goods, chattels, rights, credits, personal and “*testamentary estate*.”

Smith v. Coffin, 2 H. Bl. 444. See Doe v. Gilbert, 6 B. Moo. 268; S. C. 3 Bro. & B. 85.

So, “all the rest of my goods and chattels and estate.”

Audrey v. Middleton, cited Ca. temp. Talb. 286.

So, “all the rest and residue of my estate, of what nature and kind soever, to be equally divided, and the shares to be *paid* to guardians, and their *receipts* to be sufficient.”

Doe v. Chapman, 1 H. Bl. 223; Pennington v. Pennington, 1 Ves. & B. 406; Dunage v. White, 1 Jac. & W. 583.

So, “personal estate and estates whatsoever.”

Dictum per Lord Hardwicke, and Lord Kenyon, 2 T. R. 659, 660. *β* See Young and wife v. Executors of McIntire, 3 Ohio, 500. *g*

So, “all the residue of my estate, goods, and chattels whatsoever.”

Tanner v. Morse, Ca. temp. Talb. 284.

So, “I give to S my land in W. Item, I give to the said S my wearing apparel, linen, books, *with* all other my *estate whatsoever* and wheresoever, not hereinbefore given.”

Scott v. Alberey, Com. Rep. 337. See Ridout v. Pain, 3 Atk. 486. In Doe v. To-

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field, 11 East, 246, the expression "personal estates" passed the fee, it being manifest from the will that the testator meant thereby such real property over which he had an absolute personal power of disposition.

In the following cases, the word "estate," though accompanied by descriptive expressions, was held to carry the fee:—

"My estate of Ashton."

Chichester v. Oxendon, 4 Taunt. 176. *β* Jackson v. Merrill, 6 Johns. 185; Jackson v. Delancy, 13 Johns. 537; Lambert's Lessee v. Paine, 3 Cranch, 96; Kennon v. M'Roberts, 1 Wash. 96. *γ*

"That estate *I bought* of Mead."

Bailis v. Gale, 2 Ves. sen. 48.

"My estate in Kirby Hall."

Tuffnell v. Page, 2 Atk. 37.

"My estate at Braywick."

Holdfast v. Martin, 1 T. R. 411. See Ibbetson v. Beckwith, Ca. temp. Talb. 512.

"All my estate, freehold and copyhold, in B."

Doe v. Wright, 8 T. R. 64.

"My B F estate, with the lands thereunto belonging."

Doe v. Earl of Jersey, 3 Barn. & C. 870.

"My freehold estate, consisting of 30 acres of land, situate at S, in the occupation of B."

Gardner v. Harding, 3 B. Moo. 565; S. C. 1 Brod. & B. 72. See Chorlton v. Taylor, 3 Ves. & B. 160.

"All my real and personal estates whatsoever, that is to say, my land, houses, and buildings situate at S upon my estate."

Denn v. Hoo, 7 Taunt. 35.

"All my lands at T and H, or elsewhere, with household goods, to S for life; and, after her decease, then all *the said estates, goods, &c.*"

Roe v. Bacon, 4 Maul. & S. 366.

It seems now agreed, that the words "in the occupation of" will not restrict the word "estate."

Gardner v. Harding, 3 B. Moo. 565; S. C. 1 Bro. & B. 72; S. P. 7 East, 268. But see 3 Ves. & B. 163.

β A devise of "all my real estate" to five nephews, share and share alike, will pass a fee.

2 Binn. 20. *γ*

There are other expressions, besides the word "estate," which pass a fee in a will; indeed, whenever it appears that the intention is to devise a fee, it is immaterial what words are made use of. The word "*property*" is of itself sufficient to pass real estate, unless there be something in the other parts of the will to show clearly that that word was used in a more confined sense. Per Lord Tenterden, C. J. Thus this word "property" is equivalent to "estate," and all the rules and cases which have been stated as to the latter may be applied to the former.

Doe v. Morgan, 6 Barn. & C. 512, and cases there cited. Nicholls v. Butcher, 18 Ves. 193; Patton v. Randall, 1 Jac. & W. 189. So, estates contracted for will pass by the word "property." Holmes v. Barker, 2 Madd. 462.

It is clear a devise of "all my *interest* in B" passes the fee.

Andrew v. Southouse, 5 T. R. 292.

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A devise of a *remainder* or *reversion* carries the fee.

Bailis v. Gale, 2 Ves. sen. 48; Price v. Gibson, 2 Eden, 115.

But "rest and residue," ordered to be divided by executors, does not give a fee.

Bebb v. Penoyre, 11 East, 164.

"My half part" may pass a fee.

11 East, 163.

So, "my share of the B estate."

Paris v. Miller, 5 Maul. & S. 408.

The word "effects," in its natural sense, more peculiarly imports movable personal property, but a testator may use it so as to pass his interest in real estate.

11 East, 296; 3 East, 523; 15 East, 394.

The word "effects," used *simpliciter*, will carry the whole personal estate, as a gift of "all my effects," without more. But it is frequently used in a restricted sense, meaning "goods and movables," as in the common expression of "furniture and effects." Per Sir John Leach, V. C.

5 Madd. 71. See 3 East, 516; 13 Ves. 46; 15 Ves. 319.

A devise of "all and singular my effects, of what nature or kind soever," will not alone pass real estate.

Doe v. Dring, 2 Maul. & S. 448, S. P.; Henderson v. Farbridge, 1 Russ. Rep. 478. See Camfield v. Gilbert, 3 East, 516.

But if the devise be of "the remainder and residue of all the effects, both real and personal, which I shall die possessed of," a fee will pass. Lord Mansfield argued, that "real effects" means real property.

Hogan v. Jackson, Cowp. 299. See 15 Ves. 507; 1 East, 33; 15 East, 394; Cowp. 245, and Ward v. Bevil, 1 You. & Jer. 512.

"All I am worth," may pass real estate.

Huxtep v. Brooman, 1 Br. C. C. 437.

"All I am possessed of," may pass testator's interest in real estate, if it appear from other parts of his will that such was his intention.

Monk v. Mawdsley, 1 Sim. 286. See 5 Ves. 815.

"My inheritance," passes a fee.

Wildlake v. Harding, Hob. 2. See 7 East, 97.

But "hereditament" *per se* denotes what may be inherited, and not the interest of the testator in the subject devised.

1 Salk. 238; Mose. 242; 3 T. R. 358; 5 T. R. 558; 8 T. R. 503, and 2 Bos. & P. 247, 251.

So, in a devise of a *perpetual* advowson, it was held that the word "perpetual" was descriptive only of the thing devised.

Pocock v. Bishop of Lincoln, 2 Bro. & B. 27; S. C. 6 B. Moo. 159.

¶ The testator being disseised of lands, devised his right and interest to the disseisor: held, to operate as a release.

Poor et al. v. Robinson, 10 Mass. 131.

A devise of lands held adversely to the devisor is void.

Smith v. Vanduesen, 15 Johns. 343. See Poor v. Robinson, 10 Mass. 131; Jackson v. Wilson, 12 Johns. 318.

It seems now settled, that *introductory* words in a will, however comprehensive, though of some avail to determine the intention of a testator, will

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not operate to carry the words of the devising clause beyond their usual signification. Introductory words have been relied upon as showing that the testator did not mean to die intestate as to any part of his property; but this inference seems also to arise from the mere fact of his making a will.

2 Prest. on Estates, 180 *et seq.*; 8 East, 147; 11 East, 220; 14 East, 372; || *Kenon v. M'Roberts*, 1 Wash. 96.*g*

[By this devise, viz. "I give and demise to A, her heirs and assigns for ever, all my lands at B, and I give and bequeath to A aforesaid all my lands at C," A only takes an estate for life in the lands at C, and the reversion descends, although the will begin with these introductory words, "For those worldly goods and estates wherewith it hath pleased God to bless me," and contain a legacy of 1s. to the heir at law.

Right v. Sidebotham, Dougl. 739.

So, though a will begin with like introductory words, and then the testator gives all his freehold tenement lying in G to A, B, and C, "*to them my sister's sons*," and then, among several pecuniary legacies, leaves 10s. to his heir at law, A, B, and C, take only for life, and the reversion descends.

Denn v. Gasken, Cowp. 657.

So if, after the like words in the preamble, the testator gives to W W, his nephew, two houses at S, with a croft and appurtenances belonging to them, now in the occupation of A and B, and further directs that the said houses should not be entered upon by the devisee till after the decease of his executor, W W takes only an estate for life.

Frogmorton v. Wright, 3 Wils. 414.

And yet introductory words to this effect are material in the construction of subsequent devises.

Ibbetson v. Beckwith, Ca. temp. Talb. 160; *Maudy v. Maudy*, Ca. temp. Hard. 143; *Goodright v. Stocker*, 5 Term Rep. 13; *Gulliver v. Poyntz*, 3 Wils. 141; *Hogan v. Jackson*, Cowp. 306; || 8 T. R. 503. ||

One devises thus, "*As touching my worldly estate*, I devise the same as follows: I give to my wife E M 5*l.*, to be paid yearly out of my estate at G, and also one part of the dwelling-house, with as much wood-croft home at her (a) as she shall have need of, by her executors hereafter named. Item, to my son T M and daughter E 5*l.* each, to be paid twelve months after my decease. Item, to my sons T M and R M, whom I make my — and ordain my sole executors, all my lands and tenements, freely to be enjoyed and possessed alike." T M and R M are tenants in common, and take a fee.

Loveacres v. Blight, Cowp. 352. (a) || The court thought the word "request" was omitted after "at her." ||

So where, after introductory words to that effect, a testator gave several legacies to A, and directed him to sell all or any part of his real or personal estate for the payment of his debts and legacies, and desired three persons to assist him in the sale thereof, and to be supervisors of his will; and, after giving some pecuniary legacies to others, concluded with this residuary devise: "As to all the rest of my goods and chattels, real and personal, movable and immovable, as houses, gardens, tenements, my share in the coperas works, &c., I give to the said A;" it was holden that a fee passed to A.

Grayson v. Atkinson, 1 Wils. 333.

So, where a testator reciting, "As to such worldly estate as God has pleased to bless we with," made a provision for his heir at law, and devised "all the rest and residue of his goods and chattels, rights, credits, per-

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sonal and testamentary estate whatsoever to B, for his own use, benefit, and disposal," it was holden, that B took an estate in fee in the lands of the testator, for the residuary clause is commensurate with the introductory clause.

Smith v. Coffin, 2 H. Bl. 444.]

A devised his house or tenement, wherein J S dwelt, called the White Swan, in Old Street, to J N for ever; this carries the (a) fee-simple, and though J S had but a separate apartment in the house, and the other rooms were inhabited by other persons, yet the whole passed, because the house in which he dwelt was devised, and that house was called the White Swan, which sign extending to the whole house, shows the intent of the devisor.

Cro. Car. 129; Chamberlain and Turner, Jon. 195; Dyer, 357, *in margine*. (a) A devises in these words: "I give, ratify, and confirm all my estate, right, title, and interest, which I now have, and all the term or terms of years which I now have, or may have in my power to dispose of, after my death, in whatever I hold by lease from J P, and also the house called the Bell Tavern, to B;" it was holden by three judges against Holt, that the devisee took an estate in fee in the Bell Tavern. Salk. 234; 3 Wils. 419. ¶ See Press v. Parker, 2 Bing. 458.¶

¶ Lands devised to A for life, with remainder to the heirs of A, vest a fee-simple in A.

Bishop v. Selleck, 1 Day, 299.

Testator devised the use of his real estate to his wife, until his son should arrive at the age of twenty-one years, she bringing him up; and then devised to the son the whole of his real estate, except the bequest to his wife, to be and remain in him an estate for ever; held, that the fee vested in the son immediately on the death of the testator, subject to a personal trust for the benefit of the mother.

Evarts v. Crittendon, 2 Day, 338.

A devise of the income of land is, in effect, a devise of the land itself.

Reed v. Reed, 9 Mass. 372.

A devise of lands charged with the payment of a sum of money in gross, no matter how small, gives the devisee, on his paying such sum, an estate in fee.

Gibson et al. Lessee v. Horton, 5 Har. & Johns. 177. See Beall's Lessee v. Holmes, 6 Har. & Johns. 208.g

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AND here the former rule will hold good, that the intent of the devisor will supply the want of those words which are necessary in a conveyance at common law; and therefore, (b) if A devises land to B and his heirs male, the law will supply these words, *of his body*, and make it an estate-tail.

Bro. tit. *Devise*, 1; Co. Lit. 9 b, 25 a, 27 a; Hob. 33; Vent. 228, 229. Vide head of *Estate-tail*. (b) But a devise cannot direct an inheritance to descend against the rules of law; and therefore, in this case, if B hath issue a daughter, who hath issue a son, he shall never inherit; for the rule is, that whoever claims as heir in tail-male, must convey his descent wholly by heirs male. Roll. Abr. 835; Vent. 228. Vide tit. *Descent*. ¶ To create an estate-tail by a devise, it is not necessary that the body from whom the issue is to come should be mentioned in express terms. It is sufficient if the testator's intention appears with reasonable certainty; therefore a devise to one "and his lawful begotten heir for ever," passes an estate-tail to the devisee. Hall v. Vandegrift, 3 Binn. 374.g

So, a devise to one and *semini suo* creates an estate-tail: so, if lands are

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devised to one, and if he die before issue, or if he depart, not leaving (a) issue, or if he die, not having a (b) son, all these limitations create an estate-tail.

2 Vern. 766; Abr. Eq. 179. (a) And if it shall please God to take my son R before he shall have issue of his body, so that the lands descend to his brother, this is an estate-tail. Owen, 29, adjudged. (b) For the word *son* is *nomen collectivum*. Vent. 231. ¶Mellish v. Mellish, 2 Barn. & C. 520.¶

¶ For if, after devising to one in general terms, the testator shows an intention that the subject devised shall go to the descendants of the devisee, his estate will be enlarged to carry such intention into effect.

Thus, where a house was devised to three brothers among them; provided always that the house be not sold, but go to the next of the name and blood: it was held that the devisees took estates-tail.

Chapman's case, Dyer, 533. β See the following cases, as to what circumstances will create an estate-tail. Caskey v. Brewer, 17 S. & R. 441; Paxson v. Lafferts, 3 Rawle, 59; Carlisle v. Cannon, 3 Rawle, 489; Wright v. Scott, 4 Wash. C. C. 16; Amelong v. Dorneyer, 16 S. & R. 323; Duer v. Boyd, 1 S. & R. 203; Clarke v. Baker, 3 S. & R. 470; Gause v. Wiley, 4 S. & R. 509; Carter v. McMichael, 10 S. & R. 429; Hall v. Vandegrift, 3 Binn. 374; Evans v. Davis, 1 Yeates, 332; Haines v. Wilmer, 2 Yeates, 400; Sharp v. Thompson, 1 Whart. 139; Heffer v. Knepper, 6 Watts, 18.g

So, by a devise to J S, and his children lawfully begotten, with full power for him to settle the same, or any part or parts thereof, by will or otherwise, on them or any of them as he should think proper; and for default of such issue, over, J S, who had no child at the time of the devise, was held to take an estate-tail.

Seale v. Barter, 2 Bos. & P. 485. See Doe v. Vaughan, 5 Barn. & A. 464; Mellish v. Mellish, 2 Barn. & C. 520.

And so, by the following devise:—"It (real estate) to go to my daughter C as follows: in case she marries, and has a son, to go to that son; in case she has more than one daughter at her husband's or her death, and no son, to go to the eldest daughter; but in case she has but one daughter, or no child at that time, I desire it may go to my brother." C took an estate in tail-male.

So though there be an express devise to A only in a *certain event*, yet by implication he may take the estate absolutely.

Thus a testator, after bequeathing an annuity to his son, devised, "in case his son should marry before he attained the age of 30 years, then he gave to him and the heirs of his body all his real and personal estates; and if his son should happen to die without leaving issue of his body, then over." Held that the son took an estate-tail, though he did not marry before 30.

Daintry v. Daintry, 6 T. R. 307.¶

But if a man devises lands to another, without more words, this is but an estate for life; and if the devise had gone farther, viz. to *him and his assigns*, these words, of themselves, had not enlarged the estate; but if it had been to him and his assigns for ever, it had been a fee.

Co. Lit. 9 b, Bro. tit. *Devises*, 33; Roll. Abr. 834.

If A devises lands to his eldest son J S, and the heirs male of his body, for the term of 500 years; provided if he, or any of his issue male, alien the premises then to remain over, this is an estate-tail, and the limitation for 500 years void; for though generally a devise to a man, and the heirs of his body, for 1000 years is a term, and not an inheritance, yet here the testator's intent was that it should be an inheritance, because by the provis-

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he took care to advance the issue of J S ; but if it should be a term, then, by the descent of the inheritance on J S, the term would be merged, and the issues would be unprovided, for J S might alien the estate.

10 Co. 78, Moore, 772, S. C.

A, seised in fee of a house and lands belonging to it, devises the moiety of the house to his wife for life ; *item*, he devises the other moiety of the house to his second son ; *item*, he devises the said house, and all the lands belonging to it, to his second son : yet the son took but an estate for life ; for the second devise to the son had its effect by conveying that moiety of the house, and the land which he had not by the first devise, and there are no words in the will to create a larger estate.

Roll. Abr. 834.

A, having issue two sons, devises Black Acre to the eldest, and White Acre to the youngest ; and if either of them died, his acre should go to the survivor ; and farther devised (having two daughters) to each of them 10s., it was adjudged the sons took but an estate for life ; for though the consideration generally gives a fee, yet where there are express words to determine the intent of the deviser, (which is always the rule in wills,) there the devise shall be (a) construed accordingly ; and here it is provided, that, after the death of either of them, the survivor should have both acres, which declares his intent that they should have it but for life, notwithstanding the sums appointed to be paid to the daughters.

Cro. Eliz. 498. (a) If lands are devised to A and B equally to be divided, they have but estates for life, for this can mean no more than they should severally occupy the land. Roll. Abr. 834.

§ In a devise to a man and to the heirs of his body, these last words are a limitation of an estate-tail ; and if it descend from the devisee in tail, all the heirs of his body cannot take together, but in succession only, the eldest son and his issue, then the second son and his issue, and so on.

Hawley v. The inhabitants of Northampton, 8 Mass. 3.

Testator devises as follows : " I give, bequeath, and dispose of all and singular the said lands and plantations, to my wife's son J E, and his lawful begotten heir for ever ; and my will further is, that if the said J E should die without lawful begotten heir, that then I give and bequeath the said lands unto my brother A E, and to his heirs and assigns for ever." J E, by this devise, took an estate-tail.

Don v. Cox, 4 Halst. 10.

I give all my lands to my son William and his male heirs, in a will, create an estate-tail.

Den v. Fogg, 2 Penning. 819 ; Den v. Hamilton, 2 Penning. 883. *

Testator, after describing the parcel of land devised, proceeded as follows : " I give Abraham the said place during his life ; for default of male issue, the land shall return to the said Abraham and John, then to the next according to law ; but it is not my will that none of it be sold, I being the first purchaser have a right to will it so ;" held, that Abraham and John took estates in tail-male, in their respective shares, with a fee expectant, on failure of male issue.

M^r Murtrie v. M^r Murtrie, 3 Green, 276.

The words, " I will and bequeath to my son A one half of the plantation I now live on, joining C and D," convey only a life-estate.

Witherspoon v. Dunlap, 1 M^c Cord, 546.g

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¶ W devised to C for life; remainder to her first and other sons in tail-male; remainder to all her daughters as tenants in common; and in default of such issue to testator's right heirs: Held that the daughters took for life only.

Hay v. Earl of Coventry, 3 T. R. 83. See Goodright v. Jones, 4 Maul. & S. 88; Doe v. Vaughan, 5 Barn. & A. 464, and Ward v. Bevil, 1 Youn. & Jer. 512. β In the following cases, the devisees took estates for life. Abbott v. Jenkins, 10 S. & R. 296; Kinsey v. Lardner, 15 S. & R. 192; Clayton v. Clayton, 3 Binn. 476; Steele v. Thompson, 14 S. & R. 84; Burr v. Sim, 1 Whart. 252; Hoge v. Hoge, 1 S. & R. 144; Findlay v. Riddle, 3 Binn. 139; Bennett v. Morris, 5 Rawle, 9; Holme v. Harrison, 2 Whart. 283; Ellet v. Paxson, 2 Watts & S. 418; Turner v. Fowler, 10 Watts, 325.γ

The following case should here be noticed:—A devise to Solomon for life, remainder to his son Thomas, and his heirs male for ever; “but if Thomas should die without issue, then to his next heir male for ever, the elder to be preferred before the younger; and if no issue male left behind Solomon, *then the estate to devolve to the females; and if no females*, then Solomon to give and dispose of the same as he should think fit.” Solomon had two children, Thomas and a daughter: Thomas died without issue, in the lifetime of Solomon. A bill was filed by the daughter to restrain Solomon from cutting timber: and in a case sent to the C. B., the judges certified that Solomon took an estate for life; and his son Thomas dying without issue, the daughter took an estate in tail general, and that a remainder in fee-simple was vested in Solomon.

Fell v. Fell, 3 Wils. 399.¶

Again, testator devised real estate to trustees in fee to pay one moiety of rents to his sister Fanny for life for her separate use, and after her decease to convey a moiety to her children living at her decease; and made a similar devise to another sister. By a codicil he declared his estates should not be equally divided between his sisters, but in proportion to the number of their children at his decease. By another codicil he devised: “to prevent disputes, I leave to my sister Fanny, and her heirs, my estate in Cornwall, and to my youngest sister and her heirs I leave my estate of Hordly:” Held, that by the word heirs the testator did not mean to increase the quantity of estate given to the sisters by the will.

Lushington v. Sewell, 1 Sim. 435.¶

If A devises land to his son B, and if he hath issue male of his body lawfully begotten, then that issue to have it, and if he hath no issue male, then to others in remainder; by this devise B hath an estate-tail; for where the deviser saith, if he have no issue of his body, then it shall remain over, that is as much as if he had said, if B dies without issue male, which had been sufficient to create an estate-tail in him.

9 Co. 128; Owen, 29; Vent. 227; Pollex. 487.

¶ A devised to the three sons of C D successively, in tail-male, remainder to every son and sons of the said C D which should be begotten on the body of Sarah his wife; and for want of such issue to W N, &c. C D had a fourth son by Sarah, and it was held that he took an estate in tail-male; as the words “for want of such issue,” must be construed “for want of heirs male of the body.”

Evans v. Astley, 3 Burr. 1570.

So, by a devise to J S, “but if the said J S shall die without male heir,”

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then to A in fee, J S took an estate-tail, though the estate was charged with an annuity and legacies.

Denn v. Slater, 5 T. R. 335.

Land was devised to A, and after his death to his first and other sons, and, in default of male issue, then to his eldest and other daughters, &c., their heirs male for ever; held, that A took an estate in tail-male. For, observed Sir W. Grant, it was evidently the intention of the testatrix to prefer the male issue of the father or his sons to the daughter; but the estate given to the father and sons respectively amounts in law to an estate for life only: to effectuate, then, the intention of the testatrix, an estate-tail must be given to the father or his sons, and I think the male issue of the father is intended.

Wight v. Leigh, 15 Ves. 564. ||

A, having two sons, B and C, devised Black Acre to B and his heirs, and White Acre to C and his heirs, and farther willed that the survivor of them should be heir to the other, if either of them died without issue: though the first words are sufficient to pass an estate in fee, yet the subsequent words corrects them, and pass only an estate-tail, and the remainder in fee is not contingent, but executed, each son being tenant in tail of the part to him devised, with the remainder to the survivor in fee.

Cro. Ja. 695, Chadock and Cowley; Pollex. 487. See Sid. 148.

A man devised all his free lands to his wife, for life, and after her death to A, B, and C, his three daughters, equally to be divided; and if any of them die before the other, then the others to be her heirs, equally to be divided; and if they die without issue, then to others named in the will: adjudged, that the daughters had an estate-tail.

Cro. Ja. 448, King and Rumball; Roll. Abr. 836; Pollex. 487.

So, where the devise was to a man and his heirs, and if he die without issue, that then the land should go to A and B, or the survivor of them, adjudged an estate-tail in the first devisee; for in these cases, the (a) extent of the word *heirs* is confined to the descendants or issue of the body of the devisee, since otherwise the limitation over cannot vest according to the intent of the devisor, for even in wills they will not allow a limitation of a fee upon a fee.

Nov. 64; Dyer, 330; Roll. Abr. 835. {Willes, 1, Brice v. Smith; 8 Term, 211, Doe v. Wichelo; 9 East, 382, Doe v. Ellis.} (a) Where a man devised land to A, his son, for ever, and after his decease the remainder to his heirs male for ever, with other remainders over, it was holden an estate-tail in A; for though the first devise, being to him for ever, would give him a fee-simple, yet the subsequent words to *his heir male*, show what sort of inheritance the devisor intended him. Bulst. 219—223; Whiting and Welkins, Roll. Abr. 836.

{One having an only child Rebecca, who was married and had three children, Thomas, Rebecca, and Ann, devised his copyholds to Rebecca his daughter, for life, remainder to his grand-daughter Rebecca, for life, remainder to trustees to preserve contingent remainders, remainder to the use of the *issue of the body* of his grand-daughter Rebecca in such parts, shares, and proportions, *manner and form*, as she should by deed or will appoint; and in default of appointment to the use of all and every the *children* of his said grand-daughter, and *their heirs*, as tenants in common; and *in default of such issue*, to the use of all and every the other children of his daughter Rebecca and their heirs as tenants in common, &c.; and in default of such issue to his own right heirs. It was held that upon the death of the testa-

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tor's daughter and of his grand-daughter Rebecca, without any appointment, an only child of the latter took an absolute fee; on whose death, under age and unmarried, the premises descended to her uncle Thomas as her heir at law; and that the subsequent limitation to the other children of the testator's daughter Rebecca did not take effect. For the devise to the children of his grand-daughter Rebecca, and *their heirs primâ facie* carry a fee; and the subsequent words, "in default of such issue," refer to her children and not to their heirs; though the limitation over in default of such issue be made to those who might take as heirs to the children of Rebecca, the grand-daughter. And the intention of the deviser that her children, if any, should take a fee, was further evinced by this, that the limitation to them and their heirs was in default of appointment under a power given to her to appoint "to the use of the issue of her body in such *manner and form* (as well as in such parts, shares, and proportions) as she should direct:" under which words *manner and form* she might have appointed to all or any of her children in fee, and was not restrained to appoint to them in tail only; and the limitation in default of appointment was a substitution for the execution of the power.

7 East, 521, *The King v. the Marquis of Stafford*. Vide 6 East, 336, *Lewis v. Waters*, and the observation on it in 7 East, 528.}

|| It is a settled rule, that though a man devise land by words which give the fee, yet if subsequent words show that "heirs of the body," and not "heirs" generally, were intended, the gift will be reduced to an estate-tail.

Willes, 3. See 8 T. R. 10; 3 Wils. 246, *Wealthy v. Bosville*; Ca. temp. Hard. 258.

A devised to his eldest son and his heirs for ever; and failing issue of his said son, then to his second son and his heirs for ever; and failing issue of that son, then to every other son that he might have and their heirs for ever; and failing his issue male, then to his issue female, and their heirs for ever: Held that the sons took an estate in tail-male successively.

Fitzgerald v. Leslie, 3 Br. P. C. 154. See also *Chapman v. Scholes*, 2 Chitty's Ca. temp. Mansfield, 643; S. C. Jeremy's Ind. for 1824, page 53.

A devised a messuage to his son P and his heirs for ever, on condition of his paying a sum of money to C; and testator declared if P should die without issue, the estate devised to him should go to his heirs for ever: Held that P took an estate-tail.

Brice v. Smith, Willes, 1. See *Roe v. Scott*, stated by Mr. Butler in note, *Fearne*, C. R. 473; *Tenny v. Agar*, 12 East, 253.

A devised a messuage unto his son Joseph, his heirs and assigns, for ever; "but in case my said son Joseph shall die without issue, then I devise the same messuage unto the child or children with which my wife is now *ensient*, his or her heirs and assigns for ever." Joseph took an estate-tail.

Doe v. Ellis, 9 East, 382. See *Doe v. Whichelo*, 8 T. R. 211. β Testator devised lands to his son, A, if he should have a lawful heir, but if he should have none, then, after his decease, to be divided between his brothers and sisters; after testator's decease, A had a child born alive, who died immediately thereafter; held, that this devise created an estate-tail in A, with remainder to his brothers and sisters, and, consequently A, after the birth of his child, had no power to alienate the estate, so as to defeat those in remainder. *Williams v. McCall*, 12 Conn. 328. γ

So, a devise to one, and his heirs lawfully begotten, for ever, gives an estate-tail only. The testator in the same will had made a previous devise to the same person and his heirs for ever.

Vanfan v. Legh, 7 Taunt. 85.

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So, a devise to D and his heirs, but if he should die and leave no issue, then over.

Dansey v. Griffiths, 4 Mau. & S. 61; *Romilly, Knt. v. James*, 6 Taunt. 263.

A Testator devised his lands to his son B, and his male heir, but if he should have no male heir, then to his daughters; and if he should die without issue, then to the daughters of the testator. Held, that B took an estate-tail.

Hamilton v. Hempsted, 3 Day, 332.

Testator devised land to his son S, his heirs and assigns for ever, adding this limitation: "My will further is, that my son S shall not sell or dispose of such land from his lawful male issue, and in case he should die without lawful male issue, his land hereby given shall revert, and become the estate of my surviving sons, and their male issue. Held, that S took an estate-tail male general.

Dart v. Dart et al., 7 Conn. 250. *g*

Nor is the construction different, though the testator in certain cases gives the devisee power to charge or dispose of the fee.

Thus W G devised lands to his eldest son and his heirs, upon condition that he should grant to his second son and his heirs annual rent of 4*l*. And testator directed if his eldest son should die without heirs of his body, the land should remain to the second son, and the heirs of his body. Eldest son took an estate-tail.

Dutton v. Ingram, Cro. Ja. 427.

J B devised land to his four children, A, B, C, and D, and their heirs, share and share alike: and he directed that, if they agreed to sell the land, they should have the money in equal shares; but if to keep it unsold, the rents should be divided among them, and to the respective heirs of their bodies, share and share alike. The children took estates-tail, with a power of selling the estate.

Roe v. Aris, 4 T. R. 605. See *Doe v. Rivers*, 7 T. R. 276.

But on a devise to S, her heirs and assigns for ever, "but if S shall happen to die leaving no child or children, lawful issue of her body living at the time of her death," then over; it was held that S took an estate in fee, and that the devise over was good as an executory devise.

Doe v. Wetton, 2 Bos. & P. 324.

So, on a devise to M H, her heirs and assigns, and in case she should die, and leave no child or children, then over, the court decided upon a consideration of the whole will that the words "die, and leave no child or children," meant "die without issue living at her death," and that the estate of M H was not reduced to an estate-tail.

Doe v. Webber, 1 Barn. & A. 713. See *Denn v. Shenton*, Cowp. 410.

It appears to be settled, that if the estate is given over to a person in existence for his life, dying without heirs or issue will be referred to the time of the first devisee's death. But other circumstances may be sufficient to induce a court to restrain the words "dying without issue" to issue living at the death of devisee. See the above-cited case of *Doe v. Webber*.

Porter v. Bradley, 3 T. R. 143; *Roe v. Jeffery*, 7 T. R. 589; *Glover v. Monkton*, 3 Bing. 13. Lord Hardwicke seems to have been influenced by the same principle as is contained in the above cases, when he decided in *Lethieullier v. Tracy*, 3 Atk. 774, that the contingency of a dying without issue should be confined to the duration of the succeeding devise.]]

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If a man devises land to his wife for her life, and after to her son, and if he dies without issue, having no son, that then J S shall have it; the son by this devise takes an estate in tail-male, for though the devise to the son, and if he dies without issue, had been a good tail-general, yet when the devisor went further and said, having no son, he thereby explained what issue he intended should inherit the land, and limited it to the issue male.

Roll. Abr. 137.

A, having issue B and C, devised some of his lands to B his eldest son, and the heirs of his body after the death of his wife, and if B died, living his wife, then to C his son; and devised other lands to C his son, and the heirs of his body, and if he died without issue, then to remain over. B died in the life of the wife, yet adjudged that C could not enter into the land, while any issue of B remained; for the words, if B *died, living the wife*, did not abridge the estate-tail which was given by the former words, because the testator could not be supposed to intend to prefer a younger son before the issue of his eldest, especially when he had, in the former part of the will, settled it on the issue of the eldest, and made the same provision of other lands the same way for the youngest son.

Cro. Car. 185; Spalding's case, Bulst. 230, S. C.; Vent. 230; 3 Lev. 434, S. P.; 1 P. Wms. 427, S. P.; 2 P. Wms. 196, S. P.; Ld. Raym. 524, S. P.

A seised of lands, devised them to his wife, if she did not marry, but if she should marry, then his eldest son presently after her marriage to enter, and hold the land to him and the heirs male of his body, the remainder to his other sons in tail-male; the wife did not marry; yet the court resolved that the lands were entailed by the will, taking the intent of the devisor to be, that the entail should be created in all events, but that the eldest son should not enter till after the decease of the wife, unless in case of her marriage, and then to enter presently.

3 Lev. 125, Luxford and Cheek; Raym. 427, S. C., by the name of Brown v. Cutler; 2 Show. 152, pl. 134, S. C., by the name of Brown v. Cutler. [Note, Raymond has reported merely his own argument.]

A man had issue, A, B, and C, and having three houses, devised them all to his wife, with remainder of one house to each child and his heir; and if any of his said issue die without issue of his body, the survivors to have *totam illam partem* between them, equally to be divided: these last words carry only an estate for life in the house of him that first dies to the survivors, for they imply no more than that the whole part of him that dies first shall go to the survivors, and there being no estate limited it can be only for life.

3 Leon. 129, 194; 3 Leon. 180; Cro. Eliz. 53, Hawkins's case, *qu. et vide supra*.

A devised all his lands to his wife till his son should be of the age of 24 years, and then to his heir and to his heirs for ever, and when he comes to the age of 24 years, that he shall have the third part for her life, and if he dies before the age of 24 years, then she to have it all for life; and after her decease, if the heir has no issue, the remainder to B, the remainder to the right heirs of the devisor. The heir came to the age of 24 years; but no entail was created by the will, for the fee-simple descended to him, and the limitations were to take place if he died before the age of 24 years, which he did not.

Dyer, 124; Roll. Abr. 839.

A devised lands to B his son, and if C his daughter survived B and his

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heirs, then she should have the lands: it was adjudged, that B had but an estate-tail, for the word *heirs* must be intended heirs of his body, for he could not die without (a) collateral heirs while his sister was alive. But if the will had said, that if J S a stranger survives B and his heirs, then he should have the lands; there, B would have had a fee-simple, and then the intended remainder over must be void, for it is to vest on a contingency of B's dying without heirs, which is too (b) distant to expect.

Roll. Abr. 836; Cro. Eliz. 525; Cro. Ja. 415, 416, 448; Bulst. 193; Cro. Car. 41; 2 Lev. 162. (a) Salk. 233, pl. 12; Ld. Raym. 568; 1 P. Wms. 23, pl. 5; Comyns, 82, pl. 51; [2 Eq. Ca. Abr. 305, pl.; 2 Ca. temp. Talb. 1; Dougl. 254; Ambl. 363; 3 Term Rep. 488, n. 491; 1 Ves. 89; 3 Atk. 617.] {8 Term, 9, Doe v. Hawley; Willes, 164, Preston v. Funnell; Ibid. 352, Ginger v. White; 1 Hen. & Mun. 559, Eldridge v. Fisher;} S. P. adjudged. (b) Vide Vaugh. 270, 271.

So, where A devised to B for his life and to his heirs, and for want of heirs of him to C in the same manner, and for want of heirs of him to D and his heirs for ever, and the jury found that B and C were brothers, and that D was next cousin and heir to them, though not mentioned in the will, the court held, that they had but an estate-tail, and the remainder in fee to D was good; for D being cousin and heir to them, proves that he intended heirs of the body; (c) also, want of heirs of him, are to be taken for want of heirs of his body.

3 Lev. 70, Parker and Thacker, adjudged. [Morgan v. Griffiths, Cowp. 234, S. P.] (c) 7 Co. 4, S. P.

[So, where A devised lands to his son for life, then to his son A for life, remainder to his son G and his heirs for ever, and if he should die *without heirs*, then to his two daughters, this was determined to be an estate-tail in G; for it was impossible he should die without heirs whilst his sisters were living; consequently the testator by *heirs* could only mean *heirs of the body*.

Ca. temp. Talb. 1, Tyte v. Willis; || S. P. Doe v. Bluck, 6 Taunt. 485; Pickering v. Towers, Ambl. 363, S. C.; 1 Eden, 142; Ives v. Legge, 3 T. R. 488, note.]]

{The devisor, having devised lands to his wife for life, added, "if my son R" (who was the eldest) "happen to die without heirs, then my son J shall enjoy my lands." It was held that R took only an estate-tail; the word *heirs* meaning *heirs of his body*, as he could not die without heirs while his brother J was living; and though no express devise was made to him, the fee-simple that was permitted to descend to him as heir at law was restrained by those words to an estate-tail, in the same manner as an express devise to him and his heirs would have been.

Willes, 369, Goodright v. Goodridge.}

The rule holds the same where the remainder is limited to the heirs of the testator himself, if such heirs must also be heirs to the first devisee. As, where A devised to his second son and his heirs for ever; and for want of such heirs then to the testator's right heirs; here, though the devise to the testator's heirs was a mere nullity, as such heirs must be in by descent, yet it was held sufficient to manifest the intent, and aid the construction of an estate-tail.

Nottingham v. Jennings, 1 P. Wms. 23; {8 Term, 9, Doe v. Halley.}

But where there was a devise to one and his heirs, and if he die without heirs then to a *charity*, Lord Chancellor said, the devise being to one and his heirs, and if he die without heirs, then over, such devise over was void; and the word heirs should not be construed to signify heirs of the body, where the devise over is not inheritable.

Attorney-General v. Gill, 2 P. Wms. 369.

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So, where the testator devised to his son *and his heirs*, and if he should die *without heirs*, remainder over to another who was half brother to the first devisee; upon a question made, whether the first limitation was in fee or in tail? Lord Hardwicke said, it was a plain case, and one of those points which the court would not suffer to be argued, as having been determined before. This was a devise over to a stranger, as the law considers him, and who could not in any event inherit as heir to his brother.

1 Ves. 89; *Tilburgh v. Barbut*, 3 Atk. 617.]

If A devises lands to B for life, and if he die without issue, then to remain to C, this is an estate-tail in B, for it is not to (a) remain to C till the issue of B be spent.

Robinson's case, 1 Roll. Abr. 837, pl. 12; 2 Brownl. 271; Moor, 682; Lit. Rep. 259; 1 P. Wms. 57; 1 Vent. 230, S. C. cited. {Devise to testator's son W, and if he should chance to die *without heir or issue*, the land should fall into the possession of his brother R, gives W an estate-tail. 2 Bin. 455, *Lessee of Willes v. Bucher*.} (a) And therefore, whenever the ancestor takes an estate for life, and there is a limitation to his heirs or issue, these words shall be words of limitation, and not of purchase, and vest the inheritance in the ancestor; laid down as a rule in *Shelley's case*, Co. 99. But on this rule, of creating by implication an estate of inheritance in the ancestor, there have been several nice distinctions, as appears by the cases on this head.

|| If a man devise an estate to A for life, and, in case A dies without issue generally, devises it to another, A will take an estate-tail if such an estate be requisite to enable all his issue designated to take.

Sparrow v. Shaw, 3 Br. P. C. 120. See *Willes's Rep.* 3; 3 Atk. 796; *Doe v. Halley*, 8 T. R. 5.

A devise to D for his life, and after his decease to and amongst his issue; and, in default of such issue, over. Here, indeed, "issue" was construed as "heirs of the body," to satisfy the presumed intention of the testator, so that D was entitled to an estate-tail by the rule in *Shelley's case* after noticed.

Doe v. Applin, 4 T. R. 82. See *Goodtitle v. Otway*, 2 Wils. 6.

Devise to A for his life only, and after his decease to his issue as tenants in common; but in case A shall die without leaving lawful issue, then over. Held, that A took an estate-tail by implication, from the words "without leaving lawful issue."

Doe v. Cooper, 1 East, 229. See *Wollen v. Andrewes*, 2 Bing. 126.

A devise to W for life; "and, in case he has issues, then it is my will they should jointly inherit the same after his decease." In a subsequent part of the will, "but in case W dies without issue," then over. W took an estate-tail by the latter words.

Ward v. Bevil, 1 You. & Jer. 512; *Alexander, C. B.*, observed, that W would only have had an estate for life had it not been for the words giving the estate over.

A devise to three nieces for their respective lives, share and share alike; upon the death of each her share to go to her issue for life in like manner: "and if either of my said nieces shall die in the lifetime of the others or other of them, without issue of her body," her share to go to the survivors; "and if all my said nieces shall die without issue," then over. The nieces took estates-tail.

Murthwaite v. Jenkinson, 2 Barn. & C. 357; S. C., 3 Barn. & C. 191, Affirmed Dom. Proc.; 2 Sim. & Stu. 414, note.

A devise to A for life and no longer; and after his decease to such son

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as he should have, and for default of such issue, over. A took an estate-tail.

Robinson v. Robinson, 1 Burr. 38.

But on a devise to L for life, and after his death to his children equally, and to their heirs; and in case L died without issue, then over, the counsel admitted, and the court assented to the proposition, that L did not take an estate-tail; and that *issue* there meant *children*.

Goodright v. Dunham, Doug. 251. *Semble*, An estate-tail was not implied in this case, because it was not required to effectuate the intention of the testator. The children of L took in fee.

So, on a devise to R H for her life, remainder to trustees for her life, remainder to the use of the issue of the body of R H, in such parts, shares and proportions, manner and forms, as R H should by will appoint; and, in default of such appointment, to the use of all and every the *children* of R H, and their heirs, as tenants in common; and in default of such issue, over. R H did not appoint, and died leaving one child, who, it was held, took an absolute fee. "In default of such issue," was construed "in default of children."

The King v. The Marquis of Stafford, 7 East, 521; Doe v. Perryn, 3 T. R. 484.

So, on a devise to G for life, remainder to all his children, their heirs and assigns for ever, as tenants in common; but in case G should depart this life without leaving any child or children, or *issue of any such child or children*, then over. The court of C. B. certified that G took for life only.

Smith v. Horlock, 7 Taunt. 129.

So, on a devise to L for life, with remainder unto all and every his child and children, whether sons or daughters, they, if more than one, to take as tenants in common, in equal shares; "and for want of such issue," over. L took for life only, "*such issue*" meaning children, and therefore not comprehending all the issue of L.

Doe v. Vaughan, 5 Barn. & A. 464. See Seale v. Barter, 2 Bos. & P. 485.

So, on a devise to A for 99 years, if he should so long live; and after that term to the use of the first, second, third, and fourth sons of the said A, and the issue males of their bodies, for the like term of 99 years, as they should be in seniority of birth; and in default of such issue male in him or them, then over. It was certified by the judges of K. B. that A took an estate for 99 years, determinable with his life; and that upon his death his first son would take a like estate, but that the subsequent limitations were void.

Somerville v. Lethbridge, 6 T. R. 215. Observe, that the words "in default of such issue" did not comprehend *all* the issue of A; and see Mr. Fearn's observations on White v. Collins, Fear. C. R. 153.

And it is not only necessary that the words limiting the estate over should comprehend all the issue, male or female, of the devisee for life, but it must also appear that all the issue so comprehended would not take otherwise than by giving an estate-tail to the first devisee.

A testator devised all his estate to trustees in fee, upon trust for his son when he attained 23, with maintenance in the mean time; and if he married a gentlewoman, then upon trust to make a jointure and settle the estate upon the issue of the marriage in strict settlement, as counsel should advise. "But if he (the son) dies without issue of his body," then over. It was held, that subsequent to the settlement the son was entitled to an estate-tail.

Allanson v. Clitherow, 1 Ves. sen. 24.

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The case of Lethieullier and Tracy was very special. Sir W. D. had one child, a daughter, who was an infant; and the next object of his care, Sir H. N., was also an infant. Sir W. D. devised his estates to his daughter for life; remainder to trustees for her life; remainder to her first son in tail-male; remainder to her second, third, and every other son in tail-general; remainder to her daughters in tail-general. He gave his trustees power to accumulate the rents during the minority of his daughter, and to lay out the proceeds in land to be settled to the same uses. "And in case my said daughter shall depart this life without issue of her body living at her decease," then the testator gave his trustees power, *during the minority of Sir H. N.*, to accumulate the rents as before. Then followed a substantive, independent devise of all the estates to Sir H. N., after his attaining 21, in strict settlement; with a remainder over to another person in strict settlement. It was admitted, that giving the first son of the daughter an estate in tail-male only was a mere slip; and it was urged, that to supply this omission an estate-tail must be given to the daughter by implication from the words, *in case she shall depart this life without issue, &c.*; but Lord Hardwicke decided that these words in this will were not words of limitation, but were only introduced to provide for the contingency of the daughter dying without issue, then living during the minority of Sir H. N.; and therefore that the daughter was only entitled to an estate for life, with remainders to her issue in strict settlement, as set forth in the will.

3 Atk. 774. See *Chapman v. Brown*, 3 Burr. 1626.

Agreeably to the above qualification of the rule, in the following case, the estate for life of the devisee was not enlarged:—There was a devise to J for life, with remainder to his male children successively, one after another as they were in priority of age, and to their heirs; and in default of male children of J, then to his female children, and their heirs; "and in case the said J shall die without issue," then over. But *all* the issue of J were provided for by the prior limitations, therefore it was unnecessary to give him an estate-tail. The word "heirs," annexed to the devise to the children of J, was construed "heirs of their bodies."

Ginger v. White, Willes, 348.¶

So, of a devise to B for life, the remainder to the next heir male, and for default of such heir male, the remainder over; this is a good estate-tail, for the words *heir* and *issue* are *nomina collectiva*, and carry the land, not only to the immediate heir or issue, but to all that descend from the devisee.

Vent. 230. *Burley's case*, cited by Hale, C. J., to have been adjudged, 43 Eliz., but *qu.* Whether there be any such case on the roll?

But if lands are devised to A for life, the remainder to his first heir male, and the heirs male of the body of such heir male, the devisee hath but an estate for life, by the express words of the will; and the limitation of the remainder to the heir male, and to the heirs male of such heir male, is a good contingent remainder in the heir male, because it may vest *eo instanti* that the particular estate determines.

2 Co. 66; *Archer's case*, 2 Anders. 37.

Lands were devised to A and his wife, and after their decease to their children, they having then a son and a daughter; it was adjudged, that A and his wife had but an estate for life, the remainder to the children for life; for no greater estate had passed at common law; and the intent of the deviser must plainly appear, or they will never admit of a construction dif-

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ferent from what they would allow in conveyances executed in the life of the party; and for that reason, if the devise had been to A and his children or issue, A having children at the time, A and the children would have been joint-tenants for life.

6 Co. 16 b; Wyld's case, Moor, 397; S. C. Cro. Eliz. 743; S. C. Vent. 229; 10 Mod. 376, S. C. cited. ¶ See Seale v. Barter, 2 Bos. & P. 485. ¶ {Willes, 348, Ginger v. White; 1 Hen. & Mun. 240, Smith v. Chapman.}

But if A had devised land to B and his children or issue, and B had none at the time of the devise, then he takes an estate-tail; for it is plainly the intent of the devisor that the children shall have the land; and they cannot take as immediate devisees, for they were not *in esse*; nor by way of remainder, for the devise was immediately to B and his children; and therefore the words shall be taken as words of limitation, viz. as children of his body.

6 Co. 17; Vent. 229; 2 Lev. 59, 60.

{And where a devise was to A of all the testator's estate, "who shall hold and enjoy the same as a place of inheritance to her and her children or her issue for ever: and if it should so happen that A should die leaving no child or children, or A's children should die without issue," then over, and A had then and at the death of the testator one child, it was held that A took an estate-tail.

1 East, 259, Wood v. Baron.

J C devised land to his "eldest son J only for his life, and then to his male children (if he have any) for their natural lives only, and to the male children descending from them; and upon their decease or failure, then to his son L and the heirs male of his body for the same term of life and upon the same terms as the devisor intended for J and his male children; and in case of L and his male children failing, then to his son T and his male children for the same term of his and their life, and upon the same terms." J took an estate for life only; and on his death without male issue, L also took an estate only for life.

Willes, 592, Goodtitle v. Wodhull.}

One having two sons, A and B, by his will in writing devises lands to his son A for his natural life, and after his decease he gives the same to the issue of his body lawfully begotten on a second wife, (he having a first then living,) and for want of such to B and his heirs for ever, with power to A to make a jointure to such second wife for her life, and dies; A, in the life of his first wife, suffers a recovery to the use of himself in fee, and dies without issue: and the question was, whether by this devise A was tenant in tail, for then by the recovery the remainder was destroyed; or if he was only tenant for life, then this recovery was a forfeiture of his estate; and it was adjudged in B. R., against the opinion of Hale, Ch. Just., that A had but an estate for life; but this judgment was reversed in the Exchequer Chamber, where it was adjudged that A had an estate-tail.

King v. Melling, Vent. 214, 225, &c.; 2 Lev. 58; 3 Keb. 42, 52; Pollex. 101; Fitzgib. 23, S. C. cited; 8 Mod. 263, 384, S. C. cited; 2 P. Wms. 472, S. C. cited. As this seems to be the most ruling and established case relating to this doctrine, it may not be improper briefly to insert the reasons of the resolution, which are these:— 1. Because that *issue* is *nomen collectivum*, and is a stronger word than *children*, which takes in only the immediate descendants of the parent; but *issue* takes in all from generation to generation; and so long as there is any issue of A the remainder is not to take place. 2. In acts of parliament, *issue* is as comprehensive as heirs of the body; as in West. 2, *de donis*, it is said, *quo minus ad exitum descendat*, which takes in

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all issues in *secula seculorum*. 3. He had no issue at this time, for then it would, as this case is, vest in them by way of remainder; but having none, leaves it to the construction of law, upon the import of the word *issue*. 4. It is issue of his body begotten, which is an eye of an estate-tail. 5. It is said, "*and for want of such issue*," which is a phrase agreeable to an estate-tail. 6. It is in case of the creation of an estate-tail, where *voluntas donatoris* has some influence. 7. It is in case of a will, where the intention of the testator is to govern.

{J W devised to his second son, A, for life, and after his decease to his children successively and their heirs, and if A died without issue, then to B (son of A's elder brother) in fee. A had then no children. He took only an estate for life.

Willes, 348, *Ginger v. White*. See 1 Hen. & Mun. 240, *Smith v. Chapman*.)

|| The rule in Shelley's case has produced a long series of decisions, in which devisees have been held to take estates-tail, though not expressly given to them by the words of their testators. The rule has thus been stated:—"When a person takes an estate of freehold, and in the same instrument there is a limitation similar in quality, by way of remainder, of the inheritance to all his heirs, general or special, of one denomination, such person is entitled to the estate limited to his heirs, in possession or by way of remainder." (a)

Walters's Brief Analytical View of the rule in Shelley's case, 2. (a) *Brydges v. Brydges*, 3 Ves. 120; *Elton v. Eason*, 19 Ves. 73. β A bequest of chattels is within the rule in Shelley's case; the words "I lend my daughter A B my negroes, &c., during her lifetime or widowhood, and then I give them to her lawful heirs, for them and their heirs for ever," pass the absolute interest in the slaves to the daughter. *Ham v. Ham*, 1 Dev. & Bat. Eq. 598. γ

The several requisites of this rule must all be satisfied before the devisee can take an estate-tail by virtue of it. (b) He must take an estate of freehold; the estate of freehold and the estate to the heirs must be both legal or both equitable; (c) the limitation to the heirs must be by way of remainder; (d) and the inheritance must be limited to the heirs, which is shown by the following cases:—

(b) *Pybus v. Mitford*, 1 Vent. 372; *Wills v. Palmer*, 2 W. Bl. 687; *Hayes v. Foarde*, 2 W. Bl. 698; *Curtis v. Price*, 12 Ves. 89. (c) *Fearne, C. R. 52 et seq.*; *Ireson v. Pearman*, 3 Barn. & C. 799. (d) *Fearne, C. R. 275*, *Lloyd v. Carew*.

A devise to F for life, with remainder to the heir male of his body *during his life*, and for want of such heir male, over. F took only an estate for life. (e)

White v. Collins, Com. Rep. 289. See *Burley's* case cited, 1 Vent. 230, that this limitation would have given an estate-tail to F, had "during his life" been omitted. (e) The devise over, for want of such heir male, did not import that the ulterior devisee should not have it till F died without heir male generally, but for want of such heir male, who was to have it for life. *Fearne, C. R. 153*.

And so a devise to H B for his life, with remainder to his eldest or any other son after him, during his life; and after them to as many of his descendants, issue male, as shall be heirs of his or their bodies, down to the tenth generation, during their natural lives.—H B took only for life.

Seward v. Willock, 5 East, 198. Note, in this case there is no devise over; and *Murthwaite v. Jenkinson*, 2 Barn. & C. 357.

But whether this rule is applicable to a devise, generally depends upon the question, whether the limitation of the inheritance comprehends *all* the heirs of the given denomination. Thus the words "heirs of the body," *primâ facie*, mean all descendants; and it is a rule of law that all descend-

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ants shall take under these words: but then they may be qualified, and restricted by testators to mean certain descendants only. No rule has, however, yet been given to determine at once what is or what is not sufficient to restrict a limitation to "heirs of the body." Some opinion may, however, be formed from an examination of the cases in which the question has been considered. In the following cases, "heirs of the body" have been held not to be restricted by the accompanying expressions, and the devisees, by the rule in Shelley's case, have taken estates-tail. It should be observed, that "heir of the body," or "heir male," may be taken as *nomen collectivum*, and be as expressive as "heirs of the body."

See dictum per Lord Eldon, 2 Bligh, 49.

A devise to S, and *the heirs of his body*, the males to be preferred before the females, and to succeed according to their birth; and a devise to a trustee during the life of S to preserve contingent remainders, and on failure of issue of S, over.

Sayer v. Masterman, Amb. 344.

A devise to W for his life, without impeachment of waste, and after his decease *to the heirs male of his body*, severally, respectively, and in remainder, the one after the other, as they and every of them shall be in seniority of age and priority of birth; with remainder to T in strict settlement, with the interposition of trustees to preserve contingent remainders. Powers were given to W whilst in possession of leasing, (a) making jointures for wives, and raising portions for younger children.

Jones v. Morgan, 1 Br. C. C. 205. See Legate v. Sewell, 1 P. W. 86. (a) Bale v. Coleman, 1 P. W. 141. Devise to A for life, with a power of leasing; remainder to the heirs of his body, remainder over. An estate-tail in A.

A devise to trustees in fee, in trust for testator's first son for his life, and to preserve contingent remainders; and after his decease for the several *heirs male* of such first son, so as the elder of such sons, and the heirs male of his body, should take before the younger and the heirs male of his body; and for want of such issue, over.

Poole v. Poole, 3 Bos. & P. 620.

A devise to M and the heirs of her body for ever, as tenants in common, but in case M should die before twenty-one, or without having issue of her body, then over.

Doe dem. Candler v. Smith, 7 T. R. 531.

A devise to V and to the heirs of her body, whether sons or daughters, as tenants in common; and in default of such issue, over.

Pierson v. Vickers, 5 East, 548.

A devise to H A for life, without impeachment of waste, and after his decease to the heirs of his body, to take as tenants in common; and in case of his decease without issue of his body, over.

Bennett v. Earl of Tankerville, 19 Ves. 170.

A devise to T C for his life; remainder to trustees during his life; remainder to and amongst all and every the heirs of the body of the said T C, as well female as male, such heirs, as well female as male, to take as tenants in common, and not as joint-tenants; and for default of such issue, over.

Doe v. Harvey, 4 Barn. & C. 610.

A devise to W for life, he keeping the premises in repair, and after his

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decease to the heirs of his body, in such shares as he (W) should appoint; and for want of appointment, then to the heirs of the body of W, share and share alike, as tenants in common; and if but one *child*, the whole to such only child; and for want of such issue, to testator's right heirs—W took an estate-tail.

Jesson v. Wright, 2 Bligh, 1, overruling *Doe v. Goff*, 11 East, 668.

So a devise to F G for his life, with remainder unto the heirs of his body, in such parts, shares, and proportions, manner and form, as he (F G) should appoint; and in default of such heirs of his body, then over.

Doe v. Goldsmith, 7 Taunt. 209.

So a devise to B for life, remainder to his heir of his body begotten, for ever.

2 Roll. Abr. 794, pl. 6.

So a devise to B and such heir of her body as shall be living at her death, with remainder over in default of such.

Richards v. Lady Bergavenny, 2 Vern. 324.

So a devise to A for life, remainder to the next heir male; and for default of such heir male, then to remain.

Burley's case, cited 1 Vent. 230. See *Miller v. Seagrave*, Rob. Gav. 96.

So a devise to W C for his life, and after his decease to heir male of his body; and so on in succession to the heir at law, male or female.

Britton v. Twining, 3 Mer. 177, 182.

So a devise to T for life, and after to the first heir male of his body; remainder over.

Dubber v. Trollope, Amb. 453.

So a devise to A W and his sons in tail-male, and for want of such issue male, over.

Wharton v. Gresham, 2 W. Bl. 1083.

If there be trustees interposed to preserve contingent remainders, this does not prevent the application of the rule, but the devisee takes an estate-tail in remainder, as was held in the following case:—

A devise to C for life; remainder to trustees for the life of C; remainder to the heirs of the body of C; remainder over.

Colson v. Colson, 2 Atk. 246; *S. P. Papillon v. Voice*, 2 P. Wms. 471; *Roe v. Bedford*, 4 Mau. & S. 362; *S. P. Hodgson v. Ambrose*, Doug. 337; *Affirmed*, Dom. Proc. Feb. 14, 1781; *S. P. Browncker v. Bagot*, 19 Ves. 573.

The word "issue" in a will is either a word of purchase or of limitation, as will best answer the intention of the testator. The word, indeed, has not the same rigid and technical character as "heirs of the body;" for, as Lord Kenyon remarked, though the words "heirs of the body" have been restrained, they always give way with greater difficulty than the word "issue." But it is clear that this word, unless restrained, includes all descendants, and therefore has the same force as "heirs of the body," and equally requires the application of the rule in *Shelley's case*, as may be seen by the following case:—

4 T. R. 300; and see *Doe v. Applin*, 4 T. R. 88; 3 T. R. 373; *Davenport v. Hanbury*, 3 Ves. 257; *Leigh v. Norbury*, 13 Ves. 340.

A devise to C and the issue of his body living at his death, and for want of such issue, over. Lord Northington held, that all the posterity of C were

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intended to take, and that they must take by descent ; it therefore followed that C took an estate-tail.

University of Oxford v. Cliftons, Amb. 385 ; S. C. 1 Eden, 473. See Doe v. Applin, 4 T. R. 82. ¶ The word "issue" in a will is sometimes a word of limitation and sometimes of purchase, according to the context of the devise. Lyles v. Digges's Lessee, 6 Har. & Johns. 364.7

The following are cases in which "heirs of the body," and "issue," have been held to be restricted by other words or parts of the testator's will, so that the first devisee took only for life :—

A devise to B and his heirs lawfully to be begotten ; that is to say, to his first, second, and other sons successively, and the heirs of the body of such sons successively.

Lawe v. Davies, 2 Ld. Raym. 1561.

A devise to H and his first and every other son in tail-male, with remainder over. H took only a life-estate.

Doe v. Mulgrave, 5 T. R. 320.

A devise to M for life, remainder to the first son of her body, if living at the time of her death, and the heirs male of such first son ; and for default of such issue to the second son of her body, if living at the time of her death, and the heirs male of such second son ; and so on to the third, fourth, &c., and every other son and sons of the body of the said M and their heirs male successively ; and *for default of such issue male*, over. M had only one son, who died in her lifetime, leaving a son, who survived M. Held, that M took for life only, and that her grandson took nothing, but that the remainder over took effect on the death of M. In answer to an argument, that the words "*for default of such issue male*," which preceded the gift over, might in favour of the intention have given M an estate-tail, Lord Kenyon quoted the words of Lord Mansfield : "these words mean the same thing as, '*and after such estate-tail* ;' so that, the first estate never taking place, the remainder vests in possession immediately."

Denn v. Bagshaw, 6 T. R. 512.

¶ A being seised in fee of certain lands, devised them to his "daughter Ann during the full term of her natural life, and, at her decease, to descend to the first male child to be lawfully begotten on her body ; but if Ann should die without issue male of her body, then the said land to belong to her present daughter Martha, to her and her heirs for ever." Ann had several male children after the death of the testator, and her eldest male child died in her lifetime, leaving her daughter Martha : held, that on the birth of the first male child, the estate vested in him, by which means the limitation to Martha was defeated ; that this was according to the intent of the testator, otherwise if the first child had left children they would have been unprovided for.

Den ex dem. Wootten v. Shelton, 2 Murph. 188.7

A devise of gavelkind land to A and the heirs of her body, as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common ; no devise over. Held, that the words "heirs of the body" were in this case words of *purchase*, and not of limitation.

Doe v. Laming, 2 Burr. 1100. See Roe v. Collis, 4 T. R. 294 ; but see Doe v. Harvey, 4 Barn. & C. 610, which differs only in having a devise over.

A devise to D for life, remainder to trustees for her life, remainder to the heirs male of the body of D, severally and successively one after another ; the

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elder of such sons, and the heirs male of his body being always preferred, and to take before the younger of such sons, and the heirs male of their bodies; and for want of such issue, over. D's estate for life was not enlarged.

Goodtitle v. Herring, 1 East, 264; but see *Poole v. Poole*, 3 Bos. & P. 620.

So a devise to S for life, remainder to the heirs of her body, their heirs and assigns for ever, without regard to seniority of age or priority of birth; and in default of such issue, over.

Doe v. Ironmonger, 3 East, 533. This case seems contrary to later authorities. See *Doe v. Harvey*, 4 Barn. & C. 610.

So a devise of all estates to testator's wife, she paying all debts; and after her decease, to the heirs of her body, share and share alike, if more than one; and in default of issue to be begotten by him, the testator, to be at her own disposal. There were children, and the wife was held to take only for life.

Gretton v. Haward, 6 Taunt. 94. This case excited much surprise in the profession, and seems to be incompatible with *Jesson v. Wright*, 2 Bligh, 49.

A devise of all testator's "*estates*" to O and the issue of her body as tenants in common, if more than one; but in default of such issue, or being such, if they should all die under the age of twenty-one years, and without leaving lawful issue of any of their bodies, then over. Held, that O took for life, with a contingent remainder in fee to her issue.

Doe v. Burnsall, 6 T. R. 30; S. C. 1 Bos. & P. 215. See *Gulliver v. Wickett*, 1 Wils. 105.

A devise of gavelkind lands to W J and R during their respective lives, as tenants in common; and after their respective decease, testator devised the share of him or them so dying unto the heirs of his and their body and bodies respectively; and if more than one, as tenants in common; and if but one, to such only one, and to his or their heirs and assigns for ever. And if W J or R should die without such issue, or leaving any such, they all should die without attaining twenty-one, then he devised the share of him and them so dying unto the survivors and survivor, and the heirs of the body of such survivors or survivor, as tenants in common; and in default of such issue of W J and R, to testator's right heirs. Held, that W J and R took for life only.

Crump v. Norwood, 7 Taunt. 362.

But the devisee takes an estate-tail, though there are words of limitation added to the gift to his heirs; if such words (1.) are of the same import, and are virtually included in the words of limitation of the gift; or (2.) limit a fee to the heirs of the body or issue of the devisee, and there is a remainder over for default of such heirs or issue.

(1.) A devise to R M and the first heir male of his body, and the heirs male of his body; and in default of such issue, over. R M took an estate-tail.

Minshull v. Minshull, 1 Atk. 411.

So in a devise to Ambrose and the heirs male of his body, and the heirs male of their bodies, and for want of such issue, over.

Gulliver v. Ashby, 1 W. Bl. 607.

So a devise to G G for life, remainder to the issue male of his body, and the heirs male of the body of such issue male; and for want of such issue male, over.

Roe ex dem. Dodson v. Grew, 2 Wils. 322.

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So a devise to P for his life only, without impeachment of waste, and after his decease, then to the issue of his body, and to the heirs of the body of such issue ; remainder over.

Hodgson v. Merest, 9 Price, 556.

(2.) So in a devise to N for life, remainder to the heirs male of his body lawfully to be begotten, and his heirs for ever ; but if the said N should die without such heir male, then over.

Goodright v. Pullyn, 2 Ld. Raym. 1437.

A devise to L for life, remainder to the heirs of the body of L and their heirs ; and if she died without such heir of her body, then over. L took an estate-tail.

Morris v. Le Gay, cited 2 Burr. 1102 ; 2 Atk. 249

So in a devise to J H for life, remainder to the issue male of J H and to his and their heirs, share and share alike ; and for want of such issue, to the issue female of J H and her and their heirs ; and for want of such issue, over.

King v. Burchell, Amb. 379 ; S. C. 1 Eden, 424.

So in a devise to T R for life, remainder to his heirs male and their heirs, with a remainder over.

Wright v. Pearson, Amb. 358. See Fearn's C. R. 126.

So a devise to S and the heirs of his body and their heirs for ever ; but in case the said S shall die without leaving issue of his body, then over to G in fee, chargeable with the payment of 100*l.* to A B within one year next after G or his heirs should be possessed of the land devised.

Denn v. Shenton, Cowp. 410.

So a devise to N W for life, without impeachment of waste, and after his decease to the issue male of his body, and to the heirs and assigns of such issue male for ever, and for default of such issue male, over.

Denn v. Puckey, 5 T. R. 299.

So a devise to A for life, without impeachment of waste, and with a power of jointuring, and after his decease to the issue male of his body and their heirs, and in default of such issue, over.

Frank v. Stovin, 3 East, 548.

So a devise to J F and to the issue of his body, and to the heirs of such issue for ever ; but if J F should die without having [*qu.* a misprint for *leaving?*—see argument and judgment] any issue of his body, then over.

Franklin v. Lay, 6 Madd. 258.

So in a devise to T for life, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of T, his, her, and their heirs and assigns for ever, and on failure of issue of the body of T then over.

Measure v. Gee, 5 Barn. & A. 910.

So in a devise of freeholds and leaseholds upon trust, to permit and suffer T E to receive the rents for his life, and after his decease, "I devise the same unto the heirs of the body of the said T E, their heirs, executors, administrators, and assigns, for ever ; but in case T E shall die without issue, then over."

Kinch v. Ward, 2 Sim. and Stu. 409.

But where a testator devised his estate to be equally divided between

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his two daughters, and gave one moiety to E in fee, and the other to S for life, and after her decease to the issue of her body and their heirs for ever, *and no remainder over*, it was held, that S took an estate for life only. It was observed, that had S taken an estate-tail, the estate would not have been equally divided.

Doe v. Collis, 4 T. R. 294.

And the following case may here be noticed :—A devise to H G and to the issue of his body, his, her, or their heirs, equally to be divided, if more than one ; and if H G shall have no issue of his body living at the time of his decease, then over to H E in fee. H G, who had no issue, suffered a recovery. Lord Ellenborough said, “ *Quicumque viâ datâ*, the devise over was barred ; for if H G was not tenant in tail, but took for life only, the next limitation to the issue unborn was contingent, and the remainder over being also contingent, according to *Loddington v. Kime*, those contingent estates were destroyed.” His lordship, however, and the other judges, seem to have favoured the construction that H G took for life only. (a)

Doe v. Elvey, 4 East, 313. See *Doe v. Holmes*, 3 Wils. 237, 241 ; 2 W. Bl. 777. (a) See *Franklin v. Lay*, 6 Madd. 258.

But if the devise be to trustees, upon trust to convey or settle the estate devised to or upon A for life, with remainder to his issue or the heirs of his body, a court of equity will direct the trustees to convey the estate in strict settlement.

Ld. Glenorchy v. Bosville, Cas. temp. Talb. 4 ; *Ashton v. Ashton*, 1 Ves. sen. 149 ; *Meure v. Meure*, 2 Atk. 265.

Thus, on a devise to trustees, upon trust that they should, as counsel should advise, convey, settle, and assure the said manors, &c., to the use of J for life, and after her death then to the heirs of her body ; but in case J should die without leaving issue of her body, then over to J P in fee ; Lord Kenyon, M. R., declared the estate should be settled on J for life, remainder to her first and other sons in tail-general, remainder to her daughters in general, as tenants in common, with cross remainders in tail-general, with remainder to J P in fee.

Bastard v. Proby, 2 Cox, 6 ; *Papillon v. Voice*, 2 P. W. 471 ; *White v. Carter*, Amb. 670 ; S. C. 2 Eden, 366.

So, when an estate was devised to trustees, to convey to the use of the testator's daughter for her life, and so as she alone, or such other person as she should appoint, should receive the rents, and so as her husband was not to intermeddle therewith ; and after her decease in trust for the heirs of her body for ever ; Lord Hardwicke, on the ground that it was a trust *executory* and not *executed*, decreed that the wife was entitled to an estate for life only : for if she had had an estate-tail, the husband, whom it was plainly the intention of the testator to exclude from all benefit, either during the wife's lifetime or after, would have been entitled to be tenant by the curtesy.

Roberts v. Dixwell, 1 Atk. 607.

But if the trusts are *executed*,—that is, if the testator sets them out fully, and executes his whole intention respecting them, taking upon himself to be his own conveyancer, and leaving nothing to the discretion of his trustees or their counsel,—the will must receive the same construction as if the limitations were of legal estates.

1 Jac. & W. 570.

Thus lands were devised to a trustee, in trust to pay the rents to S G
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to her separate use for life; and after her death to pay the same to E G, her son, for life; and afterwards to pay the same to the heirs of his body; and for want of such issue to pay the same to all and every other son or sons of the body of S G, and the heirs of the bodies successively, the eldest to be preferred in priority of birth; and for want of such issue in trust, to convey to T G in fee. Lord Hardwicke decreed that E G, who survived his mother, was entitled to a conveyance in tail.

Garth v. Baldwin, 2 Ves. sen. 646.

So, where a testator devised lands in trust for P for life, remainder to trustees for his life, remainder to the heirs of the body of P, remainder over; and also bequeathed certain moneys to the trustees, to be laid out in the purchase of lands of inheritance, to be settled upon the same trusts as the lands devised; it was decreed that P was entitled to an estate-tail in the lands to be purchased.

Austen v. Taylor, Amb. 376. See 1 Jac. & W. 572, and 3 Atk. 794.

But A, being seised of a legal estate in fee in L, and of an equitable estate in fee in S, by his will directed B, the trustee of S, to convey the legal estate to the uses therein declared, and then devised L and S to B for life, and afterwards to the first son or issue male of his body, and to the heirs male of the body of such first son, remainder to B's second son, and his issue male in tail (but did not carry over the limitations to his third or other son,) subject to a proviso, "that the said B or his assigns, and the heirs male of his body should not commit waste, and should not impeach or endeavour to defeat the bequests in his said will; and after the death of B without issue male of his body, or after the death of such issue male, testator devised all his estates to charities. B suffered a recovery of L and S, and died without issue." It was decreed that the recovery as to L was good, but void as to S; thus determining that the devise as to S was *executory*, and that in equity B, as to that estate, was only tenant for life.

Attorney-General v. Sutton, 1 P. W. 754.

The difference between trusts executed and executory, is stated in *Jervoise v. the Duke of Northumberland*, 1 Jac. & W. 559, and the cases there cited; and see *Lord Deerhurst v. Duke of St. Alban's*, 5 Madd. 232.

If a devise be to the heirs of the body of a person, who either has no estate, or whose estate will not, by the rule in *Shelley's case*, unite with the limitation to his heirs, such limitation will create a *quasi entail*, and the heirs included in it will take estates-tail, in the same manner as if an estate-tail had vested in the ancestor.

See *Fearne's C. R.* 80.

Thus, on a devise to a widow, and the heirs of the body of her late husband, it was held that the widow took an estate for life, that her son took an estate-tail, with remainder to his sister (the only other child) in tail.

Mandeville's case, 1 Co. Lit. 26 b.

So, on a devise to trustees, upon trust to pay the rents to Rebecca the wife of P for her life, for her separate use, and after her decease to the use of the heirs of the body of the said Rebecca; the elder of such issue, and his, her, and their heirs, to take before the younger of such issue, his, her, and their heirs, with remainders over; it was held that the two daughters, the only children of Rebecca, should take *successive* estates-tail. Rebecca's life-estate being

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equitable, could not unite with the *legal* limitation to her heirs, so as to give her an estate-tail.

Henry v. Purcel, 2 W. Bl. 1002.]

Upon a special verdict, the case was: Richard Gooch, seised in fee of lands in Suffolk, by will in writing devises to Richard, son of his late brother, all his lands, commonly called P, and also all other his lands during his natural life, and to the heirs male of his body begotten; and for want of such issue, he the said Richard to have the said estate but during his natural life, and no longer; and then his will was, that the aforesaid estate should descend to Philip, his nephew: Richard suffers a common recovery to the use of himself and his heir, and devises this land to the defendant in fee, and dies without issue male. It was adjudged to be an estate-tail in Richard, and so the remainder barred by the recovery, and not an estate for life, and so forfeited by the recovery; for the words *and for want of such issue, he the said Richard to have but an estate during his natural life*, are no more than the law implies; for if tenant in tail has no issue, it resolves into an estate for life, and so it was adjudged. The objection was, that it should be construed thus:—I give the land to Richard during his life, and no longer, in case he has no issue male of his body; and so an estate-tail upon a contingent; and he dying without issue male, it is now become but an estate for life *ab initio*; but the judgment was *ut supra*.

Fountain and Gooch, Hil. 29 & 30 Car. 2; Rot. 1247; [S. C. cited by Lord Mansfield in *Cowp.* 380.]

[A testator devised lands to his daughter E to hold the same, after the death of the testator's wife, to his said daughter and *the heirs of her body* lawfully begotten; and to his daughter M other lands, to hold from and after his wife's decease to the said M, and to the heirs of her body lawfully begotten; and declared his further mind and will to be, that in case either of his said daughters should happen to die single, married, or widow, without leaving children or child *living at their decease*, lawfully begotten, then the *estate* given her by his will should be void as to the *inheritance of heirs*, and of none effect, and the lands so given her should go to his heir male, and his heirs male, he and they paying to the surviving daughter an annuity during her life. E, after the decease of her mother, suffered a common recovery of the lands so devised to her, and afterwards devised them, and died unmarried. Upon a question, whether the recovery had barred the remainder over; it being contended on behalf of the claimant in remainder, that upon the whole of the will the intention of the testator was not to give his daughter an immediate estate-tail, but an estate for *life* only, with remainder to her children in tail, if she left any, and if not, then to the testator's heir male, &c.; but if not so, still, that in providing for the event that had happened, he expressly revoked the estate of inheritance;—the court said, the validity of the recovery depended on the point, whether the daughter was tenant in tail, or tenant for life only; and that it was necessary for the plaintiff to support the proposition, that, at the death of the testator, E was, during her own life, tenant for life only; that the estate was given to *her and the heirs of her body*, which was an estate-tail; that if she was tenant in tail to the hour of her death, nothing was so clear, as that all conditions limited upon such estate-tail were avoided by the common recovery which had been suffered. And the court were of opinion, that she was tenant in tail.

Driver v. Edgar, *Cowp.* 379.]

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A copyholder in fee surrenders to the use of his will, and by will devises his copyhold lands to his wife, and if she hath issue by the devisor, that issue shall have it at his age of twenty-one years; and if the issue die before that age, or before his wife, *or if she hath no issue*, then she shall choose two attorneys, and she to make a bill of sale of my lands to her best advantage. *Per Curiam*.—She hath only an estate for life; and having no issue, hath no interest to dispose, but an authority only to nominate two, who shall sell, and the vendee shall be in by the will.

Cro. Ja. 199, Beal and Shephard, adjudged; 4 Mod. 318, 319, S. C. cited.

One by will devises lands to A for life, without impeachment of waste; and in case he shall have issue male, to such issue male and his heirs for ever; and after the death of A, in case he shall leave no issue male, to B and his heirs for ever, and dies: A suffers a recovery, and declares the use to himself in fee, and by his will devises it to C in fee, and dies without issue; And the first question was, Whether by this devise A took an estate in tail-male, or only for life?—and it was held to be but an estate for life in A. 1st. Because it was devised to him expressly for life, and that without impeachment of waste, which would have been needless if it were an estate-tail. 2dly. The words, “*and in case A die without issue male, or leave no issue*,” are not to be taken substantively and absolutely, but relatively to what was said before, viz., “if A die without issue, who shall take the fee as before is appointed;” and these oblique words cannot be intended to destroy by implication the estate expressly devised before to the issue male of A, and there is no uncertainty in these words, *to the issue male*, which of them shall take, if there be several, for the eldest shall take the fee by purchase, &c.

3 Lev. 431; Ld. Raym. 203, S. C. cited in 8 Mod. 256. See Fitzgib. 21, 10 Mod. 403, between Loddington and Kime; and the court being ready to give judgment on this point, J. Powell, jun. started another, viz., Whether these remainders could take place as executory devises or contingent remainders? upon which it was twice argued: but before any judgment the parties agreed; but in Salk. 224, pl. 1, S. C. it is said to have been further held, that this limitation to the issue was not an executory devise, being after a freehold, but a contingent remainder, so that a posthumous son could never take; but there is no judgment; but *per* Raym. C. J., in the case of Sparrow and Weigh it was determined, and judgment entered, Patch. 9 W. 3, that it was only an estate for life; and it was likewise decided in the same manner in Chancery, and on an appeal to the House of Lords. Abr. Eq. 183.

|| If there be a devise to A for life, with remainder to his *children* and their heirs; “and in default of such issue,” or “in case A die without issue,” over (a);—or, with remainder to his issue in fee; “and in default of such issue,” or being such, if they should all die under twenty-one, and without leaving lawful issue, over (b);—or, with remainder to the heirs of his body and their heirs; and if A die without such issue, or leaving any such they all should die without attaining twenty-one, over (c);—such limitation does not enlarge A’s estate for life, but gives a contingent remainder in fee to his children or issue; and the remainder over is also contingent, subject to be determined by the vesting of the remainder in fee to the children.

(a) Goodright v. Dunham, Doug. 251; Doe v. Perryn, 3 T. R. 484; The King v. The Marquis of Stafford, 7 East, 521. (b) Doe v. Burnsall, 6 T. R. 30; S. C. 1 Bos. & P. 215; Loddington v. Kime, 1 Salk. 224. (c) Crump v. Norwood, 7 Taunt. 362; Doe v. Holmes, 3 Wils. 237, 241; 2 W. Bl. 777.

Mr. Fearn has observed, that the limitation in fee grafted on the limita-

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tion to the issue carries these cases out of the rule in Shelley's case; and further, that when in such cases as above cited the words preceding the limitation over refer to the issue of the parent, there is no circumstance to extend the construction beyond the words, which may therefore be confined to the children or issue themselves; and if the words refer to *such issue*, the issue, children, or heirs just mentioned may be understood, if there be no contrary intention apparent.

C. R. 152; C. R. 375.

But if the words preceding the limitation over refer to the children or issue *and their issue*, the estate in fee given to the children or issue will be restricted to an estate-tail, and the remainder over will be a vested remainder.

Thus where there was a devise to M, testator's daughter, for life, and after her decease the same to go and be enjoyed by the children of her body begotten, and their heirs, if she should have any, and in default thereof to W L (a son of testator) in fee, the words "*in default thereof*" referred both to the children *and their heirs*, so that the estate to the children was held to be an estate-tail.

Ives v. Legge, 3 T. R. 488, in note; Fearn, C. R. 376. See Doe v. Reason, cited 3 Wils. 244.]

[A testator devised lands to his son F to enjoy the rents and profits thereof during the term of his natural life, with power to make a jointure of all or part, and after his death and jointure, if any were made, *to the heirs male of his body lawfully begotten, during the term of his natural life, and for want of such heir male*, he gave the same lands to another son. It was adjudged that F took only an estate for life.

White v. Collins, Com. Rep. 289.

Again, where a devise was to B and his heirs lawfully to be begotten, *that is to say, to his first, second, third, and every son and sons successively, lawfully to be begotten of the body of the said B, and the heirs of the body of such first, second, third, and every other son and sons successively*, lawfully issuing as they should be in *seniority of age and priority of birth*, the eldest always, and the heirs of his body, to be preferred before the youngest, and the heirs of his body, remainder over; it was adjudged, that B took only an estate for life; for that the subsequent clause was not *contrary* to the preceding general limitation to B's heirs lawfully to be begotten, but explanatory of what heirs, &c., were meant.

Law v. Davis, 2 Ld. Raym. 1561.

{So where lands were devised to A for her natural life without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the "*heirs male of the body of A to be begotten, severally, successively, and in remainder one after another according to seniority, the elder of such sons and the heirs male of his body being always preferred before the younger of such son and sons and the heirs male of their bodies, and in default of such issue to the daughter and daughters of the body of A*" as tenants in common in tail, remainder over, it was determined that A took only an estate for life; the words *heirs male of her body* being explained by the subsequent words to mean first and other sons, &c.

1 East, 264, Goodtitle v. Herring; said, in 3 Bos. & Pul. 628, to have been affirmed in the House of Lords.

But where a devise was to the testator's first son by his wife, begotten or to be begotten, for life; remainder to trustees to preserve contingent remain-

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ders; remainder to the several heirs male of such first son lawfully issuing, so as the elder of such *sons* and the heirs male of his body shall always be preferred and take before the younger and the heirs male of his body; remainder to the testator's second, third, fourth, and all and every other son and sons, for their several and respective lives; remainder to trustees, &c.; remainder to the several heirs male of their several and respective bodies lawfully issuing, so as the elder of such *sons*, and the heirs male of his body, shall be always preferred and take before the younger of the same sons, and the heirs male of his and their body and bodies; remainder to the testator's first and other daughters for their lives; remainder to trustees, &c.; remainder to the several heirs of their several and respective bodies lawfully issuing, so as the elder of such *daughters*, and the heirs male of her body, shall always be preferred and take before the younger of the same daughters, and the heirs male of her and their body and bodies; and there were other clauses in the will, by which, after giving an estate for life to the first taker, the testator limited to trustees, &c.; remainder to the first and other *sons* of such first taker and the heirs of their bodies, so as the elder of such *sons*, and the heirs of their bodies, should always be preferred before the younger of the same *sons* and the heirs male of their bodies: it was held that the first son of the testator took an estate-tail; because (whatever might have been the effect of the clause "so as the elder of such *sons*, &c." added to the limitation to the testator's first son, in restraining the general sense of the words *heirs male*, had that clause stood alone and unexplained by other parts of the will,) there did not appear, on the whole will taken together, sufficient indication of the testator's intention to restrain the legal effect of the words *heirs male of the body*, and to convert them into words of purchase.

3 Bos. & Pul. 620, Poole v. Poole.}

Gavelkind lands were devised to A *and the heirs of her body* lawfully begotten or to be begotten, as well females as males, and to their heirs and assigns for ever, to be divided equally, share and share alike, as tenants in common, and not as joint-tenants. It was holden, that the words *heirs of her body* did not operate as words of limitation, nor, consequently, create an estate-tail in A. For here, these words did not stand independent and unqualified, but were corrected and explained, very expressly, by the words which followed and were coupled with them; the words *as well females as males*, annexed to the words *heirs of the body*, were incompatible with and expressly broke the descent, because gavelkind lands cannot descend in that manner; and the devise expressly created a tenancy *in common*, which was impossible *by descent*, as that must have been in *coparcenary*; and besides, there were words of limitation *in fee* grafted on the words *heirs of the body*, which could not have been satisfied by an estate-tail in the ancestor.

Doe v. Laming, 2 Burr. 1100; 1 Bl. Rep. 265.

W. Williams, being seised in fee of a plantation in Jamaica, devised in the following words:—"Should my wife be enseint with child, at any time hereafter, and it be a female, I give and bequeath unto her the sum of 2000l., &c.; if it be a male, I give and bequeath my estate, real and personal, equally to be divided between the said infant and my son J W, when the said infant shall attain the age of 21. Item, It is my intent and meaning, *that none of my children should sell or dispose of my estate for longer time than his life; and to that intent I give, devise, and bequeath all the rest and*

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residue of my estate to my son J W and the said infant, for and during the *term of their natural lives*; the remainder to my brother-in-law J G and his heirs, for and during the lives of my said son J W and the said infant; the remainder to *the heirs of the body of my said son J W* and the said infant, lawfully begotten or to be begotten; the remainder to my daughters, &c." No other son was born, and the question was, what estate J W took under this will? The Court of King's Bench (Yates, J., *dissent.*) determined, that he took only an estate for life. This judgment was reversed in the Exchequer Chamber, from which an appeal was lodged in the House of Lords. The judgment of that House, however, was never had; for after the appeal had depended a considerable time, the parties compromised the dispute, and the plaintiff obtained leave to withdraw his writ of error.

Perrin v. Blake, 4 Burr. 2579; 1 Bl. Rep. 672; Dougl. 329, note.

J N devised his estate to his two daughters, equally to be divided between them, not as joint-tenants but as tenants in common, viz. the one moiety or half part thereof to his daughter E N and her heirs for ever: and the other moiety to his daughter S, the wife of W H, during the term of her natural life, and after her decease *to the issue of her body lawfully begotten, and their heirs for ever*. It was adjudged, that S, the second daughter, took only an estate for life, with remainders to her children, as purchasers. For if the devise of the second moiety were construed to give an estate-tail to this daughter, the devisor's estate would not be equally divided, for then the ultimate reversion of the second moiety would be again subdivided between the heirs of the two daughters; and the first daughter and her heirs would take a moiety of this reversion over and above what they take under the devise of the first moiety of the whole.

Roe v. Collis, 4 Term Rep. 294.]

A devised his estate to trustees and their heirs, in trust for B for life, and to his first and other sons in tail; but in case A died without an heir male of his body begotten, the trust to be void; and in such case he gave the estate to J S. It was held, that these words, *if he die without heir male of his body begotten*, did not give him an estate-tail by implication, nor enlarge an express estate devised to him for life.

2 Vern. 427, 449; Popham and Bamfield, 1 P. Wms. 54; S. C. 1 Salk. 236; S. C. but said by Lord Hardwicke, in 1 Ves. 26, to be wrong reported by him; S. C. cited in 8 Mod. 260; Fitzgib. 26, 27; 1 P. Wms. 333.

If A devises to D, his daughter, for life, and after her decease to her first son, and the heir of his body; and if he dies without heirs of his body, then to her second and other sons, and the heirs of their bodies, and after them to N *in eodem forma*, and for default of such issue to J S in fee; and after the will was finished, but before publication, the testator adds this clause: *Memorandum, the intent and meaning of the testator is, that D shall not alien the lands given to her, but they shall be to her heirs male, and for want of such issue, to N*;—this restrictive clause explains the intent of the testator, and therefore B shall have an estate for life, and not an estate-tail by implication.

Skin. 240, pl. 5; 3 Mod. 62, 311, S. C. cited; Vent. 230; 4 Mod. 318; Pollex. 657; 2 Show. 405, pl. 377; Eq. Abr. 184, pl. 25, Friend and Bouchier.

[Where the devise was to A for life, with power to trustees to settle a jointure, if he married a gentlewoman, and subject to such jointure, a direction to limit the estate on the issue of the marriage in strict settlement:

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but if A died without issue of his body, then over; Lord Hardwicke held, that the latter words gave A an estate-tail by implication.

Allanson v. Clitherow, 1 Ves. 24.

Sir W D devised all his manors, messuages, lands, &c., to his daughter M D for life, remainder to trustees to preserve, &c., remainder to her first son in tail-*male*, remainder to every other son in tail-*general*: and gave all his personal estate to trustees, to be laid out in land; and settled upon his daughter and her issue, in such manner as he had devised his manors, &c.; and *in case his said daughter should die without issue of her body living at her decease*, then he devised to trustees his manors, &c., and also all his personal estate, to be laid out as aforesaid; upon trust, to receive the rents and profits thereof annually, as well of the lands so to be purchased, as of all other the premises so as aforesaid devised to them, and lay out the same in the purchase of lands of inheritance in the county of G or some adjacent county, and also the rents thereof, until his cousin Sir H N should attain his age of 21 years. And then the will goes on in these words: "*Item*, I give and devise all my manors, &c., unto my cousin, Sir H N, after he shall have attained the age of 21 years, (taking the name of D,) for life, without impeachment of waste; with remainder to his first, &c., sons in tail-*male*, remainder to his daughters in tail. And in default of such issue, or in case the said Sir H N shall happen to die before he attain his said age of 21 years, and without issue, then to S L, (taking the name of D,) for life, with remainders to his sons in tail-*male*; and for default of such issue" — And then there was a blank, without any farther disposition. Lord Hardwicke held, that M D, the testator's daughter, was not entitled to an estate-tail by implication: for that the words, "*If my said daughter should die without issue living at her decease*," are to be considered as if he had added *during the minority of Sir H N*, and do not give an estate-tail to the daughter, but her issue take by purchase.

Letheullier v. Tracey, 3 Atk. 774; Ambl. 204, 220, S. C.

A testator devised all his real estate to L H for and during the term of his natural life, *and no longer*; provided that he altered his name, and took that of R and live at his house at B; and after his decease to *such* son as he should have, lawfully to be begotten, taking the name of R: and for default of *such issue*, then he bequeathed the same to his cousin W R, and his heirs for ever: And he further willed, that the said W R have liberty to present whom he pleases to any vacancy that should happen in any of his (the said testator's) presentations during his life; and in case any of his children should take or be designed for holy orders, then it was his (the said testator's) desire, that in case of any vacancy in either of his presentations, bonds of resignation be taken to such child or children, if the vacancy happen before he or they attain such orders; and after the same should be disposed of as aforesaid, then he gave *the perpetuity of the said presentations to the said L H in the same manner, and to the same uses*, as he had before given his estate. The Court of King's Bench certified, that upon the true construction of this will, the said L H must, by necessary implication, to effectuate the manifest general intent of the testator, be construed to take an estate in tail-*male*, he and the heirs of his body taking the name of R; notwithstanding the express estate devised to the said L H *for his life and no longer*.

Robinson v. Robinson, 1 Burr. 38.

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Sir S D devised all his manors, &c., to S D, son of C D, during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to C D, another of the sons of the said C D, during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to J D, another of the sons of the said C D, during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, then to every son and sons of the said C D which should be begotten on the body of Sarah his then wife; and for want of such issue, then to W H for his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to S G for and during his natural life, and the heirs male of his body lawfully to be begotten; and for want of such issue, to J G for and during his life, and the heirs male of his body lawfully to be begotten; with the reversion to the testator's right heirs. There was a proviso annexed to the devise to the said S D *and others*, that if the estates devised to him or them and their descendants, should come to him or them and be in possession, then and thereupon he and they and their descendants to whom the premises should come and be in possession, should procure an act of parliament to take his name and arms; otherwise their estates should determine. The testator also devised several things to go, as heir-looms, along with the estate; and he gave powers to make leases and jointures. The three sons of C D, viz. S D, C D, and J D, all died without issue. But C D had a fourth son, named W, born after the making of the will, who became seised, and took the name and arms according to the directions of the will. It was adjudged, that this son took an estate-tail, for that the testator evidently intended the same estate for the after-born sons, as he had given to the others.

Evans v. Astley, 3 Burr. 1570.

J B devised, after the death of his nephew W B, eldest son of his brother R B without issue, to the second son of his said brother R B, for and during the term of his natural life; and after the death of the said second son of his said brother R B, then to the first son of the body of such second son of his said brother R B, lawfully begotten or to be begotten, and to the heirs male of the body of such second son lawfully to be begotten; and for want of such issue, to the third, fourth, fifth, and every younger son or sons of the said second son of the said R B, (according to their seniority,) and to the heirs male of the bodies of the said third, fourth, fifth, and other sons of the said second son of the said R B, with remainders over. At the time of making the will, R B had no other son but W B. His second son T B was born after the making of the will, and after the testator's death. The question being, whether T B, the second son of R B, took an estate-tail under this will, or an estate for life only? It was pressed upon the court in order to make it an estate for life only, to change the limitation to the heirs male of the body of such second son, to the heirs male of the body of such first son of such second son, and to insert a limitation to the second son of the said second son; but the court said, that they could not supply a contingency omitted in the most favourable case that could exist; that adding these words in this case would introduce a void limitation, for that a possibility could not be devised upon a possibility; that it would defeat the intention of the testator; that that intention could not be answered but by giving the second son of R B an estate-tail; and that as the words stood in the will, he took an estate-tail.

Chapman v. Brown, 3 Burr. 1626.

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An estate was devised to A for life, remainder to trustees to preserve, &c., remainder to his first and other sons in tail-male, remainder to B for life, remainder to trustees to preserve, &c., remainder to his first and other sons in tail-male, remainder to the use of all and every the daughters of A and B as tenants in common; and in default of such issue, to the use of the right heirs of the devisor. After the death of A and B without any son, an only daughter of B, it was adjudged, took only an estate for life, for that here the testator has used no words testifying his intention to give an estate of inheritance to the daughters, and the court could not supply them.

Hay v. Earl of Coventry, 3 Term Rep. 83.

A testator devised to his nephew W D all his estate at, &c., to hold to him during his natural life, and after his decease *to and amongst his issue*, and *in default of such issue*, he gave the estate over. The court said, that in this case, as in that of Robinson v. Robinson, they must, to answer the devisor's general intention, defeat some particular intent: that his general intent was to give W D an estate-tail; and that to effectuate that intent they must reject the words "*to and amongst*."

Doe v. Applin, 4 Term Rep. 82.

If A devises lands to trustees to pay debts and legacies, and then to settle the remainder of one moiety of what should remain unsold to H, and the heirs of his body by a second wife, and in default of such issue to her son F and the heirs of his body; the other moiety to F and the heirs of his body, with remainders over; taking special care in such settlement, that it never be in the power of either of my said sons F or H to dock the entail of either of the said moieties given them, as aforesaid, during their or either of their life or lives;—this estate being only executory, it must be construed as if like provision had been contained in marriage articles: and therefore the sons shall have estates for life conveyed to them; but it must be without impeachment of waste.

2 Vern. 526, between Leonard and Earl of Sussex, decreed in Chancery.

[J S being seised in fee of a legal estate in L, and of a trust or equitable estate in S, by his will directed B, his nephew and trustee in the land in S, to convey his land in S to the uses of his will; which if he refused to do, or to acknowledge the trusts of his will in manner therein mentioned, then—"all the gifts, legacies, and bequests in the said will given, devised, and bequeathed to the said B and the heirs male of his body should be void." He then devised all his lands in L and S to B for life, and afterwards to the first son, or issue male of his body lawfully to be begotten, and to the heirs male of the body of such first son, remainder to B's second son, and his issue male in tail, (not carrying over the limitations to his third or other son,) subject to a proviso, "that the said B or his assigns and the heirs male of his body should not commit waste upon the said premises, and should not impeach, question, or endeavour to defeat, avoid, destroy, invalidate, or obstruct the payment of all or any the annuities, legacies, or charitable bequests in the said will." And from and after the death of the testator's wife, and of the said B without issue male of his body, or after the death of such issue male, he devised all his said premises to trustees for charities. Afterwards A suffered a recovery and died without issue; and the question was whether the recovery barred the charities? As to which, on an appeal from the Court of Exchequer to the House of Lords, it was agreed by all the Lords, that the recovery was good of the lands in L, of which the tes-

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tator had a legal estate, and that the charities were barred by it; but as to the trust-lands in S the order of the Court of Exchequer was reversed by a majority; the effect of which being only to reverse the plea allowed by the Exchequer, it only put the respondent to answer over, without determining the right any way against him. However, in consequence of this order, the Barons decreed, that the recovery of the trust-estate was void, as contrary to the trusts created by the will: and there having been no conveyance of the lands in S to trustees, pursuant to the directions in the will, they directed such a conveyance, and a perpetual injunction for quieting possession. As to the lands in L, in which the testator had the legal estate, the court, after a trial at law, and a special verdict found, gave judgment for the lessors of the plaintiff, being of opinion that the nephews took an estate-tail in those lands, and they ordered the tenants to attorn.

Attorney-General v. Sutton, 1 P. Wms. 754; 2 Br.-P. C. 282, S. C.; Vin. Abr. tit. *Devise*, (B b.), pl. 22, S. C.; Fort. 66, S. C. cited.

Lands were devised to trustees and their heirs, in trust, until the marriage or death of the testator's grand-daughter, to receive the rents and profits, and pay her an annuity for her maintenance, and as to the residue to pay his debts and legacies, and after payment thereof, in trust for his grand-daughter; and if she married a protestant, after her age, or with consent, &c., then to convey the estate after such marriage to the use of her for life, without impeachment of waste, remainder to her husband for life, remainder to the issue of her body, with several remainders over. Lord Talbot held, that the grand-daughter was *tenant for life* only, with remainders over in strict settlement.

Lord Glenorchy v. Bosville, Ca. temp. Talb. 4.

An estate was devised to trustees to convey to the use of the testator's daughter, for the term of her natural life, and so as she alone, or such person as she should appoint, should take and receive the rents and profits thereof, and so as her husband was not to intermeddle therewith; and from and after her decease, in trust *for the heirs of the body* of the said daughter for ever. Lord Hardwicke said, that it was plainly the intention of the testator, that the husband should have no manner of benefit from the estate either in the lifetime of the wife, or after her decease, (for immediately upon her decease it was to be conveyed in trust for the heirs of her body;) the wife therefore could only take an estate for life; for if she were entitled to an estate-tail, the husband must be entitled to be tenant by the curtesy.

Roberts v. Dixwell, 1 Atk. 607.

A M devised all his lands in B and C to trustees, in trust, to sell the same, and with the money arising by the sale, to purchase other freehold lands, or long annuities, or stock, or some other public fund; and then to permit the defendant and his assigns to receive the interest and profits thereof during his life; and he further directed, that the defendant should receive the rents and profits of the estates until sold to his own use; and after the defendant's decease, then in trust to permit the plaintiff and his assigns to receive the interest and profits of the said money as aforesaid, or the rents and profits of the said land, if unsold, or such other lands as should be purchased, during his natural life; and after his decease, then in trust for the use of the issue of the body of the plaintiff lawfully begotten; and in default of such issue, the estates were devised over in fee. One of the trustees in the will died before the estates were sold, but after he had proved the will. On a

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bill brought by the plaintiff to have the estates sold by a decree of the court, and that the money arising thereby might be disposed of according to the will; the question was, whether an estate-tail was to be limited to the plaintiff in the lands to be purchased, or an estate for life only? By the master of the Rolls:—Where lands are to be settled to one for life, and to the heirs of his body, there is no case where such a limitation has not been held to be an estate-tail: on the other hand, there is no case where they are to be settled to one for life, and after his death to the issue of his body, that such a limitation hath been construed an estate-tail. In *Sweetapple v. Bindon*, 2 Vern. 536, there was no estate for life particularly given before the word *issue*, which differs it from the present case; and yet Lord Keeper Wright said, upon the like words in marriage-articles it would not have been construed an estate-tail, when it appeared the estate was intended to be preserved for the issue. And in the case of *Bale v. Coleman* it is laid down, that there is a difference between a deed and a will, as to construction. There is something in this will that denotes the intention of the testator, that the plaintiff should only take an estate for life, for there is a distinction between the wording and framing of the limitations: in the first place, the estate is during the lives of the defendant and the plaintiff to continue in the trustees; and when the testator limits it to the plaintiff for life, it is to permit the plaintiff to receive the rents and profits, &c.; and when the limitation is to the issue, it is to their use and behoof, and the court should, as near as they can, preserve the intention of the testator. The words, *in default of such issue* to A F, show the testator intended, that F the remainder-man should not take while there was issue of the plaintiff: issue of his body takes in both male and female, and there must be cross-remainders to the issue female. Lord Glenorchy v. Bosville is in point, and I shall in this case make my decree accordingly.

Meure v. Meure, 2 Atk. 265.

A devised lands to five trustees, their heirs and assigns, in trust, by rents and profits, sale or mortgage, to pay his debts, &c.; and after payment thereof, he devised the same estates to three of the same trustees, their executors, &c., for 500 years upon trusts to pay his legacies, and an annuity of 200*l. per annum* to his sister for life; and after the determination of the said estate for years, he devised the same premises to all the said trustees and their heirs, in trust, as to a moiety, to the use of T, his nephew for life, without impeachment of waste, and after the determination of that estate to the trustees and their heirs during the life of T, to support contingent remainders, and after his decease, to the use of the heirs of the body of T lawfully begotten, and for want of such issue, then to the use of his nephew B for the term of his natural life, without impeachment of waste, and after the determination of that estate, to the same trustees during the life of B to preserve contingent remainders: and after his decease, then to the use of the heirs of the body of B lawfully begotten, with like remainders to other nephews. The first devisee T died without issue; upon whose decease B the next in remainder filed his bill, praying, among other things, to be let into possession of a moiety of the estates; afterwards B dying pending the suit, his widow and devisee brought a bill of revivor and supplemental bill, charging that B in his lifetime, by bargain and sale enrolled, conveyed this moiety of the estates to two persons and their heirs, to make them tenants of the freehold, and suffered a recovery thereof (in which he was vouched) to the use of himself in fee; and afterwards devised his said moiety to his

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widow in fee, and died without issue. The general question between the parties was, whether an estate-tail, or an estate for life only, passed by the will of A to B? It was insisted for the plaintiff, that it was an estate-tail, upon the general rule, that where lands are limited to a man for life, with a limitation in the same deed or gift to the heirs of his body, that this makes an estate-tail: and that a devise of lands in the same way passed the same estate; that the limitation was either a legal estate, or a trust vested or executed, and not executory. On the other hand, it was contended, that those rules were artificial, not founded in justice, but for support of the feudal tenures, and therefore the judges ought to show themselves *astute* in supporting exceptions to such rules. The master of the Rolls, however, held it to be a *trust*, and not a *legal estate*; but decreed that B was entitled to an *estate-tail* in the moiety so devised to him; as it was the case of an immediate devise, and not a devise of lands to be *settled*. Upon an appeal to Lord Hardwicke from this decree, he agreed, that this devise was only a trust in equity; but that this being the case of a trust, the court was bound to carry it into execution according to the intent of the testator; that the intent was clear that the words "heirs of the body" should be taken as words of purchase, from the clause, *without impeachment of waste*, and the limitation to trustees to *support contingent remainders*: that there was no distinction between trusts executed and executory; that all trusts were in notion of law executory, and to be carried into execution by the court. His lordship therefore reversed so much of the decree at the Rolls, as gave B an estate-tail under the will.

Bagshaw v. Spencer, 2 Atk. 246, 570, 577; 1 Ves. 142. See observations on this case in *Jones v. Morgan*, 1 Br. Ch. Rep. 206, *Fearn's Conting. Remainders*, 4th ed. 177, &c.

J A devised 6000*l.* South-sea stock, and 1200*l.* to trustees, to sell and lay out in the purchase of lands, to convey to G J A for life, and afterwards to the issue of his body: in default of such issue, then over. G J A brought a bill for performance: the question was, whether he had an estate for life, or in tail? It was insisted for him, that if it had been a devise of land, he would be tenant in tail; and there should be the same construction in this case; but the court held it an estate for life only of the lands to be purchased.

Ashton v. Ashton, 3 Ves. 149.

Personal estate was bequeathed to trustees, in trust, to lay out the same in land to be settled and assured as counsel should devise, unto and upon the trustees and their heirs, upon trust, and to and for the use of P *and the heirs male of his body*, to take in *succession* and *priority of birth*, and for default of such issue male, then, upon further trust, and to and for the use of B, *and the heirs male of her body*, to take in *succession* and *priority of birth*, remainder over. And the testator ordered the trustees to pay the remainder of the interests, dividends and profits, after deducting the expenses of the trust, until the purchase or purchases made, to P and B respectively, and to their *respective sons and issue male*, who should be *respectively entitled* to the rents and profits of the estates to be purchased. Upon the question, whether the lands to be purchased should be settled on P as tenant in tail, or in strict settlement upon him for life, with remainder to his first and other sons in tail-male, Lord Northington, on hearing, directed the settlement to be made on him for life, with remainder to his first and other sons in tail-male. Upon a re-hearing, Lord Camden was clearly of opinion to confirm

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the decree, and took a distinction between the case where a testator has given complete directions for settling his estate with perfect limitations, and where his directions are incomplete, and are rather minutes or instructions: in the former case, he said, the legal expression should have legal effect, though perhaps contrary to his intention, as in *Garth v. Baldwin*; in the latter, the court would consider the intention, and direct the conveyance according to it. Here, the intention was very plain; the testator directed the settlement to be made by *advice of counsel, and in succession and priority*. He meant something different from an estate-tail, when he wanted the assistance of counsel; and though the words in *succession and priority* might have effect in case P took an estate-tail, yet they were meant to give an interest to the sons after the death of P; the latter clause put it out of doubt; he there explained his meaning by making use of the words *sons and issue*.

White v. Carter, Ambl. 670.

P P devised to "A, B, and C, and their heirs and assigns for ever, to the use of them, their heirs and assigns for ever, all his manors, lands, &c., in the county of D and elsewhere, upon trust, to set the same out in such manner as they should approve, for the benefit of his (the testator's) daughter J, and the rents and profits thereof, to lay out and apply for her most advantage, until she should attain her age of 21, or be married; and on her attaining that age, that the said trustees or the survivor of them, or the heirs of such survivor, *should, as counsel should advise, convey, settle, and assure* the said manors, lands, &c., *unto, or to the use of, or in trust for the said J for her life, and after her death, then on the heirs of her body lawfully issuing*; but in case his said daughter should die without leaving issue of her body lawfully begotten, then he devised all his said real estates to his brother J P, his heirs and assigns for ever." On a bill filed by the daughter and her husband to have the trusts of this will carried into execution, Sir Lloyd Kenyon, M. R. declared, that on the true construction of the will, in the events which had happened, the real estates ought to be settled on Mrs. Bastard for life, with remainder to her first and other sons successively in tail-general, remainder to her daughters in tail-general, as tenants in common, with cross-remainders in tail-general, with remainder in fee to J P. And his honour ordered, that the master should settle proper conveyances according to such directions, and that the defendants, the trustees, should execute the same.

Bastard v. Proby, 2 P. Wms. 478, note.]

A makes a settlement of his estate on B, his son, for life, remainder to his first, &c., son in tail-male. Afterwards, the reversion in fee being in himself, he made his will as followeth: *As touching my lands and tenements, &c., my will is, that if my son's wife die, during the life of her husband, without issue male, that then he shall have power to make a jointure to any other wife; and for want of such issue male of my said son, then the lands shall be and remain to my son, &c., by any other wife, and my granddaughter shall have 4000l. And in case of failure of issue male by my son, then all my lands shall go to my grandchildren and their heirs, share and share alike*. Adjudged, that the settlement and will being distinct conveyances, the estate for life in the settlement cannot be tacked to the estate in the will, so as to create an estate-tail in the son, so that he continued only tenant for life.

4 Mod. 316; *Skin.* 359, pl. 1; *Ld. Raym.* 37, S. C., *Moor and Parker*; [*Lady*

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Lanesborough v. Fox, Ca. temp. Talb. 262; S. P. Doe v. Fonnerreau, Dougl. 487; S. P. Habergham v. Vincent, 5 Term Rep. 92; 2 Ves. jun. 204, S. P. So, an equitable estate for life cannot unite with a legal estate-tail, nor *vice versa*. Shapland v. Smith, 1 Br. Ch. Rep. 75; Knight v. Ellis, 2 Br. Ch. Rep. 570;] {7 Term, 347, 438, Venables v. Morris; 9 East, 6, Robinson v. Grey; 2 Wash. 34, Roy v. Garnett.}

A man, seised in fee, devised to J B for his life only, without impeachment of waste, and from and after his decease, then to the issue male of his body lawfully to be begotten, if God shall bless him with any, and to the heirs male of the bodies of such issue lawfully begotten; and for default of such issue, remainder to J C and the heirs male of his body; and for want of such issue, he limits two remainders over in the same words: it was adjudged, that J B took only an estate for life, for the estate was given to him for life, and there was a limitation afterwards to his issue, which was a description of the person who was to take the estate-tail.

Abr. Eq. 184, pl. 27; 10 Mod. 181, cited in Fitzgib. 12, 23; 8 Mod. 261, 383; Fortesc. 133; Ch. Cas. 173; Backhouse and Wells, Gilb. Ca. 8vo, 20, 129.

A devised certain lands to his eldest son for life, without impeachment of waste, remainder to J S his grandchild for life, without impeachment of waste, with power to him to limit a jointure of the same land to any woman he should marry, for her life; and after his death he devised the lands to the first son of J S the grandchild in tail, and so to the sixth son; and then devised, that if J S the grandchild should die without issue male, the land should remain to J B. Held, that J S took an estate-tail; for if there had been a seventh son, he could not have taken; and there it was necessary to create an estate-tail by implication.

Abr. Eq. 185; P. Wms. 759; S. C. cited 8 Mod. 258, 384; Fitzgib. 14. Langley and Baldwin, certified to be an estate-tail by the Court of Common Pleas, and decreed accordingly in Chancery. S. C. cited in 1 Ves. 26, and said to be wrong reported in Eq. Abr.

A devised the surplus of his personal estate to be laid out in a purchase of lands to be settled on B, his nephew, for life, and after his decease to the heirs male of the body of the said nephew, and to the heirs male of the body of every such heir male, severally and successively one after another, as they shall be in seniority of age and priority of birth, every elder, and the heirs male of his body, to be preferred before every younger; and for want of such issue, to his brother in the same manner. On a case stated for the opinion of the Court of Common Pleas, three of the judges certified, (a) that the nephew should have an estate-tail conveyed to him, but Judge Tracey held it only an estate for life.

Legate and Sewell, 2 Vern. 551; S. C. but no resolution, Eq. Abr. 389, 394, pl. 7; Gilb. Eq. Rep. 145; 1 P. Wms. 87, 90, 91, pl. 17. [(a) Though P. Williams says the parties agreed, yet in 2 Ves. 657, Lord Hardwicke says, that Lord Cowper thought himself bound to agree with the three judges, and so decreed.]

The plaintiff's father, by his will, devised the estate in question to the plaintiff for life, without impeachment of waste; remainder to trustees during his life, to support contingent remainders; with remainder to the heirs of the body of his said son, reversion to himself in fee, with a power to the son to make a jointure of such a part; and devised likewise a considerable personal estate to be laid out in a purchase of lands, and settled to the same uses: and the only question was, Whether the plaintiff took an estate-tail, or only an estate for life?—and it was held, that he took only an estate for life, as the words were express, and had all the other marks attendant on an estate for life; and, consequently, that the heirs of the body

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should take by purchase: and though the estate would vest in the first son as tenant in tail by way of purchase, yet not so as to exclude the other sons, or their issue, from taking the like estate, whenever his estate determined for want of issue.

Abr. Eq. 185, 186; Papillon and Voice, decreed at the Rolls; 2 P. Wms. 471, pl. 150; Fitzgib. 38; S. C. cited in Ca. temp. Talb. 8.

A devises lands to his wife for life, and for her better support he gives and bequeaths unto her the sum of 500*l.*, to be raised by his executors or administrators by sale of timber, or by sale of any part of the premises, or otherwise by digging, sinking, getting, and sale of coal on the premises, or any part thereof, at her, her executors' and administrators' choice and election; and if my said wife shall happen to die before the said sum be raised, as aforesaid, then such person whom she had appointed in her lifetime to raise, &c., for which I give them and her full power and authority; provided nevertheless, that if either of my sisters hereafter named, or such person for whom my trustees hereafter named shall be trustees, shall pay unto my wife, her executors, &c., the said sum of 500*l.*, that the said power of selling shall cease; and after the decease of my said wife, I devise all my estate before mentioned to A, B, and C, and the survivor and survivors of them, upon the trusts hereafter mentioned, that is to say, in trust for my sisters A L and D E, equally betwixt them, during their natural lives, without committing any manner of waste, from and after the decease of my said wife; provided always, that what sum or sums of money, in part or in full of the said 500*l.* hereby left my wife, shall be really paid my wife, her executors, &c., by either of my said sisters, that in that case my will is, that such money be likewise raised by the getting of coal on the premises only; and if either of my said sisters happen to die, leaving issue or issues of her or their bodies lawfully begotten, or to be begotten, then in trust for such issue or issues of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues; and if it shall happen that both my said sisters die without issue, as aforesaid, and their issue or issues too die without issue or issues lawfully to be begotten; the said trustees to stand and be intrusted to and for my kinsman J S and the heirs male of his body, &c., and for want of such issue, then in trust for R G. This was held an estate-tail in the sisters.

Abr. Eq. 184, pl. 28; Gilb. Eq. Rep. 28; 3 Danv. Abr. 178, pl. 26; 8 Mod. 253, 382; Fortesc. 58; 2 Stra. 798; Barnard. K. B. 54; Fitzgib. 7; Shaw and Weigh, adjudged an estate-tail in the sister, in the Great Sessions of Wales, but that judgment reversed by B. R., where it was held only an estate for life; but the judgment of B. R. reversed in the House of Peers, by the opinion of Eyre, C. J.; Pengelly and Fortescue, 3 Br. P. C. 469.

[A devised lands, in trust, for B for life, with a leasing power, and after his decease, in trust, for the heirs male of his body. Lord Keeper decreed an estate-tail to be conveyed to B, although he admitted, that upon articles of marriage, founded upon an agreement, B might in such case be made only tenant for life; but in a will (he said) *you must take words as you find them.*

Bale v. Coleman, 1 P. Wms. 142; 2 Vern. 670, S. C.; Vin. Abr. tit. *Devise*, (D b.) pl. 7, S. C. more fully reported.

Lands were devised to a trustee, in trust, to pay the rents and profits to S for her separate use during her life, as if she were sole, and after her decease, to pay the same to E her son for life, and afterwards to pay the same

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to the heirs of his body, and for want of such issue, to pay the same to all and every other son or sons of the body of S begotten, &c. Lord Hardwicke decreed a conveyance in tail to B of the estate so devised.

Garth v. Baldwin, 2 Ves. 646.

A testator devised to trustees and their heirs, upon trust, after his death, by and out of the rents and profits to raise 500*l.* with interest, and pay the same to his five grandchildren; and subject to the raising and paying of the said 500*l.* and the interest thereof, to the use of his nephew for life; subject nevertheless to his nephew's qualifying himself according to a proviso thereafter contained, with remainder to the said trustees and their heirs to preserve contingent remainders, with remainder to the use of the heirs male of the said T R and their heirs, provided that, in case his said nephew T R should die without having any issue male of his body living at his death, then he charged the premises with 100*l.* a-piece to two nieces, if then living, at their respective ages of 21 years, if either died, her part to go to the survivor; and he empowered his said trustees, as soon as conveniently could or might be after the death of the said T R without issue male as aforesaid, by and out of the rents and profits of the premises, to raise and pay to his said two nieces the said 100*l.* a-piece; and for default of such issue male of the said T R, then he devised the premises (subject to the payment of the said 500*l.* and 200*l.*) to the use of all and every his said five grandchildren, or such as should be living at the time of failure of issue male of the said T R, to take as tenants in common, and to their respective heirs and assigns, equally to be divided between them, share and share alike, provided that the said T R should, immediately after the testator's death, be placed out an apprentice to a surgeon, or some other good trade, for seven years, or else be sent to some college in Cambridge, there to continue till he was qualified to be ordained a clergyman; and in case he should refuse or neglect to be put out, and continue such apprenticeship, or qualifying himself to be ordained a clergyman, then his will was, that the estate so before limited to the said T R *for his life*, should cease and determine and be void, as if he had been dead, and that the said premises so limited to the said T R *for his life and his issue male* as aforesaid, should thenceforth revert over, and go and remain to the use of such of his five grandchildren as should be living, to be equally divided amongst them, and to their respective heirs, as tenants in common. Lord Keeper Henry determined, that T R took an estate-tail.

Wright v. Pearson, Fearn's C. R. 187; Ambl. 358, S. C.

A testator, after giving certain lands to trustees and their heirs, in the first place to the intent his sisters should respectively have an annuity, or rent charge of 80*l.* for their lives, with power of distress and entry; and subject thereto in trust for P for life, remainder to trustees to preserve, &c., remainder to the heirs of the body of P, remainder to his own right heirs; gave the residue of his personal estate to trustees, in trust, to buy lands in fee-simple; which he directed should remain, continue, and be to, for, and upon such and the like estate and estates, uses, trusts, intents, and purposes, and under and subject to the like charges, restrictions and limitations, as were by him before devised, limited, and declared of and concerning his lands and premises thereinbefore last devised, or as near thereto as might be, and the deaths of persons would admit. It was adjudged by Lord

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Keeper Henley, that P was entitled to an estate-tail in the lands to be purchased.

Austen v. Taylor, Ambl. 376.

A testator devised his estate to trustees, to raise money (in aid of his personal estate) for payment of debts; and after payment of debts, and after limitations to the use of his youngest son, and the heirs male of his body, in the same manner as those following to his eldest son W, *to the use of his son W for and during his natural life, without impeachment of waste, and from and after his decease to the use and behoof of the heirs male of the body of his said son lawfully begotten, severally, respectively, and in remainder, the one after the other, as they and every of them should be in seniority of age, and priority of birth, with remainder over.* Powers were given to the testator's sons, whilst in possession, of leasing, making jointures for wives, and raising portions for younger children. Upon a claim by the personal representative of W, to the amount of an encumbrance which W had paid off in exoneration of the estate, one point insisted upon in answer to it was, that W was tenant in tail; and therefore his paying off the encumbrance was an exoneration of the estate. And Lord Thurlowe was of opinion, that W took an estate-tail. The decision of the cause, however, did not depend merely on the point of the devisee's taking an estate-tail; but the complexion of the chancellor's arguments, and the inferences from them, leave little room to doubt that his decision would have been the same, if it had turned on that point.

Jones v. Morgan, 1 Br. Ch. Ca. 206.

A devised to his daughter B for life, and after her death to her lawful issue, and if she should have no issue, that she should have power to dispose of the estate at her will and pleasure. B was the testator's heir at law, and died without issue. She took an estate-tail, and a contingent fee by the will, and had a fee by descent.

Goodtitle v. Otway, 2 Wils. 6.

Lands were devised to M and his wife for their lives, remainder to the next heir male of their two bodies. It was holden a devise in tail; for that a devise to the heir male was a devise in tail, unless there are words of limitation superadded, so as to bring it within the reason of Archer's case, and that the words first, next, or eldest made no difference.

Miller v. Seagrave, Rob. Gav. 96.

A testator devised lands to N *for his life*, and after the decease of N, *to the heirs male of the body of N* lawfully to be begotten, and *his heirs* for ever: but if the said N should happen to die without such *heir male*, then he devised the lands to B, &c. The question was, whether N took an estate-tail, or for life only, by the will? It was contended on one side, that the testator intended him only an estate for life, by his devising to him expressly for life: and then here were superadded words, *his heirs for ever*, engrafted on the words *heirs male*; that though these words *heirs male* were in the plural, yet the subsequent words *his* and *for default* of such *heir male* qualified them, so as to make them signify the same thing as *next heir male* in Archer's case. But the judges were all unanimous in opinion, that N took an estate-tail, that the rule was settled so firmly that it was not to be disputed. They held that the subsequent words *his* and if he dies without *such heir male*, were not sufficient to restrain and alter the operation of the

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words *heirs male*, and so qualify them as to make them a description of the person.

Goodright v. Pullyn, 2 Ld. Raym. 1437; 2 Str. 729, S. C.; 1 Barnard. 6, S. C.; 2 Eq. Ca. Abr. 315, S. C.

A devise to L *for life*, then to *the heirs of the body of L, and their heirs*, and if she died without *such heir* of her body, then over, was holden to be an estate-tail.

Morris v. Le Gay, cited 2 Burr. 1102; 2 Atk. 249.

A devise was to the testator's eldest son W for life, remainder to his first son for life, remainder to the right heirs male of his body; remainder to other sons of W and the heirs male of their bodies; remainder to the testator's son T for life, and after to the *first heir male* of his body; remainder over. The court of C. B. held, that the words *heir male* were to be understood collectively, and gave an estate-tail to T, it being distinguished from Archer's case, by no limitation being superadded to the words *first heir male*, and the word *first* signifying *first* in order of time. And the Court of K. B. affirmed the judgment of C. B.

Dubber v. Trollope, Ambl. 453.

Again, a devise was to R M and the first heir male of his body, and the heirs male of his body; and in default of such issue to E M and the heirs male of his body, and their issues remainder over. Lord Hardwicke held, that R M took an estate-tail.

Minchull v. Minchull, 1 Atk. 411.

Again, a devise was to C *for life*, remainder to trustees *to support contingent remainders* during the life of C, remainder to *the heirs of the body of C* lawfully begotten. Upon a question whether C took an estate-tail or for life? a case was stated for the opinion of the judges of B. R., who certified, that by reason of the remainder interposing between the devise to C for life, and the subsequent limitation to the heirs of his body, C took an estate for life, not merged by the devise to the heirs of his body, but by that devise an estate-tail in remainder vested in C.

Coulson v. Coulson, 2 Str. 1125; 2 Atk. 246.

A testator devised lands to his nephew, to hold to him during the term of his natural life, and from and after his decease to the use of *the issue male of his body* lawfully begotten, and the *heirs male* of the body of such *issue male*; and for want of such *issue male*, remainder over. The devisee had no issue at the time. The court of C. P. held, that he took an estate-tail; and one judge said, he thought too great regard had been paid to the words, "*heirs male of the body of such issue.*"

Roe v. Grew, 2 Wils. 322.

{ W. Ascough devised lands to his daughter and the heirs of her body for ever *as tenants in common and not as joint-tenants*, and in case his daughter should happen to die before 21, or without leaving issue of her body, then to B in fee. The daughter took an estate in tail. For though the testator intended that she should only take an estate for life, and that her children should take as purchasers, yet he also intended that all the progeny of those children should take before any interest should vest in his more remote relations. Now the latter intention cannot be carried into effect unless the daughter takes an estate-tail. And it is a rule of construction settled by a variety of decisions, but particularly by that of *Robinson v.*

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Robinson, {1} that where it appears in a will that the testator had a general intention, and also a secondary intention, and they clash, the latter must give way, and such a construction adopted as will effectuate the former.

7 Term, 531, Doe v. Smith. {1} *Ante*, p. 266. See also 5 Term, 299, Denn v. Puckey; 8 Term, 9, Doe v. Halley; 1 East, 229, Doe v. Cooper; 3 East, 548, Frank v. Stovin; 5 East, 548, Pierson v. Vickers; 2 Bos. & Pul. 485, Seale v. Barter; 1 Dall. 47, James's claim; 2 Wash. 31, Roy v. Garnett, S. P. Vide 1 Hen. & Mun. 240, Smith v. Chapman.

But by a devise "to A for life, and after him to his eldest or any other son after him for life, and after them to as many of his descendants issue male as shall be heirs of his or their bodies, down to the tenth generation, during their natural lives," A takes only an estate for life. There is in this case no *general* intention that the lands should continue in the descendants of the first taker as long as there were any, clashing with a *particular* intention to give the first taker an estate for life only; but a *single* intent to create a succession of estates for life not warranted by law, which will not allow of a *successive* limitation of estates for life to persons unborn.

5 East, 198, Seaward v. Willock.

If a devise be to a trustee to receive and pay the rents and profits for the maintenance of S, a feme covert, and the issue of her body during her life, and after her decease upon trust for the use of the *heirs of the body of S*, their heirs and assigns for ever, *without regard to seniority of age or priority of birth*, and *in default of such issue* to the use of the right heirs of the testatrix, S takes only an estate for life; the words *without regard, &c.*, plainly showing an intention that the heirs of her body should take as purchasers.

3 East, 533, Doe v. Ironmonger.

James Garnett the elder devised several tracts of land to his son James during his natural life, remainder to his son Muscoe and his heirs in trust and for the use of the first and every other son of his said son James *who should survive him*, in tail-male, *equally to be divided*, but *if his son James should die without male issue*, then to Muscoe for life, with like remainders to his surviving sons, and if he should die without male issue, then in trust for three grandsons of the testator with like limitations, remainder to Muscoe in fee; and he desired that the widows of any of his said sons and grandsons should be entitled to dower. James died, never having had male issue. It was adjudged that James took an estate for life only, with remainder to his surviving sons as tenants in common in tail-male, remainder to himself in tail-male; and that his life-estate and remainder could not unite, because the estates were of different natures; the former being a legal estate, and the latter remaining an equitable estate not executed by the statute, for the want of male issue of James coming *in esse*.

2 Wash. 9, Roy v. Garnett.}

A devise was in the following words: "After the decease of my said brother E S, and on failure of issue as aforesaid, I give the said several estates and farms to my brother G S, and *the heirs of his body, the males having preference as aforesaid*, and succeeding according to *their births*; and to *preserve the contingent remainders from being barred during the life of the said G S*, I give the said estates and farms to my said friend Dr. R; and on failure of issue of the said G S, I give the said estates and farms to my said niece M C." On the death of E S without issue, the question was, whether G S took an *estate-tail*, or an estate for *life* only, under

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the will? The court held, that the whole inheritance was not vested in the trustee in this case; that he took only a descendible freehold during the life of G S, for the word *estates* there meant only the thing and 'not the interest, it being coupled with the word *farms*; that by inserting the limitation to the trustee next after the limitation to G S, the case would be like *Coulson v. Coulson*, with this difference, that it would not be quite so strong; because the estate was not given expressly to G S for life. They referred to Lord King's opinion in *Papillon v. Voice*, that the limitation to trustees did not control the estate-tail; and the court declared, that G S was entitled to an estate-tail.

Sayer v. Masterman, Ambl. 344; *Fearne C. R.* 250, S. C.

A testator devised, after his wife's death, and failing issue of her body, a messuage, &c., in A to J H for life, remainder to the issue male of J H, and to his and their heirs, share and share alike; and for want of such issue, to the issue female of J H, and her and their heirs; and for want of such issue to W B, his heirs and assigns for ever. He also gave other houses at R to his wife, remainder to J H for life; and from and immediately after the determination of that estate, to the *issue male* of the body of J H, and *their heirs*; and for want of such issue, to W R, his heirs and assigns for ever; with a proviso, that the bequest and limitation of all the premises limited to J H, and such *issue male and female*, was upon a special consideration, that if J H or his issue, or any of them, should alienate, mortgage, or encumber, or commit any act or deed to alter, change, charge, or defeat the bequests, they should pay, &c.; and he did thereby charge the premises with the payment of 2000*l.* unto such person or persons, his or their heirs, as would, should, or ought to take next by virtue of any of the bequests or limitations. J H having no son, but two daughters, who were heirs at law of the testator, he joined with his daughters in suffering a recovery of the estate in M: Upon which the plaintiff brought his bill for payment of the 2000*l.* But Lord Keeper Henley, after consideration, gave his opinion, that J H took an estate-tail, and that the proviso was repugnant to the estate.

King v. Burchell, Ambl. 378; 2 Term Rep. 496, note, S. C.

C V devised to the defendant, and the issue of his body lawfully to be begotten, *living at his death*; and for want of such issue, to the University of Oxford, to be disposed of in such manner as by the will directed. Lord Keeper Henley held, that it was a clear estate-tail.

**University of Oxford v. Cliftons*, Ambl. 385.

A devise was to A for life, remainder to trustees to preserve contingent remainders during A's life, and from and after his decease, then to the heirs of his body. It was adjudged that A took an estate for life, with a vested remainder to himself in tail, the words "heirs of the body" being words of limitation.

Hodgson v. Ambrose, Dougl. 337, judgment in B. R. affirmed in the House of Lords, Feb. 14, 1781.

A testator devised all the rest and residue of his estate, both real and personal, to his nephew A W and his sons in tail-male; and for want of such issue male, to his brother J W and to his sons in tail-male; and in failure of such issue male, then to his (the testator's) right heirs. Neither A W nor J W had any issue at the time of making the will, or at the death of the testator. Upon the death of A W without issue, the question was, what estate J W took in the premises under the will? And the court

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of C. P. held, that, upon the will and circumstances above stated, he took an estate in-tail-male.

Wharton v. Gresham, 2 Bl. Rep. 1083.

A devised all his lands, &c., to a trustee and his heirs, in trust, as to part, to suffer the testator's wife Rebecca to receive the rents and profits for her life; and as to the said part after his wife's decease, and the residue after his own decease, to other trustees for 100 years, to raise 200*l.* thereon for the use of his daughter Mary, and subject thereto, in trust, to pay the rents and profits to his daughter Rebecca, the wife of P. Barry, for her separate use during her natural life; and after her decease, "to the use and behoof of the heirs of the body of the said Rebecca Barry lawfully issuing; the elder of such issue, and his, her, and their heirs to inherit and take place before the younger of such issue, his, her, and their heirs," with remainders over in default of such issue. Both the daughters survived the testator, and his wife, and on the death of the latter, Rebecca Barry entered on the residue, and afterwards died, leaving two daughters, the defendant Mary Anne, the wife of Ignatius Purcel and the plaintiff Jane, the wife of Francis Heny, and no other issue. The question was, whether Jane Heny took any and what estate in any and in what part of the premises? And the court of C. P. certified, that the defendant Mary Ann Purcel took in the first place an estate-tail in the whole of the premises, and that the plaintiff Jane Heny took an estate-tail in remainder, expectant on the determination of the precedent estate-tail, in the whole of the same premises, with remainders over in default of the heirs of her body.

Heny v. Purcel, 2 Bl. Rep. 1002.

Lord Mulgrave devised his estates real and personal, in these words, viz. "in trust to T, &c., for my first and every other son in tail-male; failure of such issue, to my brother H and his first and every other son in tail-male; failure of such issue, to my brother E, and his first and every other son in tail-male; failure of such issue to my brother A, and his first and every other son in tail-male; failure of such issue to my daughter C, and her first and every other son in tail-male; and in failure of such issue, to her eldest daughter, and her first and every other son in tail-male; failure of such issue, to her daughters respectively in succession; failure of such issue, to the last surviving Lord Mulgrave: in all the foregoing cases without impeachment of waste, other than wilful." Then, after making a provision for his daughter, he proceeded, "My will is, that the money lodged at Child's to pay for the purchase of the Lyth rectory, be applied to that purpose as soon as Sir J S can complete the title; and the renewals to be made by the tenant for life."—"I name the executors in trust of this my will Mrs. A J, my brother H P, or whichever of my brothers may succeed to the estate." It was adjudged, that B took only a life-estate, with remainder in tail to his issue.

Doe v. Lord Mulgrave, 5 Term Rep. 320.

A testator appointed his cousin Solomon Fell sole executor of his will, and heir for life of all his estates, (except, &c.) and after his death to his son Thomas Fell, and his heirs male for ever; but if said Thomas should die without issue, then to his next heir male for ever, the elder to be preferred before the younger; and if no issue male left behind said Solomon, then the estate to devolve to the females; and if no females, then my said cousin Solomon to give and dispose of the same as he shall think fit. The

(D) What Words create an Estate-tail or for Life.

testator died without issue, leaving Solomon Fell, (the father of the defendant Solomon Fell, the devisee named in the will,) his cousin and heir at law, who afterwards died, leaving the defendant Solomon Fell his only son and heir at law. The defendant Solomon Fell had, at the time of the testator's death, and at the time the said will and codicil were made, Thomas his eldest son, and the plaintiff his only daughter, and no other children living; but he had had another son named Solomon, who was dead when the will was made; but the testator, though he knew that the defendant had had such a son Solomon born, did not then know that he was dead. Thomas Fell, the son of the defendant, died soon after the testator, and the plaintiff was the only surviving child of the defendant. A bill being filed by the plaintiff to restrain the defendant from cutting down timber and committing waste on the estates devised, a case was sent out of Chancery for the opinion of the judges of the court of C. P. as to what estate the defendant took in the premises under the will; and whether the plaintiff took any, and what estate in them. And the judges certified, that the defendant took an estate for life; and his son Thomas dying without issue, his daughter, the plaintiff, took an estate in tail-general, and that a remainder in fee-simple was vested in the defendant.

Fell v. Fell, 3 Wils. 399.]

¶ A B devised to C D and his heirs and assigns, but in case C D should leave no male issue, then one half of the bequest "to be equally divided among C D's children, and the other equally among the children of the testator:" held, that C D took an estate in tail-male general, and that upon the determination of the estate-tail, the half of the bequest limited over to the testator's surviving children should go to such as survived C D.

Hurlbut v. Emmerson, 16 Mass. 241.

A devise to a man and the heirs of his body creates an estate-tail.

Hawley v. Northampton, 8 Mass. 3.

A devise to "A B, and his lawful begotten heir for ever," vests an estate-tail in A B.

Hall's Lessee v. Vandegrift, 3 Binn. 374.

Testator devised lands to A B in fee-simple, and if he should die within the age of twenty-one years, then to B C. A B arrived at full age but had no issue: held, that he took an estate-tail by the common law.

Roosevelt v. Thompson, 1 Johns. Ch. 220.

A devise of land to one in fee-simple, with a devise over if he die without issue, or without leaving issue, is construed to be a devise in tail in the first devisee, with a remainder over expectant on the determination of the estate-tail.

Idc v. Idc, 5 Mass. 500. See *Browne v. Anderson*, 2 Harr. & M'Hen. 100; *Shanks v. Blackiston*, 4 Harr. & M'Hen. 481; *Duer v. Boyd*, 1 S. & R. 203; *Gause v. Wiley*, 4 S. & R. 509; *Burkart's Lessee v. Bucher*, 2 Binn. 455.

Devise to A B, when he shall arrive at the age of twenty-one years, and the heirs of his body, and if he should die without issue, then over in fee, is a devise in fee-tail, and not an executory devise in fee.

Williams v. Hickborn, 4 Mass. 189. See *Burnet v. Deniston*, 5 Johns. Ch. 35; *Chew v. Weems*, 1 Harr. & M'Hen. 463.

A devise to A, and her heirs lawfully begotten, and in case she dies without heirs, remainder over, gives A only an estate-tail.

Pratt's Lessee v. Flamer et al., 5 Harr. & Johns. 10. See *Keys et al. v. Goldsborough's Lessee*, 2 Harr. & Johns. 371; *Laidler v. Young's Lessee*, 2 Harr. & Johns. 69.g

(E) Of Terms for Years, and uncertain Interests by Devise.

If a man devises lands to his executors for payment of his debts, and after debts paid the remainder over, the remainder is good; but it shall not vest at the death of executors, but the estate shall be considered as an uncertain interest, which shall go from executor to executor for the payment of the debts; for if it were to determine by the death of the executors, the debts might never be paid.

8 Co. 96 a; Cro. Eliz. 315; Roll. Abr. 829, S. C.

If a man devises his land *to be sold by his executors, or to his executors to be sold*, the executors shall have the profits to their own use, and not as assets, therefore they are obliged to sell to the first purchaser: (a) but if the devise had been, *that his executor should sell the land*, there they have not the profits of the land before the sale; for there are no words to break the descent from the heir, and carry it from him; and for that reason the land shall descend to him till the sale. (b)

Co. Lit. 112 b; 236 a. *Vide* head of *Heir and Ancestor*. ¶ (a) It has been contended, that a devise of land *to be sold by his executors* does not invest the executors with the fee-simple, but merely confers a power. See Sugden on Powers, ch. ii. sect. 1. A devise of land to executors to be sold gives them the fee; North v. Crompton, 1 Cha. Ca. 196; but they are only entitled to the intermediate rents and profits upon the same trusts as the money to arise from the sale. (b) If testator directs that his executors shall sell his lands for payment of debts, then in the meantime such lands descend to the heir at law, but subject and liable to the debts. Lancaster v. Thornton, 2 Burr. 1027. But if the direction to sell amount to an absolute conversion into personal estate, then, though the legal estate descend to the heir, he takes no beneficial interest whatever as heir. Yates v. Compton, 2 P. W. 308. ¶ {3 East, 553, Hilton v. Kenworthy.}

If a man, possessed of a term for years, devises the land to another generally, the devisee shall have all the term, without any limitation to determine upon his death.

Roll. Abr. 831.

A devises his lands to his executors till his son comes of age, the profits to be employed in the performance of his will; though the son dies before he be of age, yet the interest of the executors continues till he might be of age, if he had lived; for since the intent of the devisor governs in wills, it might destroy that, if the executor's interest ceased at the death of the son; for it is reasonable to believe that the testator found, on a computation, that the profits of the land in that time would answer his debts, so that this is a good devise of the term till the son would be twenty-one, though he die before.

3 Co. 20, Boraston's case; Chan. Ca. 113, S. P.; ¶ 3 P. W. 177. ¶

¶ On a devise to trustees and the survivor of them, and the executors and administrators of such survivor, in trust out of the rents and profits, and the arrears due, to pay certain annuities and a gross sum of 800*l.*; and after payment of the said annuities and the said sum of 800*l.* the estate was devised to W for life; the Court of K. B. held that the trustees took an estate for life by implication for the lives of the annuitants, with a term of years in remainder for the purpose of raising the sum of 800*l.* Mr. Sanders has observed, (1 Uses & T. 247,) that by the expression "*term of years*" should be understood *chattel interest*.

Doe v. Simpson, 5 East, 162. See Carter v. Barnardiston, 1 P. W. 509, 517. ¶

If a man devises land to his wife *till his son comes of age*, to provide his children with necessaries; though the wife dies before the son comes of age,

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yet her interest does not determine by her death, because it was not a matter of mere confidence, but shall go to her executors; but (a) if the devise had been, *that his land should descend to his son, but that his wife should have the full profits thereof until the full age of his son*, for his education; here is nothing devised to the wife, but a mere confidence that she shall take profits for the education of the son; and by the will she is but in nature of a guardian or bailiff, for the benefit of the infant, which determines by her death.

Cro. Eliz. 252; 2 Leon. 211; Dyer, 210. (a) 2 Leon. 221, S. P.

{J E devised the use and improvement of all his real estate to his wife until his son should arrive at the age of twenty-one years, *sHE bringing him up*; and then devised to his son the whole of his real estate except the use and improvement as before disposed of, to be and remain to him an estate for ever. The wife died during the minority of the son. No interest was transmitted to her representatives, as the real estate devised was not a term in her, but a mere personal trust or confidence, which ceased at her death; the expressions *sHE bringing them up* {1} limiting the trust to her personally. In other words, a fee, immediately on the testator's death, vested in his son, subject to a personal trust or confidence reposed in his mother.

2 Day. 338, Everts v. Chittendon. {1} 6 Ves. J. 147, *Ex parte Davies*, S. P.}

A man devised certain lands to his wife till his son and heir apparent should attain to his age of twenty-one years, and when his son should attain to his age, then to his son and his heirs, and died; the son lived to the age of thirteen years, and then died; and the wife, supposing that she had a title to hold the lands till such time as the son would have attained his age of twenty-one years, in case he had lived to that time, continues in the perception of the rents and profits of the said lands for several years: and the bill was brought against her by the heir at law of the son, to have an account of the rents and profits from the death of the son; and though the wife was executrix likewise of her husband, yet it not being devised during that time, *for payment of debts, nor any creditors, nor want of assets appearing*,* it was held by my Lord Chancellor, that the wife's estate determined by the death of the son, and that the remainder vested presently in the son upon the testator's death, and was not to expect till the contingency of his attaining his age of twenty-one years should happen, for then in that case it never would have vested, he dying before that age; and therefore decreed the wife to account for the profits from the time of the son's death; and upon a rehearing his lordship continued of the same opinion, and grounded himself on the distinctions taken in 3 Co. 19, and 6 Co. 35.

Abr. Eq. 195; Gilbert, Eq. Rep. 36; Mansfield and Dugard, decreed Hil. 1713.

* This distinguishes it from the case above; || and see Lomax v. Holmeden, 3 P. W. 176. ||

|| So on a devise to trustees and their assigns until Rogers and Bonny should attain their several ages of twenty-one years, in trust to receive the rents for the maintenance of Rogers and Bonny, and when they attained their respective ages of twenty-one years, then to them for their lives, Lord Hardwicke was of opinion, that the trustees took only a chattel interest till Rogers and Bonny, or the survivor, attained twenty-one.

Trodd v. Downes, 2 Atk. 304.

So a devise to trustees and the survivor, and the heirs of such survivor, in trust to lay out the rents for the maintenance of T and H during their minorities, and when they should severally attain the age of twenty-one

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years, then to T and H and their heirs equally, was held to be an *immediate* gift to T and H; and consequently the trustees took a chattel interest.

Goodtitle v. Whitby, 1 Burr. 228. See Doe v. Lea, 3 T. R. 41.

So, on a devise to trustees to receive and apply rents for the maintenance of C. Sandy until he should attain twenty-one years, it was held that the estate of the trustees was only during the minority of C. Sandy, and ceased upon his death under twenty-one years.

Morrant v. Gough, 7 Barn. & C. 206.

So, after a devise to Jones of a freehold house and copyhold lands, and also of the residue of personal estate, after payment of debts and legacies and the expenses of being admitted to the copyhold lands in trust, to pay two life-annuities, with powers of distress, the will proceeded, "*Item*, after all expenses are paid and the annuities properly settled, I would have the remainder of my cash to be laid out in some of the public funds, and the dividends thereof, with the rents of my estate as above, I give to Jones or his assigns in trust for the use of W B till he attains the age of twenty-one years; and when he does attain that age, then my will is that he be *put into possession* of the above estates and money, to be at his own disposal, subject to the said annuities." Held, that the trustee took only during the minority of W B.

Doe v. Timins, 1 Barn. & A. 530.

So, on a devise of copyhold land to trustees in trust for T G P, *to be transferred* to him as soon as he attained twenty-one years, it was held that the trustees had a chattel interest during the minority of T G P. To distinguish this case from those in which a direction *to convey* has been held sufficient to give the legal estate in fee to trustees, Holroyd, J., said, that "*to be transferred*" meant that the copyhold *lands* were to be delivered up, and not that the copyhold *estate* was to be surrendered by the trustees.

Doe v. Nicholls, 1 Barn. & C. 336.¶

A term was devised to B, and if he died within the term, the residue to go to C after he attained his age of twenty-one years; B died, and then C, before he came to that age: by this devise B had the (a) whole term in him, (for if a termor devises his house, or his term, without more words, the devisee has the whole term,) and the residue of it was to go to C on a precedent contingency, viz. when he came of age, which never happened, and, consequently, his executors can never have it: and the executors of the devisor have neither an interest, nor a possibility of one, because he made a total disposition of the term; as if a copyholder for life surrenders to the use of B for life, who is admitted, and dies in the life of the surrenderor, yet he shall have no benefit by surviving him, because the whole interest was surrendered; therefore it was adjudged in the principal case, that the executors of B should have the remainder of the term.

Sid. 151; Roll. Abr. 831. (a) So if a term for 1000 years be devised to A, the remainder to B, and the heirs of his body, the whole term is vested in A, and B has only a possibility, and no interest vests in him till the death of A, because, by the strict rules of law, an estate of freehold is greater than any term for years. 3 Lev. 264, Douse and Earl. ¶ See (K) *post*.¶

A devised to B during his exile, and if it please God to restore him to his country, or if he die, then to J S. B was a Dutchman, and had a pension from the States, but upon some displeasure the States deprived him of his employment, and of his pension, and gave them to another, where-

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upon he voluntarily left the country, and lived here with A, who had been his acquaintance beyond sea; and after his coming hither a war happened between the Dutch and English, and afterwards a peace was concluded between the two nations, yet B continued here; and whether his estate was determined, was the question; and the court held it was not, for that the exile intended by A was the leaving his country, because of the States' displeasure to him, and the withdrawing of his pension upon that displeasure.

2 Lev. 191; Vent. 396; 2 Mod. 293; 2 Jon. 73, Paget and Vocius.

If a copyholder devises his land to A and B, his two sons, and to the heirs of their two bodies begotten, and wills, that each of them shall enter at the age of twenty-one years; the executors shall not take the profits till they are both of full age, but he who comes of age first shall enter, and then the other when he comes of age, and they shall hold the land jointly.

Cro. Ja. 259; Yelv. 183; vide Bulst. 48, *cont.*

A devised his lands to B and C and the survivor of them, till 800*l.* should be raised out of them: it was adjudged, that B and C should have the land no longer than they might have received it out of the profits; and that if a stranger enters after the death of the devisor, they may have an account of the mesne profits, but cannot hold the land longer than the sum might have been levied; for if that were allowed, they may make it an eternal charge on the heir's estate: but if the heir himself enters and disturbs them, they may hold over, for the heir shall have no benefit of his own wrong; or they may have their action against him, at their election.

4 Co. 82, Corbet's case; Cro. Eliz. 890; Salk. 153, pl. 1; 1 P. Wms. 518; ¶ 2 Ball & B. 49.¶

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CREDITORS are so far favoured, especially in equity, that wherever it appears to be the testator's intent that his lands should be liable to his debts; they shall be subjected thereto, although there are not express words to charge them; and it seems remarkable, that in all the cases on this head, the lands have been held liable, and that chiefly on the intention of the testator: and therefore it seems difficult to lay down any rules in this matter, which depend purely on construction. Thus much, however, may be inferred from the very cases on which the lands have been held liable, that *a bare declaration by the testator that his debts should be paid, is not sufficient*; for this being no more than the law says, shall be intended of personal, and not out of the real estate.

Eq. Abr. 197. ¶ In Pennsylvania lands are liable for the payment of debts, but the personal estate is the fund first to be applied, unless the testator, either by express words or otherwise, manifest a clear intention to exempt it. *Todd v. Todd's Executors*, 1 S. & R. 453. But personal estate shall not be applied in case of the mortgaged premises, so as to defeat specific or ascertained pecuniary legacies. *Ruston v. Ruston*, 2 Dall. 243; *S. C.* 2 Yeates, 54. See *Ripple v. Ripple*, 1 Rawle, 386; *Holliday v. Summerville*, 3 Penns. 533; *Nichols v. Postlethwaite*, 2 Dall. 131; *M'Lanahan v. Wyant*, 1 Penns. 111; *Shaw v. McCameron*, 11 S. & R. 252; *Lobach's case*, 6 Watts, 167; *Phillips v. Phillips*, 8 Watts, 195.¶ 1 Vern. 457. ¶ But see *Clifford v. Lewis*, 6 Madd. 33 ¶

A devised all his lands to B and the heirs of his body, and in another part of his will, reciting that he owed B money upon account, he therefore devised to him all his personal estate, and made him executor, willing him to pay his debts; and upon the reading of the will, though the clause, as to the payment of debts, seemed to relate to the personal estate only, and

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though the lands were devised to B in tail, with a remainder over to another; and it was objected, that a tenant in tail could not be a trustee; yet the court decreed both real and personal estate to be sold for payment of the testator's debts.

1 Vern. 411, Clowdsley and Pelham, 2 Vern. 229, S. C. cited, and the decree said to be affirmed in the House of Lords.

If J S devises his lands to his brother, who is his heir at law, in fee, and likewise devises several legacies, and makes his brother executor, desiring him to see his will performed according to the trust and confidence he had reposed in him; this makes the real estate liable, for the testator needed not have devised the estate to his brother, being heir at law, unless he intended that he should take them chargeable with the debts and legacies.

2 Vern. 228, Alcock and Sparhawk, decreed in chancery, and affirmed in the House of Lords.

A devised in the following words:—*I do by this my will dispose of such worldly estate as it hath pleased God to bestow upon me: first, I will that all my debts be paid and discharged, and out of the remainder of my estate I give and bequeath unto my wife 300l. ; my mind and will is, that my wife have one moiety of what is left, after my debts paid: Item, I give to my dear brother R B, a close lying in the parish of —, and for the remaining part of my estate, as well real as personal, I give and bequeath unto my brother J B, whom I make executor: it was held clearly that these words subjected his real estate to the payment of his debts.*

2 Vern. 690.

So where A, being seised of a real estate, and also possessed of some personal estate, made his will in writing, and thereby devised in these words: *Imprimis, I will and devise that all my debts, legacies, and funeral charges shall be paid and satisfied in the first place.* Item, *I give and devise;* and then proceeds to dispose of his real and personal estate: the personal estate not being sufficient, the question was, whether that clause in his will should amount to a charge on his real estate for the payment of his debts, legacies, and funerals?—and my Lord Chancellor Cowper was clearly of opinion that it should; for as to his debts, it was but natural justice they should be paid, and his personal estate would have been liable to the payment thereof, whether he had given any directions in his will about them, or not; when therefore he wills and devises, that his debts, legacies, and funerals shall be paid and satisfied in the *first place*, these words must be intended to give a preference, for those purposes, to any other whatsoever; and since he does not devise his real or personal estate to any person in particular, for those purposes, the persons who come within this description must be supposed to be within his view; and it must be taken as a devise for their benefit, preferable to any other disposition whatsoever, either of his real or personal estate; and, consequently, both of them are thereby made liable thereto.

Abr. Eq. 198, 199, Trot and Vernon; 2 Vern. 708, S. C. where it is said, that some stress was laid on the word devise.

[A man seised of copyhold lands surrenders them to the use of his will, and then by his will says, viz., *My debts and legacies being first deducted, I devise all my estate, both real and personal, to J S.* It was holden by the Lord Chancellor, that this should amount to a devise to sell for payment of his debts.

Newman v. Johnson, 1 Vern. 45.

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One devised in these words:—*As to my temporal estate, wherewith God hath blessed me, I give and dispose thereof as follows: First, I will that all my debts be justly paid, which I shall at my death owe or stand indebted in to any person or persons whatsoever; also I devise all my estate in G to R B.*—This estate in G was all the real estate the testator had. *Per Lord Keeper*, this will creates a charge on the real estate for payment of his debts.

Bowdler v. Smith, Pr. Ch. 264.

R M, seised of freehold and copyhold land, surrenders to the use of his will, and then devises to his wife all his goods, chattels, and estate whatsoever, upon condition that she paid his debts and legacies; and by the will bequeathed 600*l.* to the defendant his eldest son and heir, and 400*l.* to the plaintiff his daughter, and other legacies to other people, and the surplus of his estate, after his wife's death, to be equally divided between his four children, and made his wife executrix, and died, leaving the defendant, his son, an infant; and the wife died before probate. This bill was brought by the creditors and legatees to have the estate sold to pay them; and the court was of opinion, that the words *goods, chattels, and estate whatsoever*, with all the other circumstances of the case, and the personal estate falling short, would pass the testator's lands well enough, and decreed a sale, and the heir to join when he came of age: but he being an infant, they gave him a day to show cause, when he came of age.

Lumley v. May, *Ibid.* 36.

So, where a will began, “As to all my worldly estate, *my debts being first satisfied*, I devise the same as follows:” the real estate was holden to be charged, nothing being devised till the debts are paid.

Harris v. Ingledew, 3 P. Wms. 91. {So if the words are “after payment of my debts, I give, &c.” These words mean, that until his debts are paid he gives nothing; that every thing he has shall be subject to his debts. 3 Ves. J. 738, *Shallcross v. Finden*.}

So, where a will began, “As to my worldly estate, which it hath pleased God to bestow upon me, I give and dispose thereof in manner following; that is to say, *Imprimis*, I will that all my debts which I shall owe at the time of my decease be discharged and paid.” Lord King decreed, that these words created a charge upon the real estate for such debts as the personal estate was not sufficient to pay; and this decree was affirmed in the House of Lords.

Legh v. Earl of Warrington, 4 Br. P. C. 90; *Hatton v. Nicholls*, Ca. temp. Talb. 110; *Lypet v. Carter*, 1 Ves. 499; *Earl of Godolphin v. Penneck*, 2 Ves. 271, similar decisions on almost the same words. {Also 3 Ves. J. 545, *Williams v. Chetty*. See 5 Ves. J. 359, *Keeling v. Brown*; 7 Ves. J. 209, *Powell v. Robins*.}

J J by his will, first, orders all his debts and funeral expenses to be honourably paid after his decease. In a subsequent clause he devises particular premises, (enumerating them,) excepting H and R; all which enumerated premises, except H and R, he devises to trustees, by and out of the money arising by sale, and out of the rents and profits thereof in the mean time, in the first place to pay and discharge his debts, funeral expenses, and all legacies given by this will, or by other writing under his hand. He afterwards goes on and says, that H and R shall be in the first place for payment of the legacies mentioned in his will. On a bill by creditors to have the real estate by the will subjected to the payment of their debts, in aid of the personal, so far as that proved deficient, insisting, that the whole real estate was by the will established as a fund for that purpose, Sir J. Strange, M. R.,

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said, that though on the first part of the will the court might take the whole real estate to be charged with debts, yet as there is no express lien on the real estate by these general words, and afterwards the testator distributes such part of his real estate for debts, and such for legacies, it is too much to lay hold on the general words to say, the whole should be charged with payment of debts. It can be done only by implication on the general words, which may be explained afterwards, and that implication destroyed. Consequently, the plaintiffs can only have a decree for an account of the personal estate in course of administration, and then the other parts of the real estate, except H and R, for payment of their debts.

Thomas v. Britnell, 2 Ves. 313.

But where there is a clear, full charge of the whole real estate in aid of the personal for the payment of debts and legacies, this shall not be restrained by a subsequent devise of a particular part of the real estate for that purpose, unless negative words are added.

Ellison v. Airey, 2 Ves. 568.

A will began thus: *As to my worldly estate, I dispose of the same as follows, after my debts and legacies paid*; and then gives several legacies and portions to the testator's daughters; and then says, that "*after all my legacies paid*," the surplus of the personal estate shall go to the son. After which follows a devise of land to the son; but if he dies without issue in the life of any of the daughters, then to the daughters. There was a sufficiency out of the personal estate to pay great part, though not all of the legacies. It was holden, that the land was not chargeable to supply the deficiency.

Davis v. Gardiner, 2 P. Wms. 187.]

{ J R made his will, and thereby first, after his just and lawful debts and funeral charges paid, bequeathed certain legacies to his wife. He next devised all his real estate to his eldest son T in fee, provided he paid to his executors 3000*l.* by annual instalments during seven years and a half; and directed, in case of his son's failing to make those payments within three months after the times limited for them respectively, that his executors should sell and convey *particular parts* of his real estate, but made no provision for the sale of the residue. He then bequeathed other pecuniary and specific legacies, and lastly the remainder of his estate to his five children. The son T paid no part of the 3000*l.*; the lands which the executors were empowered to sell were consequently sold; but after applying the proceeds of the sale, some of the debts and all the pecuniary legacies remained unpaid. It was held that the *whole* of the lands devised to the son T were chargeable with the 3000*l.*

2 Dall. 243, Ruston's Ex. v. Ruston.

J D, seised of a tract of land, and having no personal estate, bequeathed several pecuniary legacies to different persons, "and all the rest and residue of his estate real and personal" to his son J, whom he appointed executor, and who after the testator's death entered upon the land. And by the court: It is clear that nothing is given to the residuary devisee, but what remains after payment of the legacies. These are a charge upon the testator's real estates.

2 Dall. 131, Nichols v. Postlethwaite.

The testator ordered his just debts and funeral expenses to be paid by his executors, and then bequeathed a legacy of 500*l.* to A, to be paid her

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in one year after his decease, and in case of her death to be divided among her three sisters. He also devised specific real estate to B, and a legacy of 100*l.* to be paid at lawful age, but in case of his death unmarried, the *land and money* to sink into his residuary estate. The *rest and residue of his estate real and personal* he devised and bequeathed to his brothers and sisters, their heirs and assigns, as tenants in common, provided that his sister M should keep the *whole* in her possession during her widowhood. And the court were of opinion that the lands, having been blended by the testator with his personal estate, were charged with the legacies; *rest and residue* meaning what was left after the payment of debts and legacies: and that the legacy was not intended to wait for the expiration of M's life-estate in the land, but to be paid in one year after the testator's decease.

2 Bin. 535, *Hassanclève v. Tucker*; 1 Ves. J. 444, *Kidney v. Cousemaker*, S. P.}

If lands are devised to trustees for the payment of debts and legacies (a) out of the rents and profits, the trustees may sell the land itself.

Vern. 104; 2 Chan. Ca. 205, S. P. decreed. [(a) But where the introductory words were, "First, I will and direct that all my legal debts, *legacies*, and funeral expenses, shall be fully paid;" it was holden, that they did not authorize the raising of pecuniary legacies out of the real estate, to the loss and disappointment of specific devisees. *Keightley v. Keightley*, 2 Ves. jun. 398.] {See 3 Ves. J. 551, 739.}

But if the devise be to pay debts and legacies out of the annual rents and profits; by these words the land shall not be sold.

Vern. 104; *Trafford v. Ashton*, 1 P. Wms. 415.

If there be a devise of a sum certain to be raised out of the profits of lands, and the profits will not amount to raise the sum in a convenient time: *per* Lord Chancellor, It is the law of this court to decree a sale.

Vent. 256; 2 Vent. 357, S. P.

A devises, that his executors shall receive the rents, issues, and profits of his personal estate, in the first place to pay 60*l.* *per annum* to one for life; and after that person's death, out of the remainder of his estate, his debts being paid, to raise portions for several children, payable at twenty-one, and maintenance in the mean time; and devises all his lands in several parcels to several persons, at future times; the master of the Rolls held, that the lands were liable to be sold, and that the sales should be out of all the devisee's lands, unless the personal estate were sufficient, or the rents and profits in a reasonable time; and ordered an account to be taken thereof in the first place.

2 Vern. 26, *Berry and Askam*.

[But notwithstanding these cases, a court of equity will not decree a sale of the lands, if no time for payment (b) be appointed; or if any other mode is prescribed to satisfy the charge, (c) as if the instrument contain a power of leasing, or of mortgaging the premises; or if it distinctly appear, that the rents and profits were exclusively intended to satisfy the charge. (d) And so much do courts of equity respect the intention, that Lord Hardwicke said, (e) that "where a man creates a trust for payment of debts, and declares the trust of the term to be by perception of rents and profits, or by leasing or mortgaging, to raise sufficient money for payment of his debts, it restrains it merely to a payment of rents and profits. But if it had been a trust of the rents and profits, the term might have been sold for the satisfaction of creditors."—"But where there are other limiting words following rents and profits in a trust for payment of debts, his lordship observed, he did not remember any case which would authorize a sale." And this

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opinion seems supported by Lord Loughborough in the following case: (g) T B by his will directed all his debts to be paid out of his estate with all convenient speed, and ordered his personal estate to be converted into money, and applied in aid of his real estate, in payment of funerals and debts, as far as the same would extend. In case he should die without issue, he devised his estate of B (subject to the charge) to trustees in trust to pay the yearly rents and profits as follows, viz. in discharge of his wife's jointure, and his sister's annuity, and in payment of such of his debts, and the interest thereof, as his personal estate should fall short of satisfying, and subject thereto, to pay his brother H B an annuity of 100*l.* *per annum*, to continue till after his debts affecting his lands should be paid off by the rents and profits of his estate; and immediately after the payment of his debts, then 200*l.* in lieu of the 100*l.*, and an additional annuity of 50*l.* to his sister. And as to the residue of the rents and profits, he gave them to the first and other sons of H B, with remainders over. On a bill filed by the specialty creditors and annuitants against Lord Derby, a mortgagee, and the other parties, praying an account of the personal estate, and that if it should prove insufficient to pay the debts, the deficiency might be made up by sale of the real estate; the master of the Rolls had ordered the money for the payment of debts to be raised by mortgage; but it appearing that a sufficient sum could not be raised by that means, the question was, whether the court could, under the will, decree a sale?—By Lord Loughborough: Where the devise is to pay the debts out of the *profits* of the estate it is equivalent to a devise to the trustees to sell, and a decree for a sale is only an execution of that trust. But I am afraid you will find, that both by the words and construction of the statute of fraudulent devises, where there is a devise for the payment of debts, it takes the case out of the statute, and it stands as it would have done before the statute was made: the creditor can come only as the will directs. I take it to be the clear intent of the testator here, that not an acre should be alienated for the payment of his debts; therefore, there cannot be a sale. But it is to be observed, that Lord Thurlowe was of opinion in a subsequent case, that in order to take a devise of real estate for the payment of debts out of the statute against fraudulent devises, it must be effective; and therefore where a testator, after generally charging his real estate with his debts, had devised a particular estate to trustees for that purpose, excepting the mansion-house, his lordship said, that if the master reported that the debts could not be paid by the means provided in the devise, he should either here or in the House of Lords (unless the House overruled him) order the estate to be sold, notwithstanding the statute; and consider it so far as fraudulent: that in the present case, he should order the devised estate to be sold, without including the capital mansion-house, if, without it, the estate was sufficient for the payment of the debts; if not, the mansion-house must be sold.

(b) *Ivy v. Gilbert*, Pr. Ch. 583; 2 P. Wms. 13, S. C.; *Evelyn v. Evelyn*, 2 P. Wms. 669; *Okedin v. Okedin*, 1 Atk. 550. (c) *Ivy v. Gilbert*, *ubi supra*; *Mills v. Banks*, 3 P. Wms. (d) *Small v. Wing*, 3 Br. P. C. 503. (e) *Ridout v. Earl of Plymouth*, 2 Atk. 104. (g) *Lingard v. Earl of Derby*, 1 Br. Ch. Rep. 311; {*Willes*, 521, *Barnes*, 164, S. C.; 7 Ves. J. 323;} *Hughes v. Doulben*, 2 Br. Ch. Rep. 614.]

{R H devised certain freehold estates to trustees in fee, in trust to sell and apply the money to and among such persons as they, in their discretion, should think had or have any just or indisputable demand upon W H deceased, at his death; giving to each in equal degree and proportion accord-

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ing to the principal sum due, as far as the money would extend: and upon receipt of such money the securities to be given up and cancelled; but the money to be given and received only as a voluntary gift. The fund was more than sufficient to pay the principal of the debts, and the master of the Rolls decreed that interest should be paid on the bond debts to the extent of the penalty. The testator intended that the debts should be paid, and the interest is as much a part of the debt as the principal. The words "the principal sum" are introduced only to direct the manner in which the proportions of the creditors should be ascertained, in case of a deficiency to pay all; but if there should be no necessity to make an apportionment, then he meant the whole to be paid.

6 Ves. jun. 151, *Aston v. Gregory*.)

||Testator desired his debts and funeral expenses to be paid in the first place, and nothing further appeared on the face of the will to charge the real estate with the debts. Lord Chancellor Loughborough held it to be charged, relying on *Lord Godolphin v. Penneck*, 2 Ves. sen. 271, which, he observed, was an authority that, if the testator talked about debts in the beginning of his will, the real estate must be charged.

Williams v. Chitty, 3 Ves. 545, 550. See *Coombes v. Gibson*, 1 Br. C. C. 272.

So, on a devise "after payment of all my just debts and funeral expenses," the real estate specifically devised was charged with debts.

Shallcross v. Finden, 3 Ves. 737.

So, by the words, "I will and direct that my debts and funeral expenses be paid," the debts were charged on the real estate.

Clifford v. Lewis, 6 Madd. 33. See *Ronalds v. Feltham*, *Turner & Russ*, 418.

But it seems that an introductory direction, that the debts are to be paid by the executors, is not sufficient to charge the real estate.

Keeling v. Brown, 5 Ves. 359; *Powell v. Robins*, 7 Ves. 209; *Sanderson v. Wharton*, 8 Price, 680.

Where the introductory words make the real estate liable, the charge affects copyhold as well as freehold lands. The freehold is as unnatural a fund for the payment of debts as the copyhold.

Coombes v. Gibson, 1 Br. C. C. 272; *Kentish v. Kentish*, 3 Br. C. C. 257; *Ronalds v. Feltham*, *Turn. & Russ*, 418.

After a general direction that debts and funeral expenses should be paid, and a bequest of the personal estate subject to the payment of those charges, the testator, in case his personal estate should not be sufficient to discharge "the same," charged his freehold estates with payment "thereof," and "subject thereto" devised all his freehold and copyhold estates. Held, that the copyhold estates were charged.

Noel v. Weston, 2 Ves. & B. 269.

Mr. Cox observes in a note to *Davis v. Gardiner*, 2 P. W. 190, "Although the court may have expressed itself more strongly in the case of creditors than of legatees, it seems, that no rule of construction has been adopted in the one case which does not apply to the other, and that the real estate has been charged with legacies by words not stronger than those made use of in the present case." Lord Alvanley, M. R., however, maintained that there is a distinction between debts and legacies in this respect; 2 Ves. 328, 3 Ves. 739, and 5 Ves. 362; though Lord Chancellor Loughborough declared he knew not how to state the difference. 3 Ves. 551.

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It is certainly clear that under a charge of debts and legacies, creditors are to be paid in preference to legatees.

12 Ves. 154.

The words "first I will and direct that all my debts, legacies, and funeral expenses be paid," are, it seems, not sufficient to charge the *legacies* on the real estate specifically devised.

Kightley v. Kightley, 2 Ves. jun. 328.

"John Hampton devised all his real and personal estate to his wife for life, and after her decease he gave several legacies; and all the rest and residue of his real and personal estate he devised to his nephews absolutely." Held, that the legacies were a charge on the real estate.

Bench v. Biles, 4 Madd. 187. See Hassel v. Hassel, Dick. 527.

Where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning and to confine them to the receipt of the rents and profits as they accrue, the court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell; and as a devise of the rents and profits will at law pass the lands, the raising by rents and profits is the same as raising by sale. Per Lord Hardwicke, 1 Atk. 506.

2 Ves. & B. 75.¶

If lands are devised to trustees for the payment of debts and legacies out of the rents and profits, the trustees may sell the land itself.

Anonymous, Vern. 104; Lingon v. Foley, 3 Chan. Ca. 205, S. P. decreed. See Vin. Abr. *Devise* (m. e.)

But if the devise be to pay debts and legacies out of the *annual* rents and profits, by these words the land shall not be sold.

Vern. 104; Trafford v. Ashton, 1 P. Wms. 415. ¶ See Ch. Prec. 184, pl. 152, Cook v. Parsons.¶

If there be a devise of a sum certain to be raised out of the profits of lands, and the profits will not amount to raise the sum in a convenient time, *per* Lord Chancellor, it is the law of this court to decree a sale.

1 Vern. 256; 2 Vent. 357, S. P.

A devises, that his executors shall receive the rents, issues, and profits of his personal estate, in the first place to pay 60*l.* *per ann.* to one for life; and after that person's death, out of the remainder of his estate, his debts being paid, to raise portions for several children, payable at twenty-one, and maintenance in the mean time; and devises all his lands in several parcels to several persons, at future times: the master of the Rolls held, that the lands were liable to be sold, and that the sale should be out of all the devisee's lands, unless the personal estate were sufficient, or the rents and profits in a reasonable time; and ordered an account to be taken thereof in the first place.

3 Vern. 26, Berry and Askam.

¶ A term of 200 years was created; and it was declared that the trustees should, by perception of rents and profits, or by leasing or mortgaging the same, raise and levy, &c., Lord Hardwicke said, "Where a man creates a trust for payment of debts, and declares the trust of that term to be by perception of rents and profits, or by leasing, or by mortgaging to raise sufficient

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money for the payment of his debts, it restrains it merely to a payment out of rents and profits; if it had been a trust of *the rents and profits*, the term might have been sold for the satisfaction of creditors. Where there are other limiting words following 'rents and profits' in a trust for payment of debts, I do not remember any case which will authorize me to direct a sale."

Ridout v. Earl of Plymouth, 2 Atk. 104. See 1 Ves. sen. 93.

A devise to trustees in fee, in trust to pay debts and legacies, and to provide maintenance for children till eldest son attained 21, then all the surplus as should arise from the rents and profits to and among the younger children, and that the trustees should convey his *said* manor, &c. to eldest son at 23. Testator then gave some legacies to be paid "after the debts, with all convenience, as the profits of the estate should advance the money." A sale for payment of debts was decreed. Lord Hardwicke observed, the word "*said*," in the direction to convey, must be taken according to the subject-matter, and could not hinder a sale. The word "advance" showed that the legacies should be paid out of the annual profits; but with interest from a year after the testator's death.

Baines v. Dixon, 1 Ves. sen. 41. See Lingard v. Derby, 1 Br. C. C. 311.

A devise to trustees in fee of the rents and profits of a plantation then in lease. Decreed, that creditors should be paid *pari passu* by annual perception of the rents. The will did not warrant a sale.

Conyngham v. Conyngham, 1 Ves. sen. 522.

A devise to A and B, who were appointed executors, upon trust to sell for such purposes as testator should appoint; with a direction that his debts were to be paid by his executors. Held, that A and B might sell for payment of debts.

Barker v. the Duke of Devonshire, 3 Mer. 310.

PAYMENT OF PORTIONS.

A term was created for raising portions for younger children, by rents, issues, and profits, and subject thereto to eldest son for life, and over, in strict settlement; in the mean time eldest son to have 40*l.* *per annum* for maintenance. Decreed that the portions might be raised by sale.

Warburton v. Warburton, 2 Vern. 420.

So, a term was created out of the rents and profits to raise 8000*l.* for daughters, if no sons, to be paid *as soon as conveniently could be*. Decreed, that the sum might be raised by sale or mortgage.

Trafford v. Ashton, 1 P. Wms. 415.

But a trust that trustees should raise and pay out of the rents and profits of the premises, as well by leases for one, two, or three lives, or for any number of years determinable thereon, or for 21 years absolutely at the old rent, portions for daughters, precludes a power to mortgage or sell. No time was appointed for payment of the portions, and so they carried no interest.

Ivy v. Gilbert, 2 P. W. 13; Prec. Ch. 583. Affirmed Dom. Proc. 2 Bro. P. C. 468. See Ridout v. Earl of Plymouth, 2 Atk. 104.

So, a trust to raise portions by rents, issues, and profits, or by making leases for three lives at the ancient rent, or by granting copyholds on fines, to be paid at the age of 18 or marriage, or as soon as the same could be

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raised out of the premises as aforesaid, does not, it seems, authorize a sale or mortgage.

Mills v. Banks, 3 P. W. 1.

But when a marriage settlement declared, that in case husband and wife should die and leave any issue unprovided for, it should be lawful for trustees to enter and receive the rents until they received 200*l.*, with which sum the premises were to stand and be charged for the benefit of such children unprovided for, in such manner, and in such proportions, as the survivor of husband and wife should appoint, the wife surviving appointed the 200*l.* to be paid to her daughter, the only child unprovided for. Decreed, that the sum of 200*l.* should be raised, with interest from the death of the wife.

Green v. Belcher, 1 Atk. 505.

A devise upon trust to raise portions during the minority of tenant for life, out of the rents and profits, or by sale or mortgage: held, that rents accumulated during the minority were first applicable to the payment of the portions, and that the deficiency should be raised by sale or mortgage.

Warter v. Hutchinson, 1 Sim. & Stu. 276.

When a trust was created for raising portions by means of a *reversionary* term, and no maintenance or time of payment mentioned, the court, though the portions were vested, would not decree a sale or mortgage.

Evelyn v. Evelyn, 2 P. W. 659.

Whether a reversionary term may be sold or mortgaged for raising portions, depends upon the intention manifested in the instrument. The general rule seems, that if there is nothing more than a limitation to the parent for life, with a term to raise portions at the age of 21 years or marriage; if there is nothing more, and the interests are vested, and the contingencies have happened at which the portions are to be paid, the interest is payable, and the portions must be raised in the only manner in which they can be raised; that is, by mortgage or sale of the reversionary term.

Codrington v. Lord Foley, 6 Ves. 364, and the cases there cited; see also note, 2 Ves. jun. 481; and *Mr. Cox's* note, 1 P. W. 452; *Lyddon v. Lyddon*, 14 Ves. 558.

Testator devised freeholds and renewable leaseholds to uses in strict settlement; and directed that the *finer of renewal* should be paid out of the rents and profits of the same leasehold premises, or of any part of the freehold lands. Held, that a sale or mortgage was authorized; since the purpose for which the money was to be raised might require it immediately.

Allan v. Backhouse, 2 Ves. & B. 65. See Sir Thomas Plumer's judgment, in which he reviews the authorities as to decreeing a sale or mortgage where the will directs a gross sum to be raised out of rents and profits; and see Lord Eldon's remarks, 1 Mer. 233, and the cases collected, 1 Powell on Dev. 234, (5th edit.,) in note.

If a devise for payment of debts does not provide for their payment in a practicable manner, the case is not taken out of the statute of fraudulent devises.

Hughes v. Doulben, 2 Br. C. C. 614.

A devise for the payment of debts has not the effect of reviving debts barred by the statute of limitations before the death of the devisor.

Burke v. Jones, 2 Ves. & B. 275.

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But when a debt is not barred at the death of testator by the statute, time does not run in equity after his death.

Hughes v. Wynne, Turn. & Russ. 307; Morse v. Langham, 2 Ves. & B. 286. ||

[In what cases a devise for payment of debts will make the estate either legal or equitable assets, see tit. "EXECUTORS AND ADMINISTRATORS."]

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THE law in conveying estates did not regularly suffer any to pass by implication, because it is a manner of transferring no way agreeable to the plainness and solemnity of the law; as if A surrenders to the use of B, and, for want of issue of B, the remainder over to C; this, in a conveyance at law, had been but an estate for life to B, and no estate-tail by implication. But there has been greater favour and latitude allowed in the disposition of estates by will; and in the construction of them, the judges, to support the intent of them, where it is very apparent, have admitted estates by implication, though to the disherison of the heir at law. However, in those cases, such estates have been allowed only to arise by a necessary, and not a possible implication or intention in the devisor; for the heir's title being plain and obvious, no words which will bear a contrary signification shall, by construction, impeach it.

Vaugh. 261; 3 Lev. 260; Roll. Abr. 843; 13 H. 7, 17 b; Cro. Ja. 75; Horton's case; Bro. tit. *Devise*, 52; 2 Sib. 53; 2 Lev. 207. β A fee cannot be raised by implication, in devise without words of perpetuity, and where there are no words in the will, to show an intention to give a fee. Jackson v. Embler, 14 Johns. 198. γ

As, if A devises lands to his (a) heir after the death of his wife, this is a good devise to the wife for life by implication; for by the express words of the will, the heir is not to have it during her life; and if the wife has it not, none else can, for the executors cannot intermeddle.

Vide the authorities in the preceding section, and Vern. 22; 2 Vern. 572; 2 Vent. 223, S. P. (a) So, if one having a wife and two daughters, heirs at law, devises lands to one of the daughters after the wife's death; this gives the wife an estate for life, though the daughter is but one of the coheirs. 2 Vern. 723.

{So where the devise was to a trustee to pay the rents and profits to the three daughters of the testatrix, and the survivor of them, for their lives; and after their decease in trust for all and every the child and children of her three daughters who should be living at the death of the survivor of them, as tenants in common; but if all her daughters should die without leaving any issue, then after the decease of the survivor, in trust for her grandson (who was her heir at law) in fee; the children of the daughters living at the death of the survivor of them took an estate in fee.

9 East, 1, Robinson v. Grey.}

|| So, where a testator made specific devises of real property to his three daughters severally in fee; and bequeathed his personal estate to be equally divided amongst them, and the shares to be paid at the age of 22 years, with interest for maintenance in the meantime. The will proceeded, "in case either of my three daughters shall die before 22, or unmarried, the said deceased's portion shall be equally divided between the two survivors, or their heirs; also, in case two of my daughters die without heirs, then the whole devolves to the surviving one and her heirs, in case no husband is living; if so, they enjoy the property during life only, and afterwards her or their fortune goes to the heir or heirs of their sister, as heirs at law. I also make this reserve, in case all my three daughters

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shall die without heirs, and leave no husband living, or at the decease of the said husband or husbands, should it happen such then exist at their decease, I give," &c. [A devise over to testator's three brothers, one of whom would have been heir at law of testator in case of the death of the three daughters without issue.] Elizabeth, one of the daughters, died unmarried; then Anne died, leaving a husband. Held, that the husband was entitled, under the above devise, to a life-estate in the moiety of the real estate devised to Elizabeth.

Doe v. Bowling, 5 Barn. & A. 722. ¶

But if a man devises to a stranger, after the death of his wife, this gives the wife no estate for life by implication; for it is but a demonstration when the estate of the stranger shall commence.

Bro. Dev. 52; Cro. Ja. 75; Vern. 22; 2 Vern. 572; 2 Vent. 223. ¶ The *dicta* in *Tenny v. Agar*, 12 East, 253, and *Romilly v. James*, 6 Taunt. 263, do not militate against this position; for in the one case the devise over was on the death of him who was, and in the other of him who would have been, the heir of testator. ¶

¶ So, where a testator devised that his wife should have one moiety of the rents during her life, and his son the other moiety, and that upon the death of his wife his son should have the whole in fee; "but if my said son shall depart this life without issue in the lifetime of my said wife, then after the death of my said wife" for his nephew John in fee. The son, the only child of the testator, died without issue in the lifetime of the widow, leaving John, the nephew, his heir at law, and consequently heir at law of the testator. The question was, Whether the widow by implication was entitled to the son's moiety of the rents during the remainder of her life? It was contended in argument, that there was no devise to the nephew, except in the event in which he must be the heir of the testator, namely, the death of the son without issue, and that therefore the principle of the rule applied. But Leach, V. C., decided, that the widow was not entitled to the moiety of the rents by implication; treating it as a devise to a stranger after the widow's death.

Aspinall v. Petvin, 1 Sim. & Stu. 544.

So, if a testator devise a particular estate to A for life, and after the death of A devises all the rest of his estates (he having other estates than the estate devised to A for life) to B in fee; although B be heir at law of testator, yet A takes nothing by implication, because the words "after the death of A" may be intended only of that estate which was expressly devised to him.

Dyer v. Dyer, 1 Mer. 414. ¶

So, if a man devises his *term* to his son, after the death of his wife, this raises no estate for life in the wife by implication; for here is no necessary implication that the wife shall have it, as in the former case, because the son is not by law to have the term, as the heir at law is to have the inheritance, without a particular devise, but the executor: and therefore the term in this case may go to the executor during the life of the wife.

Roll. Abr. 844. {The case here referred to (which is *Horton v. Horton*, reported in Cro. Ja. 74, 75) was not finally decided, but was adjourned; and it is opposed by later cases. It may be observed also that, in that case, the term was upon condition that the lessee should not devise it to any except his sons or daughters; so that if the wife took any interest during her life, a forfeiture would have been created by implication.—In *Roe v. Summerst*, 5 Burr. 2608; 2 W. Black. 692, the testator held a lease for 99 years, if he, his daughter Betty, and J B or the survivor of them should so long live, and he devised the premises, *after the death of his daughter Betty*, to his daughter Mary

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during the life of J B. This was holden to be a devise by implication to Betty during her life. So in *Goodright v. Hoskins*, 9 East, 306, the devise was of leasehold premises "to my son R until his son T shall attain his age of 21 years and no longer, but in case the said T shall die in his minority, then to J or R, sons of the said R, or either of them surviving or attaining 21 as aforesaid. And I desire the said premises may be quitted and delivered up as aforesaid by my said son R accordingly." The testator also revoked the bequest to R and his family if he made a certain claim, but confirmed it if the claim was relinquished; and he made his son N residuary legatee and executor. R relinquished the claim. And it was determined that T, on his attaining the age of 21, was entitled to the estate by implication. A strong probable implication is sufficient; it need not be a necessary implication.}

[So, on the other hand, if an estate is devised to A and his heirs, it shall not be controlled and cut down to an estate-tail in respect of the words, "and if he die without heirs, remainder to B," if B is a stranger and cannot be heir to A.

Tyte v. Willis, Ca. temp. Talb. 1.

If an estate be devised to A and the heirs male of his body, and if he die without issue of his body, remainder over; and A die without issue male, having issue female; no estate will arise to such issue female by implication.

Higham v. Barker, Cro. Eliz. 16; *Moor*, 124; *Lady Lanesborough v. Fox*, Ca. temp. Talb. 262; *Bodens v. Watson*, Amb. 478.]

If a man devises land to J S and his heirs, after the death of J D, or after twenty years, and the devisor dies during the life of J D, or before the twenty years expired, the land in the interim shall descend to the heir at law; for during this time the devisor has made no disposition of it, but left it to descend according to the rules of law, which carry it to the heir.

Roll. Abr. 844.

Where a man devised all his pasture lands in D to his youngest son, and also willed that all bargains, grants, &c., which he had from C should be to his youngest son, and the heirs of his body; it was resolved, that the youngest son should not have an estate-tail in the pastures of D by implication, for the words of a will to disinherit the heir at law must have a clear and apparent intent; and this at most could have been but a possible implication, that the devisor might have intended the son an entail in the pastures, which is not sufficient to destroy the plain title of descent to the heir at law.

Vaugh. 262; *Cro. Car.* 368.

||So, on a devise, "I give to A my farm and lands at R, to him and his heirs and assigns for ever; and I also give to A my farm and manor of E." *Lord Eldon*, C., held, that A took in the latter an estate for life only; and observed that all the old rules against disinheriting an heir, except by plain words or necessary implication, were gone, if a contrary construction were to prevail.

Paice v. the Archbishop of Canterbury, 14 Ves. 364.]]

A leases, upon condition that the lessee shall not alien to any besides his children; the lessee deviseth the term to H his son, after the death of his wife: it was adjudged, that this devise was no breach of the condition, for the wife took no estate by implication; for there can be here but a possible implication at most; and since the intent of the devisor is the best rule to construe wills by, it would be absurd to say, that the devisor intended to convey such an estate as must forfeit his own; therefore, the executor shall have it (a) while the wife lives.

Cro. Ja. 75; *Vaugh.* 266; *Roll. Abr.* 844. (a) If a term be devised to executors after the death of the wife; *Qu.* Whether she shall have an estate for life, or shall the executors have it during her life, to perform his will, and after her death as legatees?

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Vide Cro. Ja. 75; Vaugh. 261. || The next of kin as to the personal estate stand in parity of reason with the heir at law as to the real. *Pickering v. Stamford*, 3 Ves. 493. ||

|| Testator bequeathed leasehold premises to his wife for her life, but did not use words sufficient to pass a renewed lease; after her decease he gave the premises to three nieces absolutely, in words sufficient to carry a renewed lease. Lord Eldon observed, "In the disposition to his wife for her life, he has not used any words that would pass the renewed lease; but it is clear that his three nieces would have taken the interest in those premises after her decease absolutely, though the lease had been renewed after the date of the will. The question upon that would have been, Whether, as to those premises which the testator had bequeathed, not until after the decease of his wife, but for all the interest which he should have to come therein at her decease, he did not intend that she should have an interest for life; and, notwithstanding the general rule, I think the construction that such must have been his meaning is not too strong."

James v. Dean, 15 Ves. 241. ||

A seised of a manor, part in demesne and part in services, devised all the demesne to his wife expressly, for her life, and all the services for fifteen years, and then devised the whole manor to a stranger after her death: it was resolved, that the last devise should not take effect till after her death, and yet she should not have the services for her life by implication, but that the heir should enjoy the services after the fifteen years, while she lived; for there appears no necessary implication that she should have the whole for her life, with an exclusion of the heir; and a possible implication is not sufficient to exclude him, for nothing but the apparent intent of the deviser can do that; but if the deviser had said, that after the death of his wife and the stranger the heir should have the manor, there the wife, by a necessary implication, shall have the whole manor while the stranger and wife live, and the stranger cannot take any thing whilst she lives.

Moor, pl. 24; Vaugh. 265.

From this it appears that the rule, viz. where a devisee takes any thing by an express devise, he shall not have any other thing devised by the same will by implication, is destroyed by the distinction of a necessary and a possible implication; for the former case proves, that a necessary implication will give an estate, though the devisee took by an express devise before; and a possible implication is sufficient in no case to convey an estate to the disheirson of the heir; for that is the principal point between Gardner and Sheldon, in Vaugh. 263, where the words of the will are, that if my son G and my daughters M and K die without issue of their bodies, then my lands to remain to my nephew W—it was adjudged, that the devise to G, being son and heir, was void, and that the daughters took no estate by that possible implication; but their dying without issue is only a designation of the time when the nephew is to take.

Cro. Eliz. 16; Vaugh. 263.

|| But under a devise of lands to the testator's son and his heirs; as to part upon condition that he should pay 300*l.* to testator's daughter at twenty-one, interest in the mean time; and in default of payment that she should enter and enjoy the said part to her and her heirs; and in case his son and daughter both died without leaving any child or issue, he devised the reversion of all the lands to R A in fee: held, that the son and daughter, by implication, took successive estates-tail.

Tenny v. Agar, 12 East, 253. ¶ Where lands are devised to one without apt words

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of limitation, and the devisee is personally charged with the payment of debts and legacies, a fee will pass by implication. *Jackson v. Merrill*, 6 Johns. 185. See 18 Johns. 31; 2 Hayw. 152; 2 Binn. 464, 532.

A testator, having one son and six grand-children, devised all his lands to his son, expressly for his life, and repeating the words, "after his death," in every one of the subsequent devises, divided those lands among his grand-children, without using any words of limitation, or in any way describing the period during which it was his intention that they should enjoy them: held, that the grand-children did not take a fee by implication, though an express estate for life was given to the heir at law.

Right v. Compton, 9 East, 267.¶

A devised to his wife 600*l.* to be paid to J S for the payment of lands he purchased from him, and are already settled on her for her jointure; the lands were not settled on her; and adjudged they did not pass by the will by implication, for there appears no intent that she should have them by the will, and, consequently, they cannot pass from the heir at law by implication, since the devisor was only mistaken as to the settlement of them in his lifetime.

3 Lev. 259; 2 Vent. 57; *Moor*, 31, *Wright and Wivell*; ¶ *Skerrat v. Oakley*, 7 T. R. 492; *Dashwood v. Peyton*, 18 Ves. 27.¶

A devised all his estate, real and personal, for the payment of debts and legacies, and devised 100*l.* to his heir at law: this was decreed a good devise in fee, but no implied trust arose to the heir at law for the surplus; for by that construction the devisee would have no benefit by the devise: besides, the legacy of 100*l.* to the heir at law is in this case an exclusion of the heir from any further benefit.

Chan. Ca. 196, *North and Compton*, vide head of *Uses and Trusts*,—*Trusts by Implication*.

{ A bequeathed to his wife (besides some other legacies) a leasehold estate at Northwood for her life, and a leasehold estate at Wrentnall to B; and by a codicil he directed that the bequests to his wife in the will should be in full of all claims she should be entitled to on his real or personal estate, (except the estate for life of his wife in the premises at Wrentnall.) This gave her no estate in those premises; Wrentnall being evidently inserted by mistake for Northwood.

7 Term, 492, *Skerrat v. Oakley*. }

A has two sons, B and C, and devises part of his land to B in tail, and the other part to C in tail; and if any of his sons died without issue, then the whole land should remain to a stranger in fee: C died; yet the stranger could not enter into his part, for the other brother took it by implication, the words of the will being, that the whole land shall remain to a stranger, which he cannot have while either of the sons or any issue of their body be living.

4 Leon. 14. ¶ As to the implication of cross remainders, see (I) *post*, *sub fine*.¶

¶ By a devise to J H, and if he should die under twenty-one, then over, the fee passes. By limiting the land over only upon the contingency of his dying in his minority, the testator shows he intended to give an absolute estate in fee.

Doe v. Cundall, 9 East, 400. See judgment of *Bayley, J.*, 1 Barn. & C. 646.

Testator devised land to his two daughters, Elizabeth and Anne, to be equally divided between them; and at the death of Elizabeth her share to

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be equally divided between her children, and so with respect to Anne's share. Elizabeth had, at the time of testator making his will, three children; and he declared that the shares of such children should be placed in the hands of J F, and the rents only paid to them during their lives, and at their decease to be equally divided among their children, if any; if not, to become the property of their heirs and assigns for ever. Held, that the children of Elizabeth took estates in fee.

Doe v. Frost, 1 Barn. & C. 638.]]

Another rule relating to devises by implication is this, that where the devisee takes a particular estate of inheritance by express words in the will, such estate shall not be enlarged by implication; (a) for since devises by implication are allowed in favour to wills, that where the intention of the testator may be presumed, the judges will pursue it, though it be not expressed in plain words, yet there is no room for such construction where the devisee has an estate given him by express words in the will; for that would be to overrule the plain meaning of the testator against his own words: therefore, if A devises to B for life, the remainder to C, and the heirs male of his body, and if it happens that C shall die without heirs of his body, then the remainder to D, this is but an estate in tail-male to C, because that estate being given to him by express words, ought not to be overruled by a bare implication that the testator intended him a greater estate by the words, *if he chance to die without heirs of his body*.

Vide *supra*, letter (D); *Dyer*, 171 a; *Bendl.* pl. 114; *Moor*, 113; 2 *Leon.* 226; *Vent.* 230. [(a) Although the rule here laid down, that an estate expressly defined by the testator shall not be enlarged by implication, be generally true, yet if the manifest general intent of the testator require it, courts of justice will, in order to effectuate such general intent, disregard the particular intent, however expressly declared, if inconsistent with the general intent. See *Doe v. Applyn*, 4 Term Rep. 82; *Robinson v. Robinson*, 1 Burr. 44, and other cases *supra*, (D); and see 2 Eq. Tr. 58, note (b) by Mr. Fonblanque.]

If a devise be to A and his heirs male, and if he die without heirs of his body, then to remain to B in fee, this is but an estate in tail-male to A, for the law supplies the words *of his body*; and since the deviser only gave it by (b) express words to him and his heirs male, it would be against his plain words to let in his issue female by implication on the other words, *if he die without heirs of his body*.

Bulst. 63; *Dyer*, 171 a, *in marg.* (b) So, if a man devise to A and the heirs of his body, and if he die without heirs, these last words will not, against the express declaration of the testator, give the devisee a fee-simple by implication. 2 *Vern.* 451.

B having issue a son and two daughters by several venters, the son died leaving two daughters, and then A devises one of his messuages to B his own daughter, and her heirs for ever, and his other messuage to C his daughter, and her heirs for ever; and if B die without issue, living C, then C should have B's part to her and her heirs; and if C die before her age of sixteen years, then B should have her part in fee: and if both of his said daughters should die without issue of their bodies, then his grand-daughters should have the messuages. C died without issue, having passed her age of sixteen years; the grand-daughters had judgment for her part: and the words of the will, *if his two daughters died without issue of their bodies*, did not create cross remainders for each other's part by implication, but only denoted the time when the heirs at law should have the messuages; for, says the book, no such implication will serve when there is an express gift and limitation made to the devisees by the testator himself.

Bendl. 212, *Clatches' case*; *Dyer*, 330; *Vaugh.* 267. || As to the implication of cross

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remainders, see (I) *post*, *sub fine*. [That when express and distinct estates are limited to two or more, and their several and respective issues, and for want of such issue over, cross remainders shall not be implied; the words *several* and *respective* severing the title; see *Davenport v. Oldis*, 1 Atk. 579; *Williams v. Browne*, 2 Str. 996; *Pery v. White*, Cowp. 777; *Phipard v. Mansfield*, *Ibid.* 800. {But notwithstanding the use of those words, cross remainders may be implied from the intention of the testator apparent on the whole will. 2 East, 36, *Watson v. Mary Foxon*.}—With respect to cross remainders in a will, it may be observed, that the presumption is in favour of them, where they are to be raised between *two*; but where between *more than two*, it is against them. But it being only a presumption, it may, of course, be rebutted in either case by circumstances of plain, manifest intention. The words “*in default of such issue*,” and a devise over of all the testator’s estates, have been holden to raise cross remainders. *Phipard v. Mansfield*, *ubi supra*; *Comber v. Hill*, 2 Str. 969; *Atherton v. Pye*, 4 Term Rep. 710; *Wright v. Holford*, Cowp. 31; S. C. by the name of *Wright v. Englefield*, Ambl. 468, and by the name of *Wright v. Lord Cadogan*, 6 Br. P. C. 156; *Holmes v. Willett*, 1 Freem. 483; *Marryatt v. Townly*, 1 Ves. 102; {1 East, 229, *Doe v. Cooper*; *Ibid.* 416, *Doe v. Worsley*; 2 East, 36, *Watson v. Mary Foxon*; *Ibid.* 47, n., *Doe v. Burville*; 6 East, 628, *Roe v. Clayton*.} The presuming against cross remainders between more than two, was for a technical reason, because the law avoids the splitting of tenures. 1 Ves. 104, 105, *per Lord Hardwicke*.] {In a deed, cross remainders cannot be implied. They can only be raised by proper words of limitation, however plainly the intention of the parties may be otherwise expressed. Roll. Abr. 837, *Nevell v. Nevell*; 1 Vent. 224, *Cole v. Levingston*; Ambl. 665, *Twisden v. Locke*; 5 Term, 427, *Doe v. Wainwright*; *Ibid.* 518, *Doe v. Dorvell*; 1 East, 416, *Doe v. Worsley*.}

[Where an express estate-tail is given by the will, it will not be enlarged to a devise in fee by implication, from the land’s being charged with the payment of annuities, or of a gross sum, not even if it be a charge in fee; for the charge in such case shall issue out of the whole estate, and not out of the particular estate only; and being governed by the directions of the will, it shall take effect according to the limitations thereof, and affect the whole inheritance.

Doe v. Fyldes, Cowp. 833; *Denn v. Slater*, 5 Term Rep. 335; *Dutton v. Engram*, Cro. Ja. 427.]

(H) Of the Disposition of Goods and Chattels by Will, by what Description, and to whom good.

[See under the division “LEGACIES,” B. 2, 3.]

(I) Of Executory Devises of Lands of Inheritance: And herein of contingent Remainders, and cross Remainders as far as they relate to this Place.

AN (*a*) executory devise is defined to be a devise of a future interest, which cannot vest at the death of the testator, but depends upon some contingency which must happen before it can vest.

Abr. Eq. 186. (*a*) Of which there are three kinds. 1. Where the deviser departs with his whole fee-simple, but upon some contingency qualifies that disposition, and limits a fee upon that contingency, which is new in law, as appears by *Brook*, 234; *Dyer*, 33; *Vaugh.* 271; and was first advanced in the case of *Hind and Lyon*, 19 Eliz; 3 Leon. 64, *per Nottingham*. 3 Chan. Cases, 1, &c., in the case of the Duke of Norfolk. 2d. When the deviser gives a future estate, to arise upon a contingency, but does not part with the fee at present, but suffers it to descend to his heir, as a devise to the heirs of J S till he shall have one, &c.; and these have been frequent. Of the 3d sort are leasehold interests, or terms for years, for which vide *infra*, letter (K), and *Salk.* 226. {See an able historical view of the rise and progress of executory devises in Mr. Hargrave’s argument in *Thellusson v. Woodford*, 4 Ves. J. 247; which is also published at large in the second volume of his judicial arguments.}

[This is the definition commonly given of an executory devise; but it has been objected to as defective in point of accuracy and precision, inasmuch as it is not confined to executory devises only, but embraces every

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kind of contingent interest in lands given by devise, and some contingent interests by devise are contingent remainders. An executory devise is, strictly, such a limitation of a future estate or interest in lands or chattels (though in the case of chattels personal, it is more properly an executory *bequest*) as the law admits, in the case of a will, though contrary to the rules of limitation in conveyances at common law. It is only an indulgence allowed to a man's last will and testament, where otherwise the words of the will would be void; for wherever a future interest is so limited by devise, as to fall within the rules which the law has prescribed for the limitation of contingent remainders, such an interest is not an executory devise, but a contingent remainder.

Fearne's Exec. Dev. 4th ed. 1, 2, &c.] β An executory devise of a chattel, to take effect on a failure of issue is good, when the contingency is restricted to the time of the death of the first taker. *Scott v. Price*, 2 S. & R. 59; *Diehl v. King*, 6 S. & R. 31. See *Miffin v. Neal*, 6 S. & R. 460. γ

To understand this doctrine, it must be observed as an established rule, that a fee cannot be limited on a fee; as if lands are limited to one and his heirs, and if he dies without heirs, they shall remain over to another, this last limitation is void: so, if lands are given by deed to one and his heirs, so long as J S hath issue, and after the death of J S without issue, to remain over to another, this remainder is likewise void, because the first devisee had a fee, though it was a base and determinable fee.

Dyer, 41; *Co. 85*; *Plow. 29*; *2 Leon. 69*; *Co. Lit. 19*; *Poph. 34*; *2 Roll. Rep. 220*; *Godolp. 355*. β A limitation can never operate as an executory devise, when it can take effect as a remainder. *Haines v. Witmer*, 2 *Yeates*, 400. See *Dunwoodie v. Read*, 3 S. & R. 440; *Stehman v. Stehman*, 1 *Watts*, 475. γ

Yet, in a will, such limitations may be good upon a contingency that may happen within the compass of a life or lives in (a) *esse*, or nine months { β } after the expiration of a life, or (b) a reasonable number of years; for these tend not to a (c) perpetuity, which is so odious in law: but this not by way of direct (d) remainder, but by way of executory devise.

Cro. Eliz. 205; *Roll. Abr. 626*; *Dyer*, 124. (a) All the candles must be lighted, and burning out at the same time, *per Twisden*. { β } The time of gestation may be allowed both at the beginning and at the end of the period within which the contingency on which the estate is to vest must happen. *Willes*, 213, *Goodtitle v. Wood*; 1 *Wils. 105*, *Gulliver v. Wickett*; 7 *Term*, 100, *Long v. Blackall*; 4 *Ves. J. 227*, *Thellusson v. Woodford*; 4 *Bos. & Pul. 357*, S. C.; 11 *Ves. J. 112*, S. C.} (b) That twenty, nay thirty years have been thought a reasonable time. *Salk. 229*, pl. 8. β An executory devise, either of a real or personal estate, which must, in the nature of the limitation, vest within twenty-one years after the period of a life or lives in being, is good. See *Fearne's C. R. 437*, 7th edit. Whether the twenty-one years may be taken as a term in gross and without reference to minority, see *Beard v. Westcott*, *Turn. & Russ. 25*; *Bengough v. Edridge*, 1 *Sim. 173*. (c) As the case of *Gardiner and Sheldon* does, which therefore has been denied to be law, which vide in *Vaugh. 271*. (d) Where a contingent estate is limited, and depends upon a freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder. 2 *Sand. 380*; *Purefoy and Rogers*, 3 *Lev. 434*; *S. P. Carth. 310*. [*Doe v. Holmes*, 3 *Wils. 237*, 241; 2 *Bl. Rep. 777*, S. P.; *Goodtitle v. Billington*, *Dougl. 753*; *Doe v. Morgan*, 3 *Term Rep. 763*, S. P.; *Walter v. Drew*, *Com. Rep. 372*, S. P.; *Wealthy v. Bosville*, *Ca. temp. Hardw. 258*, S. P.; *Carwardine v. Carwardine*, *Fearne's Executory Devises*, 4th edit. 5. {1 *East*, 259, *Wood v. Baron*; 2 *Bos. & Pul. 289*, *Doe v. Scudamore*; *Ibid. 324*, *Doe v. Wetton*.}

As, if tenant in fee-simple devises his land to A and his heirs, and if he dies without issue in the life of B, then to B and his heirs; though this be a limitation of a fee-simple upon a fee, yet, because the remainder to B must

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vest upon a contingency, which will fall in a life, it has been held good as an executory devise.

3 Chan. Ca. 9.

So, in the celebrated case of (*a*) Pells and Brown, where one having three sons, A, B, and C, by his will in writing devises lands to B, his second son, and his heirs for ever, paying 20*l.*, and if B dies without issue, living A, then A to have those lands to him and his heirs for ever; B enters and suffers a common recovery to the use of himself and his heirs, and then devises those lands to J S and his heirs, and dies without heirs, living A: it was adjudged, first, that B had a fee-simple, and yet the limitation to A good, as an executory devise in fee; for it was to happen within the compass of a life; and therefore if B died with issue, living A, or without issue, after the death of A, then this future interest was never to arise: secondly, it was adjudged, that this being a mere collateral possibility was not bound by the recovery, for it had not existence at all when the recovery was suffered, and therefore the recompense in value could not extend to it; besides, to allow the particular tenant to destroy any such future interest, would be the means of frustrating the most commendable intentions of the devisor, providing for his younger children, or for the payment of his debts, &c.

(*a*) Reported Cro. Ja. 590; Roll. Abr. 611; Palm. 131; 2 Roll. Rep. 216; 2 Leon. 111; Vaugh. 272.

{So, if a devise be "to S S, her heirs and assigns for ever, but if she shall happen to die leaving no child or children lawful issue of her body living at the time of her death, then to F B and his heirs;" this devise to F B is a good executory devise: the estate of S S being a fee-simple, and not restrained by the subsequent words to an estate-tail; and the contingency on which the limitation over is to take effect being such as must happen during a life in being.

2 Bos. & Pul. 324, Doe v. Wetton.

Again: If lands are devised to A, his heirs and assigns for ever, and in case he should die "and leave no issue," or "leaving no issue behind him," then to E *who is then living*, for life, &c., the limitation over is a good executory devise; those words meaning not an *indefinite* failure of issue, but a failure of issue *living at the death of A*.

3 Term, 143, Porter v. Bradley; 7 Term, 589, Roe v. Jeffery. See Forth v. Chapman, and other cases referred to, post, p. 115.

On the same principle, where R C, having four sons, and two daughters, E and M, devised a certain part of his real estate to his son W, his heirs and assigns for ever, and other parts of it to his three other sons and his daughter E, severally in fee-simple, and then added the following clause, "further my mind and will is, that if any of my said sons or my daughter M shall happen to die without heirs male of their own bodies, that then the lands shall return to the *survivors* equally to be divided between them," it was determined that W did not take an estate-tail, but a fee-simple, with a limitation over by way of executory devise to the survivors, on the contingency of his dying without a son living at the time of his death.

1 Johns. Rep. 440, Fosdick v. Cornell. Also in Jackson v. Blanshan, 3 Johns. Rep. 292, a limitation over to *survivors* after a *dying without lawful issue* was taken to mean a dying without issue living at the death of the first taker.

Lands were devised to the wife of the devisor for life, "and after her decease, to my daughter and her heirs for ever. But in case my daughter

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should happen to die before she come to age or have lawful heir of her body begotten," then over after the wife's decease. This was holden to give a fee-simple to the daughter, defeasible on the contingency mentioned, the limitation over being good as an executory devise.

2 Mass. T. Rep. 554, Ray v. Enslin. See Ibid, 56, Richardson v. Noyes.}

One by will devises his lands to his mother for life, and after her death to his brother in fee, provided that if his wife (being then *enseint*) be delivered of a son, that then the land shall remain to him in fee, and dies, and the son is born: it was held, that the fee of the brother should cease, and vest in the son by way of executory devise upon the happening of the contingency.

Dyer, 127, *in margine*.

[A testator devised lands to his wife for life, and after her death to such child as she was then supposed to be *enseint* with, and to the heirs of such child for ever; provided that if such child as should happen to be born, should die before the age of twenty-one years, leaving no issue of its body, the reversion should go over. The court held it to be a devise to the wife, remainder to the child in contingency in fee, with a devise over, which they held a good executory devise, as it was to commence within twenty-one years after a life in being; and that if the contingency of a child never happened, then the last remainder was to take effect upon the death of the wife: that the number of the contingencies were not material, if they were all to happen within a life in being, or a reasonable time after.

Gulliver v. Wickett, 1 Wils. 105. {See Willes, 303, Roe v. Wickett.}

So, where a testator devised to his wife for 3 years, remainder to his son for 99 years, if he should so long live, remainder to him for 99 years, if such wife as he should marry should so long live, remainder to the *heirs* of his son's body, and the heirs of their bodies; the court held the devise to the *heirs* of the son's body good, as an executory devise, being to take place *in futuro* within the compass of a life in being.

1 Wils. 225, Doe v. Carleton.

Again, where a testator devised his lands to C, for the term of 90 years from his (the testator's) decease, if he should so long live, and after the determination of that term, he devised the lands to the *heirs of the body of the said C*, remainder over; upon a question referred to the judges of K. B., whether the heirs of the body of C took any and what estate under the will? they certified their opinion, that the clear manifest intent of the testator was to give an estate-tail to such person *as should be heir of the body of C at his death*, (the only determination of the 90 years' term in the testator's view,) *to him and to the heirs of the body of the said C*, with remainder over as in the will; which intent of the testator might by law take effect as an executory devise, for the contingency must happen within the compass of a life in being; and the freehold in the mean time being undisposed of, descended to the heir at law.

Harris v. Barnes, 4 Burr. 2157.]

{G B devised certain premises to the child with which his wife was then *enseint*, in case it should be a son, during his life, and after his decease then to such issue male or the descendants of such issue male of such child as at the time of his death should be his heir at law; and in case at the time of the death of such child, there should be no such issue male nor any

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descendants of such issue male then living, or in case such child should not be a son, then to P L. This limitation over to P L was holden not to be too remote.^{1}

7 Term, 100, *Long v. Blackall*; 4 Ves. J. 341; 4 Bos. & Pul. 399; 11 Ves. J. 150, S. C. cited. Vide *Willes*, 213, *Goodtitle v. Wood*, *acc.* ^{1} The time of gestation was here allowed at the beginning of the period, and might have been required at the end also. See *Thellusson v. Woodford*, *infra*.

Peter Thellusson devised real estates of the annual value of near 5000*l.*, and other real estates which he directed to be purchased with the residue of his personal estate, amounting to above 600,000*l.*, to trustees and their heirs upon trust during the lives of the testator's sons, A, B and C, and of his grandson D, and of such other sons as A now has or may have, and of such issue as D may have, and of such issue as any other sons of A may have, and of such sons as B and C may have, and of such issue as such sons may have as shall be living at the testator's decease or born in due time afterwards, and during the life of the survivor, to receive the rents and profits, and from time to time to invest the same in other purchases of real estates; and after the death of the survivor of the said several persons, that the said estates shall be divided into three lots, and that one lot shall be conveyed to the eldest male lineal descendant then living of A in tail-male; remainder to the second, &c., and all and every other male lineal descendant or descendants then living, who shall be incapable of taking as heir in tail-male of any of the persons to whom a prior estate is limited, of A successively in tail-male; remainder in equal moieties to the eldest and every other male lineal descendant or descendants, then living, of B and C, as tenants in common in tail-male in the same manner, with cross remainders; or if but one such male lineal descendant, to him in tail-male; remainder to the trustees, their heirs, &c. The other two lots were directed to be conveyed to the male descendants of B and C respectively in the same manner, and with similar limitations to the male descendants of their brothers, and to the trustees in fee; and it was directed, that the trustees should stand seized upon failure of male lineal descendants of A, B and C as aforesaid, upon trust to sell and pay the produce to his majesty, his heirs and successors, to the use of the sinking fund; the accumulation, till the purchases or sales can take place, to go to the same purpose; with a direction that all the persons becoming entitled shall use the surname of the testator only. A bill was filed in Chancery by the widow and children of P. Thellusson to have the trusts of the will declared void, and the real estate conveyed and the personal estate distributed among them; and another bill was filed by the trustees to have the directions of the court for establishing the trusts. By those opposing the establishment of the trusts three questions were made: 1. Whether the testator had in direct terms transgressed the boundary of executory devise, by making the limitation depend upon the lives of persons not necessarily to come into existence before his death: 2. Whether, according to the sense and spirit of the rule as to executory devise, it is lawful to assume the lives of any number of persons and classes of persons no way connected with the immediate enjoyment, for the mere purpose of protracting the vesting and alienation, supposing the alienation may be protracted for that time: 3. Whether the enjoyment as well as the alienation of property can, consistently with the principles of law, be prevented by the same means for the same period. But the trusts of the will were established by Lord Loughborough, (who was assisted by Sir R. P. Arden,

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master of the Rolls, Mr. J. Buller, and Mr. J. Lawrence,) and afterwards in the House of Lords. And it was determined, 1. That the testator had not exceeded the boundaries of executory devise by suspending the vesting of the estate beyond the lives of persons in being at his decease. For the restrictive words "as shall be living at the time of my decease or born in due time afterwards," refer not only to the class of persons last mentioned, but to all the previous classes; and the words "or born in due time afterwards," refer to a child *in ventre sa mere*, or amount to a declaration of the testator's will that the property should be unalienable and accumulate during the lives of all the persons, born or unborn, whom the law authorized him to take as lives; either of which constructions may be taken to be the intention consistently with the rules of law. An infant *in ventre sa mere* is a life in being for this purpose; and the time of gestation may therefore be taken both at the beginning and end of the period during which the vesting is suspended. 2. That the number of lives is immaterial, if all in being at the same time and wasting together, and the number does not exceed that to which testimony can be applied to determine when the survivor of them drops. 3. That the testator could direct that the rents and profits should accumulate for the period {¹} during which he directed that the title should not vest, and the property should remain unalienable.

4 Ves. J. 227, *Thellusson v. Woodford*; 11 Ves. J. 112, S. C.; 4 Bos. & Pul. 385, S. C. {¹} See the st. 39 & 40 Geo. 3, c. 98, (which was occasioned by this will,) and 9 Ves. J. 127, *Griffiths v. Vere*; 12 Ves. J. 295, *Longdon v. Simson*; 4 Bos. & Pul. 397.

One having issue A, his only daughter and heir apparent, by will devises lands in D to her and her husband, and her heir, upon condition that they should assure lands in fee to his executors and their heirs, to perform his will; and if they failed, then he devised the said lands in D to his executors and their heirs, and died: it was adjudged to be no condition; (a) for then by the descent to the daughter, being heir, it would be destroyed; but it was held a limitation, or an executory devise to his executors, in case the assurance was not made, and that they might, for breach thereof, enter and sell; for though a fee cannot be limited upon a fee absolute, yet upon a fee determinable it may, and inures as a new original devise to take effect when the first devisee fails to make the assurance.

Palm. 135; *Dyer*, 33, *in margine*; *Cro. Eliz.* 359; *Cro. Ja.* 592. (a) So, if a devise of borough-english lands had been to the eldest son, paying such a sum to the younger sons, and in default of payment, that the land should go to them and their heirs; though the word *paying* in a will amounts to a condition, yet because that must descend to the devisee as heir, and no one else can take advantage of his default, it must be an executory devise, to vest in default of payment by the eldest. 3 Co. 21 a; *Cro. Eliz.* 833, *Hainsworth and Pretty*.

|| So, in the following cases, a limitation of an estate to take effect after a preceding estate in fee, and in defeasance of it, was held good as an executory devise.

A devise to E H for ever, "that is, if he have a son or sons who shall attain twenty-one; but if he should chance to die without son or sons to inherit, my will is that W shall inherit." This was held to give a fee to E H, subject to an executory devise, if he should die without issue, or the issue should not attain twenty-one.

Heath v. Heath, 1 Br. C. C. 147.]

§ Testator devised his whole estate to his son A, and, "if he die before the age of twenty-one years, or lawful heir, then over to the children of B

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and C and their heirs for ever;" the word *or* is to be taken copulatively, and both these contingencies must happen before those in remainder will be entitled. But as the death of A will terminate both events, the limitation over is good as an executory devise.

Brewer v. Opie, 1 Call, 212.

Testator devises land "to A and the male heirs of his body, lawfully issuing, and if A dies without leaving lawful issue as aforesaid, I give the lands to the eldest son of B:" held to be a good executory devise to B's eldest son.

Jones v. Spraight's heirs, 1 Car. Law Rep. 544.

A, by his will, devised as follows: "I give and bequeath all my residue and remainder of my personal and real estate, goods, chattels, and credits, and lands, tenements and hereditaments of what kind and nature soever, to my beloved daughter Rebecca, and it is my further will and desire, that should the Almighty take away my said beloved daughter Rebecca, before she becomes of age to receive the said legacy, then and in that case the personal and real estate to return to my friend George Lunceford, to whom I bequeath the same on the proviso above mentioned." Rebecca, the daughter, died in 1805, under the age of twenty-one years; the testator died in possession of the premises in the year 1806; and Lunceford died in the year 1808. Held, that this was a good executory devise to Lunceford, and that, on the death of Rebecca, the estate passed to his heirs; and that the estate which Rebecca took was a conditional fee, and that the limitation over to Lunceford was good, as there was no express power in Rebecca to dispose of the estate.

Ackless v. Seekright, ex dem. Lunceford's heirs, 1 Breese, 46.

Testator devised to his three daughters A, B, and C, during their respective lives, certain specified parts of his real estate, and added, "Item, it is my will that if any of my daughters die without lawful issue, or if having issue, and such issue all die in their minority, without leaving lawful issue, then I give the land so allotted to my other child or children's lawful issue as tenants in common, to hold to them their heirs and assigns for ever." A died before the testator. Held, that the limitation over to the issue of his other daughters was good, by way of executory devise.

Way v. Gest, 14 S. & R. 40.

The testator devised several tracts of land to his sons A, B, and C, charged with certain payments, "to be enjoyed by each respective son, his heirs and assigns for ever;" and then the will proceeded, "but if any or either of my sons A, B or C, die, having no child or children, then after the decease of such son or sons, the land I have given him or them shall be equally divided among all my other children or their heirs." The testator had had another son who died before the making of the will, leaving a daughter: held that the remainder over was good, by way of executory devise, and that the grand-daughter took a share.

Neaves v. Jenkins, 2 Yeates, 414. See the following cases of executory devises: *Chamber v. Wilson*, 2 Watts, 495; *Waddell v. Rattew*, 5 Rawle, 231; *Coates street*, 2 Ashm. 12; *Wells v. Ritter*, 3 Whart. 208.

|| A devise to a child *en ventre sa mere*, and the heirs of such child for ever; provided that if such child should die before the age of twenty-one years, leaving no issue of his body, then over. The devise over was held good as an executory devise.

Gulliver v. Wickett, 1 Wils. 105. See *Davy v. Burnsall*, 6 T. R. 30; but see *S. C.* 1 Bos. & P. 215.

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So, on a devise of all my estates to my son, but in case my son shall die under twenty-one years, *or* shall leave no issue, then over to my daughter and her heirs, *or* was construed to mean *and*, so that the limitation to the daughter was good as an executory devise.^(a)

Right v. Day, 16 East, 67. (a) See the cases collected where *or* has been construed *and* in devises, and where not. 1 Powell on Dev. 379, note, (3d edit.)

So, a devise to testator's son in fee, and if he should have no children, child, or issue, then on his decease to go to the heir at law of testator; the son took in fee, with an executory estate over to the person who should be heir at law at the son's death without children.

Doe v. Frost, 3 Barn. & A. 546.

So, a devise to testator's daughter, her heirs and assigns for ever; but if she should happen to die, leaving no child or children, lawful issue of her body, living at the time of her death, then over. Held, that the daughter took an estate in fee, with an executory devise over.

Doe v. Wetton, 2 Bos. & P. 324.

So, on a devise to J F in fee; but in case J F should depart this life, and leave no issue, then the testator devised over estates *for life* only; it was held that the limitation over was good as an executory devise, the failure of issue of the first devisee being confined to the time of his death.

Roe v. Jeffery, 7 T. R. 589. See Glover v. Moncton, 3 Bing. 13.

So, on a devise to M H in fee, and in case she died and left no child or children, then to I B in fee, she paying 1000*l.* to the executors or appointee of M H: held, that the limitation to I B was a good executory devise. "Children" was construed to mean "issue," and the failure of issue was from the context confined to the death of M H.

Doe v. Webber, 1 Barn. & A. 713.¶

If A devises lands to B for five years from Michaelmas following, the remainder to C and his heirs, this is a good remainder, (a) although it cannot vest before the particular estate begins, and the freehold cannot be in expectancy, for in the mean time the fee shall descend to the heir.

Cro. Eliz. 878, Pay's case. [(a) It is inaccurate to call it a remainder, for the reason assigned for the judgment proves the limitation was allowed to operate as an executory devise. Fearn's E. D. 4th ed. 25.]

One devises lands to his wife till his son came to the age of twenty-one years, and then that his said son should have the lands to him and his heirs, and if he dies without issue before his said age, then to his daughter and her heirs: this is a good contingent or executory devise to the daughter, if the contingency happens, and in the mean time the fee descends to the son as heir; and if he lives to twenty-one, though he after die without issue, or leave issue though he die before twenty-one, yet the daughter is not to have the lands, because he is to die without issue, and before twenty-one, else the daughter cannot take.

3 Roll. Rep. 197; Palm. 132; [Thrustout v. Denny, 1 Wils. 270, S. P.]

But where one having issue three sons, A, B, and C, devises to his son A after the death of his wife, to him and the heirs of his body lawfully begotten, in fee-simple; and if he die in the lifetime of my wife, that then my son C shall be his heir, and dies; A hath issue and dies in the lifetime of the wife; it was adjudged, that the issue should have the land after the death of the wife, and not C; for it was in effect a devise to the wife for life, remainder to A in tail, remainder to C in fee, upon the contingency of

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A's dying in the life of the wife, and does not abridge the estate-tail, expressly given A by his dying in the life of the wife.

Cro. Car. 185, Spalding and Spalding; S. C. cited 3 Lev. 434; Lord Raym. 524. [See *Doe v. Micklem*, 6 East, 486.]

[A devise was to two trustees and their heirs to receive the rents until B should attain 21; and if B should attain 21 or have issue, then to B and the heirs of his body, but if B should happen to die before 21 *and* without issue, remainder over; B attained his age of twenty-one, and afterwards died without issue: Lord Hardwicke, considering the word *and* as used for *or*, and the condition as disjunctive instead of copulative, decreed that the remainder over should take effect, upon the apparent intent of the testator, that it should take place, either in default of B's attaining 21, or on his dying without issue.

2 Ves. 243, *Brownsword v. Edwards*.]

{N S, being seised of lands holden on leases for lives, devised to his brother B S all his real and freehold estates, subject to an annuity to his mother for her life; but in case his brother should die before he attained the age of 21 years, *or* without issue living at his death, then he devised the said estates to his mother for ever. B attained the age of 21, and then died without issue. And it was adjudged that the mother took nothing on his death, as the word *or* must be construed *and* to comply with the intention of the testator. If it were construed disjunctively, B could never have had the real use of this property, though the testator gives him the whole absolute interest; he could neither have sold or mortgaged it, let his family have been ever so large: for unless he had had issue living at the time of his death, the mother would be entitled; so that he never could have had the absolute estate. And if a different event had happened than that which took place—if B had had children, and had died a day before he attained the age of 21, those children could not have taken or been at all benefitted by the estate, but it must have gone to the mother; and it could not have been the intention of the testator {1} to exclude them.

5 Bos. & Pul. 38, *Fairchild v. Morgan*: in the House of Lords. {1} Moore, 422, *Sowell v. Garet*; Cro. Eliz. 525, S. C.; Pollex. 645, *Prioe v. Hunt*; 2 Str. 1175, *Barker v. Suretees*; 3 Atk. 193, *Walsh v. Peterson*; 9 Mod. 444. S. C.; 1 Wils. 140, *Frammingham v. Brand*; 3 Atk. 390, S. C.; 9 East, 366, *Denn v. Kenneys*, all *acc.* on this last point. See also 7 East, 269, *Doe v. Cooke*.

The testator devised his plantation to his son F and his heirs and assigns for ever, subject to the payment of a sum of money, which he ordered F to pay by instalments to his other son P. He also gave F certain horses, cows, &c.; and then ordered that in case his son F should die under the lawful age of 21 *or* without issue, his share in the testator's *whole estate* should go to P his heirs and assigns; and if P died under the lawful age of 21 *or* without issue, his share should go to F his heirs and assigns; and in either case, the *survivor of his said two sons* should then pay 500*l.* to the testator's daughter or her heirs. By a codicil he ordered F not to *sell* any part of the land before he was 30, when he might do with it as he pleased. F took a fee, with an executory devise to P to take effect upon F's dying under age *and* without issue; and F having attained 21, and then died without issue, the estate descended to his heir at law.

2 Bin. 532, *Lessee of Hauer v. Sheets*.}

[A *feme covert*, pursuant to a power, left her husband the profits of certain estates for life, and after his death her estates to her children, if she should

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leave any to survive her ; but in case she should leave no such child or children, nor the issue of such child or children, after the decease of her husband, she gave the estates to J K, making him her sole heir in *default of issue left by her*. Lord Hardwicke held, that the children took estates-tail, and not in fee, and that the devise to J K was a *vested remainder*, and not a limitation to take effect only on the event of the testatrix's dying without *leaving* any child or the issue of any *living* at her decease. He said the testatrix had only expressed the double contingency, which there is in the case of every limitation in remainder after an estate-tail, viz. there being no issue at all, or all such issue dying without issue.

Southby v. Stonehouse, 2 Ves. 610.

But where a testator devised to B, his son and heir, and if he died before 21, *and* without issue of his body *then living*, the remainder over, &c., and B survived the 21 years ; it was held that he had a fee-simple immediately, and that the estate-tail was to arise upon a contingency which never happened, as he attained 21. So where the testator devised land to his wife till his son came to his age of 21 years, and then that his son should have the lands to him *and his heirs*, and if he died without issue *before* his said age, then to his daughter and her heirs ; it was held to be an executory devise to the daughter, if the contingency happened ; and that in the mean time the fee descended to the son, and if he attained 21, though he afterwards died without issue, or if he should leave issue, though he died before 21, yet the daughter was not to have the lands ; because he was to die without issue, *and* before 21, to entitle her.

Collinson v. Wright, 1 Sid. 148 ; 1 Eq. Abr. 188, pl. 8. And vide Barker v. Suretees, 2 Stra. 1175.]

{E C devised lands in fee and bequeathed personal estate to his grandson, and in case of his death under 21 without leaving issue, then to his grand-daughter. He afterwards, by a codicil, affirmed the will in all respects, except by directing that his grandson should not be entitled till 25. The grandson died between 21 and 25 without issue. The grand-daughter could not take ; the codicil making no alteration of the will with regard to her interest, but only as to the age at which the grandson should enjoy the estate.

3 Ves. J. 302, 491, Scott v. Chamberlayne.}

Baron and feme being seised of a copyhold, to them and the heirs of the *baron*, *baron* surrenders it to the use of his will, and then devises it to the heirs of the body of the *feme*, if they attain the age of fourteen, and dies without issue, and then she marries a second husband, and has issue that attains the age of fourteen, and then she dies ; and whether this was a good devise, by reason of the double contingency, *scilicet*, the having heirs of her body, and that such heir should live till fourteen,—was doubted ; but it was admitted that if the devise was good, it must be by way of executory devise, which is allowable when to take effect within the compass of a life, but not after a dying without issue ; for that tends to a perpetuity : and it cannot take effect by way of remainder ; for it is a new devise to take effect after her death, and is not as a remainder joined to her estate : but the court being divided upon the point of contingency, it was agreed to be adjourned into the Exchequer Chamber, and the reporter supposes the parties agreed afterwards, for he heard no more of it.

1 Lev. 135, Snow v. Cutler, Eq. Ca. Abr. 188.

[Where one devised all his lands after the death of his executor to A

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his executor's son, and his heirs for ever, but if A died *leaving* no son, then to that son of his executor to whom he should think fit to give them by his will; and for want of a son of his executor, then to B; it was held a good executory devise to B as confined to the period of a life in being.

Proc. Chan. 67, *Fairfax v. Heron*.

Where lands were limited by marriage-settlement to the use of A and his wife, for their lives, remainder to trustees and their heirs during the lives of A and his wife, to preserve contingent remainders; remainder to the first and other sons of the marriage successively in tail-male, remainder to the right heirs of A; with a proviso, that if the heirs of the wife should, within twelve months after the death of the survivor of the husband and wife, pay 4000*l.* to the heirs or assigns of the husband, that then the fee should remain to the use of the heirs of the wife: the House of Lords held this executory limitation of the use to the heirs of the wife to be good.

Lloyd v. Carew, Chan. Proc. 72; *Show. Parl. Cas.* 137.

So, where a testator devised to his wife for life, remainder to C his second son in fee, provided if D his third son should, within three months after his wife's death, pay 500*l.* to C, his executors, &c., then he devised the same lands to D and his heirs; it was adjudged a good executory devise to D.

10 Mod. 419; *Marks v. Marks*, *Strange*, 129.]

If a man having only one sister and heir, who had issue A, and after married B, by whom she had issue C and D, devises lands to his sister until C attains twenty-one, and after C attains that age, to C and his heirs; and if C dies before twenty-one, then to the heirs of the body of B and their heirs, as they shall attain their respective ages of twenty-one, and dies: C dies before twenty-one, living B; and after B dies, D either as heir of C, in whom the fee was vested, or as heir of the body of B, (though he could not be so during the life of B,) being of age after the death of B, shall have the estate by way of executory devise, and not the right heir of the devisor.

2 Mod. 289; *Taylor and Biddulph*, *Abr. Eq.* 188; [*S. C.* cited and relied upon by the judges in *Ca. temp. Talb.* 232.]

[So, where the testator devised lands to his grandson W and his heirs, and if W should die under age, then to his grandson T, and if T should die under age, then to such other son of the body of his daughter M S by his son-in-law T S as should happen to attain his age of twenty-one years, remainder over; and the testator died, leaving two grandsons, W and T, who both died under age; afterwards another son, A, of the body of M S by T S, was born: it was decreed a good executory devise to this after-born son A, if he should attain his age of twenty-one years.

Ca. temp. Talb. 229, *Stephens v. Stephens*.]

Where A devised to B his son all his estate until C should attain his age of 21 years, and no longer; and afterwards said, Item, I give and bequeath unto C all my messuages in H and T for ever, that is, if he have a son or sons (who shall attain 21;) but if my kinsman C shall chance to die without son or sons to inherit, my will is, that the son of my son B shall inherit; C took an estate in fee at 22 years of age, subject to be defeated by an executory devise over, which was not confined to vest on the death of C if he left issue, but awaited the event of that issue dying under 21, which could not be decided until a period of 21 years after a life in being.

Heath v. Heath, 1 Br. Ch. Rep. 147.

It is the same in regard to personal estate. For where the testator be-

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queathed the residue of his personal estate to his niece A for life, and after her death the interest to be applied for the maintenance of such children as she should have, until the sons had attained 21, and the daughters 18 years of age, and at such their ages, to be paid their portions, and *for want of such issue*, then to the children of S; the niece died without issue, and it was contended that the bequest over to the children of S was too remote; for if the words *for want of such issue* should signify for want of such children of A as should attain the said ages, yet it would exceed the rule which had confined these sorts of bequests (especially of mere personal estates) to lives in being: but Lord Chancellor King held it to be a good executory devise, and cited the case of *Massenburgh v. Ash*, where the like executory devise of a term for years was held good.

Madox v. Staines, 2 P. Wms. 421; *Massenburgh v. Ash*, 1 Vern. 234, 257, 304.

So, where the money in the orphan's fund and bank stock was limited by the testator in trust for such of his brother's children then unborn as should attain their ages of 21; it was adjudged a good executory devise.

Cas. temp. Talb. 245, *Sabbarton v. Sabbarton*.

|| Mary Proctor, seised of an advowson, devised it unto the first or other son of her grandson Thomas Proctor that should be bred a clergyman and be in holy orders, in fee, but in case T P should have no such son, then to C in fee. Thomas Proctor survived testatrix, and died without ever having a son. Held, that both limitations were void, as too remote, and the heir at law took: no son could have been entitled until the age of twenty-four.

Proctor v. Bishop of Bath and Wells, 2 H. Bl. 358.

But the devise of a contingent estate, unsupported by a preceding freehold, may be good by way of executory devise. A having two sons, B and C, devises to trustees for five hundred years to pay debts, and 50*l.* *per annum* to B for his life, and after the determination of that term, to the first and every other son of B in tail, remainder over. B had no son at the death of testator, but it was held a good executory devise; and a son afterwards born took an estate-tail.

Gore v. Gore, 2 P. W. 28.

So, on a devise to testator's son for 99 years, if he should so long live, remainder to the heirs of his son's body and the heirs of their bodies, such heirs took by way of executory devise.

Doe v. Carleton, 1 Wils. 225; *S. P. Harris v. Barnes*, 4 Burr. 2157.

In consequence of the rule that an executory devise must vest within a life or lives in being and twenty-one years after, a devise after failure of the heirs or the issue of A, where such heirs or issue have not a prior particular estate, is void.

Wright v. Hammond, 1 Str. 427; 2 Eq. Abr. 338, pl. 11; *Vin. Abr.* vol. 8, p. 110, pl. 32; *Lanesborough v. Fox*, 3 Bro. P. C. 130; *Goodman v. Goodright*, 1 Bl. 188; 2 Burr. 873; *Doug.* 507, n.; *Habergham v. Vincent*, 5 T. R. 92.

Thus, by a marriage settlement, lands were settled after estates to the husband and wife to the use of the first and other sons successively in tail-male, remainder to the daughters in tail-general, remainder to the husband in fee. The husband in his will recited, that by his marriage settlement he was seised of or entitled to the reversion in fee-simple expectant upon and to take effect in possession immediately after the decease of his wife, in case and upon the contingency that there should be no child or children of his wife, by him begotten, or there being such, all of them should depart this

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life without issue. Having thus described his reversion, he proceeded to devise it. "Now, in case I should die without leaving any children or child, or there being such, all of them should happen to depart this life without issue lawfully begotten." These words describe an event that could not take place, unless his sons all died without female issue as well as without male issue, and unless his daughters died without issue either male or female; and it is only upon that contingency that he devises his reversion. This reversion, however, was a reversion expectant, not upon a general failure of his issue, but upon estates limited to the sons of the marriage in tail-male and to the daughters in tail-general. Mistaking what his reversion was, he introduces a description of it, which serves to show what it was he meant to dispose of, and what it was he meant to do with that of which he could dispose. He states, that what he meant to devise was that which he was not entitled to devise, unless there was a failure of all issue; and he does devise it, in case of there being a failure of all issue. The House of Lords held, that the devise was accordingly void as being too remote;—thinking that, inasmuch as he had stated in his will what the reversion was of which he thought himself entitled to dispose, and which was a reversion different from the interest which was actually in him, a court could not hold that he meant to dispose of that which was the real nature of his reversion.

Bankes v. Holme, Dom. Proc. cited and stated in note, 1 Russell, 394. See *Bristow v. Boothby*, 2 Sim. & Stu. 465.

But where testatrix devised to A for life, remainder to A's first and other sons in tail-male, remainder to his daughters in tail-general, remainder to trustees for a term of years to raise legacies, and in a subsequent part of her will bequeathed legacies from and immediately after the decease and failure of issue of A;—Held that "failure of issue," in the gift of the legacies, meant failure of such issue as were included in the limitation of the estate, and therefore that the bequests were not too remote.

Morse v. Lord Ormonde, 1 Russell, 382.

So, lands were settled on marriage on the sons successively in tail-male, remainder to the settlor in fee, and, there being two sons of the marriage, the settlor devises the lands so settled in case his said sons, "*or any other son or sons of mine hereafter to be born, shall happen to die respectively without any issue male of their bodies, or of the body of some or one of them.*" The Court of K. B. certified, and Lord Chancellor Bathurst decreed, that the event of a future marriage was not in the settlor's contemplation, and that the words "*or any other son or sons*" were to be restrained to sons of the first marriage; and consequently that the devise was good.

Jones v. Morgan, 3 Br. P. C. 322; *Fearne's C. R. Appendix*. See *Lytton v. Lytton*, 4 Br. C. C. 441.

If a testator devises "in default of issue of my own body," without having given any estate to such issue, these words may, on the ground of intention, be restrained to issue living at his death.

French v. Caddell, 6 Br. P. C. 58; *Wellington v. Wellington*, 4 Burr. 2165; S. C. 1 W. Bl. 645; *Sandford v. Irby*, 3 Barn. & A. 654.]]

[An estate by way of executory devise may be so limited, as that its taking effect or not may depend upon the act of the owner of the fee which precedes it. Thus, W by will devised his estates in B, except, &c., to his son F and his heirs, &c., and the rest of his estates to his son C and his heirs,

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&c.; and if either F or C should die without having settled or otherwise disposed of the estates so devised, or without leaving issue of his or their respective body or bodies lawfully begotten, or, having such issue, such issue should die before his or their age or ages of twenty-one, and without leaving lawful issue, he willed that the premises, so given to such of his sons F and C so dying, should go and he gave the same unto the survivor of them, his heirs, &c., for ever; and if the survivor should die without having settled or otherwise disposed thereof, or of the estates thereby originally devised to him, or, &c., and his son W should then be dead without issue, then he gave such of the said devised premises as should not have been settled or disposed of as aforesaid unto the right heirs of G, then deceased, in fee. F died without issue; C by lease, release, and recovery, conveyed part of the estate so limited as above mentioned to I S in fee, and then died; after which W died without issue. And the question was, whether under the devise to C, and the conveyance by him, I S took an absolute and indefeasible estate of inheritance in fee-simple? And it was held, first, that on failure of the first limitation, the second might have taken effect, as an executory devise. Secondly, that the testator had in express terms given one estate to one son and his heirs, and another to another son and his heirs, and if either of them died, without having settled or disposed of his estates, or without issue, then that it should go over; that this was a lawful intention; and that C, having settled and disposed of the estate given to him, had thereby defeated the limitation over.

Beachcroft v. Broome, 4 Term Rep. 440.]

If A hath issue two sons, viz. B and C, and devises lands to B for life; and if he dies without issue living at his death, then to C in fee; but if B shall have issue living at his death, that then the fee shall remain to the heirs of B for ever, by which devise B has only an estate for life, the remainder to his heir not executed; and though the reversion descend on B as heir of A, yet it drowns not the estate for life against the express devise and intention of the will, but leaves an opening, as it is termed, for the interposition of the remainder, when it shall happen to interpose between the estate for life and the fee; and this being a contingent remainder, and not an executory devise, will be barred by a recovery suffered by B.

Lev. 11; Holmes and Plunkett, Lord Raym. 28, 47; *Keb. 29, 119*; [Ferne's C. R. S. C.]

{So where T L devised to G L, his heir at law, for life, and from and after his death to C B her heirs and assigns, "in case she shall survive and outlive the said G L, but not otherwise, and in case she shall die in the lifetime of the said G L, then to him, his heirs and assigns for ever; it was holden that the devise to C B was a contingent remainder, and barred by a fine levied by G L.

2 Bos. & Pul. 289, *Doe v. Scudamore*.}

If one devises lands to his wife for her life, and if she hath a son, and causes him to be called by the Christian and surname of Sampson Shelton, then after her death devises the same to her son, and if he dies before twenty-one, to the right heirs of the devisor, and dies; and after the wife marries Broughton, by whom she hath a son, which she caused to be christened Sampson Shelton, &c., the devise is good by way of contingent remainder, but not by way of executory devise; for when a contingent estate is limited, and depends upon a freehold, which is capable of supporting a

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remainder, it shall never be construed an executory devise, but a contingent remainder: adjudged, and that the reversion descending to the heir of the devisor till the contingency happened, by the bargain and sale, and fine thereof, by the heir of devisor to B and his wife, and their heirs, before the birth of their son, the contingent remainder was destroyed.

2 Sand. 380, Purefoy and Rogers; 4 Mod. 284; 2 Lev. 39; 3 Keb. 11; 3 Salk. 299; [Doe v. Morgan, 3 T. R. 763.]

A having two sons, B and C, devised lands to B for 50 years, if he should so long live, and for my inheritance after the said term I devise the same to the heirs male of the body of B, and for default of such issue, then to C. And the court resolved, 1st, that B had not an estate-tail by implication upon the words *without issue*, because the devisor had given him an estate for years by express words, and the court cannot make such a construction against express words, when thereby they would drown the estate for years, and make an estate of inheritance. 2dly, The court held this devise to the heirs male of the body of B to be void in its creation for want of an estate of freehold to support it; and they seemed not to think it an executory devise, because it was limited as a remainder, and because it was limited *per verba in presenti*; for if one devises his estate to the heir of J S, and J S is living, the devise shall not be construed an executory devise, and such devise is therefore void; but if it were to the heir of J S after the death of J S, that is good as an executory devise. 3dly, The court held the limitation to the heirs of B was become void by the event, whatever it was in its creation, because B died without issue. 4thly, The court held, that if the remainder to the heirs male of B was void in point of limitation, then the next remainder limited to C took effect presently.

Salk. 226, pl. 4; Goodright and Cornish, Lord Raym. 3; Skin. 408, pl. 3; 4 Mod. 255; S. C. 12 Mod. 53; S. C. cited in 2 P. Wms. 56.

C seised in fee devised to trustees for eleven years, and then to the first son of A and the heirs male of his body, and so on to the second, third, &c., sons in tail-male, provided they, the said sons, shall take on them my surname; and in case they or their heirs refuse to take my surname, or die without issue, then I devise my land to the first son of B in tail-male, provided he take my surname; and if he refuse, or die without issue, then to the right heirs of the devisor. A had no son at the time of the devise, and died without issue, and B had a son who was living at the time of the devise, who took the surname of the devisor. The whole court agreed, that the devise to B was not a contingent remainder, because of the precedent estate for years, which could not support it; it appears likewise by the case to be the opinion of Treby, C. J., and J. Powell, that it could not be good as an executory devise, if it were considered as a devise to the heirs of A, being limited *per verba de presenti*; (a) but Blencow, J. held, that the devise to the son of A was future; for he supposed the testator knew that A had no son, and the rather because he does not name him; but it was adjudged in C. B., and affirmed in B. R., that the remainder to the first son of B was good, and vested in him.

Salk. 229, pl. 8, Scatterwood and Edge; 12 Mod. 278, S. C. [(a) In the case of a future limitation to the unborn children of the testator's grandson, Lord Talbot thought its being limited *per verba de presenti* no objection to its taking effect as an executory devise. Chapman v. Blissett, Ca. temp. Talb. 150.]

A man devised lands to his executors till his son should come of age, and when his son should come of age, then he should enjoy them for him and
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his heirs: this is a remainder executed in the son, and not in contingency, for the words *when* and *then* in this case only denote the time when the remainder is to execute, and will no more make the remainder contingent than in the common case, when a lease is made for life or years; and after the decease of the tenant for life, or the expiration of the term for years, then to remain to another; for though the words be *after the term it shall remain*, yet it is a present and not a contingent remainder, for where words refer to that which *must needs happen* there shall be no contingency.

3 Co. 19, Boraston's case; vide tit. *Remainder and Reversion*.

||So on a devise to J M in fee when he attained twenty-one; but in case he should die before he attained twenty-one, then over; it was held that J M took an immediate vested interest, liable to be divested upon his dying under twenty-one.

Doe v. Moore, 14 East, 601. See Duffield v. Elwes, 2 Sim. & Stu. 544; 3 Barn. & C. 705, S. C.

So on a devise to trustees to receive the rents for a particular purpose until T M should attain the age of twenty-one years, and at that age to convey to him for life with remainders over, Sir W. Grant, M. R. was of opinion, on the authority of a great number of decisions, from Boraston's case downwards, that T M took a vested remainder for life, after an estate in the trustees for so many years as his minority might last.

Stanley v. Stanley, 16 Ves. 491, 506. ||

A having issue five sons, (his wife being *enseint* with a sixth,) devised two-thirds of his lands to his four younger sons, and the child *in ventre sa mère*, if it were a son, and their heirs; and if they all die without issue male of their bodies, or any of them, that the lands shall revert to the right heirs of the devisor: by this devise, the younger sons are tenants-in-tail in possession, with cross remainders over to each, and no part shall revert to the heirs of the devisor, till all the younger sons be dead without issue male of their bodies.

Dyer, 303; Hob. 33.

A man having two sons, devised part of the lands to one of them and his heirs, and the rest to the other and his heirs, and further willed that the survivor shall be heir to the other, if either die without issue; by this the devisees are tenants in tail, with remainder in fee executed of each other's part.

Cro. Ja. 695.

But where a man having three sons, and seised of three houses, devised a house to each son and his heirs, with this proviso, that if all his said children shall die without issue of their bodies lawfully begotten, that then all his said messuages shall remain over, and be to his wife and her heirs: it was held in this case, that these words did not raise any cross remainders, but that at the death of any of the sons, his house should go immediately to the wife; and though a cross remainder may be by implication where lands are limited to two, yet they cannot rise where three or more houses are limited to three (a) without express limitation.

Cro. Ja. 448, 655, Gilbert and Witty; S. C. cited in Saund. 104. (a) No cross remainders can be created by implication in a deed, nor by will between three or more, unless the words of the will do plainly express the intent of the devisor to be so; as where Black Acre is devised to A, White Acre to B, Green Acre to C, and if they die without issues of their bodies, *vel alterius eorum*, then to remain; there, by reason of the words *alterius eorum*, cross remainders shall be. Vent. 224, per Hale, C. J. Vide *supra*, (F).

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¶ Estates-tail are sometimes implied in a will by way of cross remainders. The following rule has been stated as the result of the cases in the margin: "When there is a devise in tail, either express or implied, to a class of persons, whether ascertained or unascertained, and in default of issue of such persons the subject of the devise is given over, cross remainders between such persons and their issue will be implied."

Walters on Cross Remainders, 61. See the cases of *Doe v. Burville*, Lofft. 101; *S. C.* 2 East, 47, in note; *Wright v. Holford*, Cowp. 31; *Phipard v. Mansfield*, Ibid. 797; *Bradford v. Foley*, Doug. 63; *Atherton v. Pye*, 4 T. R. 710; *Watson v. Foxon*, 2 East, 36; *Roe v. Clayton*, 6 East, 634; *Doe v. Webb*, 1 Taunt. 234; *Green v. Stephens*, 13 Ves. 419, and *S. C.* 17 Ves. 64; *Mogg v. Mogg*, 1 Mer. 655; *Horne v. Barton*, 19 Ves. 398; *Staunton v. Peck*, 2 Cox, 8. And see *Powell on Dev. Ch.* xxxi., xxxii. (3d edit.)

In all the cases last referred to there is a limitation over in default of issue of the persons to whom the devise is made. In nearly all these cases, this limitation over is referred to by the court as furnishing satisfactory evidence of the testator's intention, that till failure of such issue no part of the estate should go over; and consequently, to effectuate such intention, cross remainders were implied. But in none of these cases did the court state it was necessary that there should be a limitation over in order that cross remainders might be implied, or in other words, that the intention of the testator could not be implied from other circumstances. Indeed, *Hobart*, p. 34, cites a case from the Year-book 7 Ed. 6, in which there was a devise to three brethren in tail, with a declaration that "one should be heir to the other," and this, he says, makes cross remainders. But where a testator, having three sons, devised the Withy farm to his two youngest sons, John and George, equally between them, share and share alike; and after bequeathing to them all his personal estate in the same proportions, he then adds, "I entail the Withy farm on the male heirs of John and George born in wedlock." George, having survived the testator, died without issue; the question was, whether the words, "I entail the Withy farm on the male heirs of John and George," were sufficient to raise cross remainders between them, and to exclude the claim of the heir at law, an elder brother. The court decided against cross remainders on the ground that there was nothing in the will to show that the testator intended no part of the farm to go to the heir at law till the failure of issue of both the devisees. Mr. Justice Bayley said, "It seems to me that in case we were to decide for the plaintiff now, it would next be contended, that if there was a devise to two persons of an entire estate in tail, as tenants in common, cross remainders ought to be implied between them. The words 'I entail, &c.,' are here not words of purchase, but of limitation."

Cooper v. Jones, 3 Barn. & A. 425.]

β Testator devised in these words, "I lend to my daughter A B the following slaves," naming them, "all during her natural life, and after her death, to the lawful heirs of her body, if there be any, if not, to be equally divided among my other children or their heirs." Held, that the words "heirs of her body," were descriptive of the persons of those in remainder; and that A B was only entitled to a life-estate with a remainder to her children.

Hickman v. Quinn, 6 Yerg. 96.

A testator made his will in the year 1765, and devised certain lands to his son James for life, remainder to his son Muscoe, and his heirs in trust,

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and for the use of the first and every son of his son James, who should survive him, in tail-male, equally to be divided; but if his son Muscoe should die without male issue, then he gave the said lands to his son Muscoe during his life, with like remainders, &c., to his other sons: and to three grand-children, he also devised other lands, with like limitations, and then desired that the widows of any of his sons and grandsons should be entitled to dower, &c. Held, that James took an estate for life in possession, with a contingent remainder in tail-male, expectant upon the determination of the estate-tail devised, in trust for the surviving sons.

Roy v. Garnett, 2 Wash. 9.

In order to raise cross remainders by implication, in a will, there must appear an intention that no other person shall inherit any part of the estate, or take it by way of remainder; so long as any of the immediate devisees or any of their issue are living.

Hungerson v. Anderson, 4 Day, 368.

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If a farmer devises his term to A for life, the remainder to another, though A has the whole estate (for that is in him during his life,) and so no remainder can be limited over at common law, yet it is good by way of (a) executory devise.

Cro. Car. 198; Roll. Abr. 610; 8 Co. 94. (a) The great question in these cases was, Whether the disposition of the term to a man for his life was not such a total disposition of it, that no remainder could be limited over, it being in the eye of the law a greater estate than for any number of years?—and this was resolved in the affirmative in the reign of E. 6, Dyer, 74, by all the judges of England; but this resolution seeming very severe, and against natural justice, that a man should be hindered from making provision for his family, and the contingencies of it, occasioned a contrary resolution. 19 Eliz. Co. Lit. 46; Dyer, 35. For the judges, observing the good effect such limitations by way of trust had, which were allowed in Chancery, permitted farmers to dispose of their leases in the same manner by last will; and then the Chancery, the better to fix them in it, allowed of bills by the remainder-man, to compel the devisee of the particular estate to put in security, that he in remainder should enjoy it according to the limitation; but when they perceived that this multiplied Chancery suits, they resolved that there was no need of that way, 10 Co. 47 a, 52 b, Sid. 451, but that the particular devisee should not have power to bar the remainder-man; so that the law has been long settled, that executory devises of terms for years are good, provided the contingency is to happen within a life, or twenty lives all *in esse*; for then there can be no tendency to a perpetuity, which was the great mischief apprehended from these kinds of limitations. Abr. Eq. 191. ¶ The period now allowed is a life or lives in being, and twenty-one years and a few months.¶

So if A, possessed of a term for years, devise it to B his wife for eighteen years, and after to C his eldest son for life, and after to the eldest issue male of C for life, though C had not any issue male at the (a) time of the devise, and death of the deviser, yet, if he have issue male before his death, this issue male shall have it as an executory devise; for although it be a contingency upon a contingency, and the issue not *in esse* at the time of the devise, yet, inasmuch as it is limited to him but for life, it is good, and all one with (b) Manning's case.

Roll. Abr. 612, Cotton and Heath, adjudged by Jones, Croke, and Berkley, on a reference out of Chancery. (a) If A possessed of a term, devises it to B his wife for life, and after her death to his children unpreferred, and after B dies, C then being the only daughter of A shall have it; for an executory devise, that hath a dependence on the first devise, may be made to a person uncertain. Andr. 60, 61. (b) Where a term of fifty years was devised to B after the death of C, and that C should have it during

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his life, it was adjudged that this was a good devise of as much of the term as remained at the death of C. 8 Co. 95, Matthew Manning's case.

But if A devise his term to his wife for her life, and after her decease to B his son; and if B die without issue, then to C, this devise to C after the death of B without issue is void; for since it cannot vest while B hath issue of his body, the devise is no more than to B and the heirs of his body, which, without doubt, would be void; for though men presumed on the judges when they first allowed of remainders of terms after estates for lives, and endeavoured to bring remainders upon estates-tail within the reason of these resolutions and concessions, yet the courts would never endure those remainders, because it is too foreign and distant to expect them after the man's death without issue; and if they were allowed of would make a direct perpetuity, which is an undeniable reason against any settlement, for it is against the nature of human affairs so to settle an estate in a family, that upon no contingency or revolution of fortune the owner shall have power over it.

Cro. Car. 167; Roll. Abr. 610; Sid. 456; Cro. Ja. 46; 6 Inst. 87; 3 Chan. Ca. 6, 10.

Therefore, the devise to B in the above case is an absolute disposition of the term to him, and vests it totally in him, and at his disposal, and shall go to his executors during the continuance of it, and shall never for default of issue of his body revert to the executors of the devisor.

Sid. 451; Roll. Abr. 611, 631; {1 Bay. 453, *Dott v. Cunningham*.} But vide 10 Co. 87. Leonard Lovie's case, and Sid. 37, which seem *contra*, but have been denied to be law. 3 Chan. Ca. 6, 10.

If one possessed of a term devise it to his wife for life, the remainder to his first son for life, and if he die without issue, to his second son, &c., the remainder to the second son is void, for the remainder of a term cannot depend upon a possibility so remote as the dying without issue; although it was objected that the devise was not to the first son and his issue, (in which case it was agreed it should go to his executor,) but it was given to him for life only, with an executory devise to the second son, upon the contingency of the first's not having issue at the time of his death.

Lev. 290; Love and Wyndham, 2 Chan. Rep. 14; S. C. Sid. 450; Vent. 79; Mod. 50; 2 Keb. 637; {5 Ves. J. 440, *Rawlins v. Goldfrap*.}

[So, where a lessee for 1000 years without impeachment of waste, devised to L, and if he should die without issue, then to B; the court held, that the remainder was void, and that the whole vested in L, his executors and administrators. And where a personal estate was devised to A, and in case she should die without issue, then to B, it was resolved that the devise over to B was void, and the whole decreed to A.

2 Freem. 210, *Burford v. Lee*; 2 Freem. 287, *Anon*.

Again, where A possessed of a personal estate, appointed by will that it should be sold, and the money arising from the sale be to the use of his sister M, and if she should die without issue, it should go equally between his other sisters; and in a subsequent clause it was said, *then after the death of his sister M in manner aforesaid, &c.*; there, it was contended, that although the first limitation to M contained nothing to restrain the generality of the meaning of *dying without issue*; yet the words in the subsequent clause *then after the death* amounted to a restriction, which confined it to a dying without issue *living at the death of M*. But the court observed that

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the words in *manner aforesaid* prevented such a construction; because they referred to the first limitation, and were tantamount to a repetition of it; which being a dying without issue generally, the limitation over was too remote, and therefore void.

Fitzgib. 68, *Green v. Rod*.

And so in a case of later date, where the testator said, *M D I make my sole heir and executrix, and if she die without issue*, then to go to L B; Lord Hardwicke held, that no authority came up to supporting the point, that *ex vi termini* such a limitation of a personal estate should be confined to a dying without issue *living* at the death of the first taker; and that as the limitation was general, and not restrained by any circumstance in the will, the devise over was void. And his lordship was of the same opinion in a subsequent case, when he said, "Where there is a devise of a lease for years to a man, and if he die without issue, remainder over; there is no doubt but the whole interest vests in the first taker."

2 Atk. 308, *Beauclerk v. Dormer*; 2 Atk. 376, *Saltern v. Saltern*.

If a man possessed of a term for years, devises it to D, his wife, for life and after to W, his eldest son, and his assigns, and if he dies without issue *then living*, to T, this being a perpetual limitation by intendment of law is void; and if men should be admitted to make such devises, there would not be any end of them, nor any certainty.

Cro. Ja. 459, *Child and Baily*; Palm. 333, 336, S. C.; Jon. 15, S. C.; Roll. Abr. 612, 613, S. C.; Mod. 52, cited, and Sid. 37, cited. And in 3 Chan. Ca. 1, &c., in the Duke of Norfolk's case, where it is denied to be law; and in Salk. 225, pl. 3; Carth. 226, denied to be law; and that the established law in cases of this nature is the Duke of Norfolk's case. See the next case.]

A having issue several sons (the eldest *non compos*) created a term for years, and by another deed declared the trust thereof to his second son, and the heirs male of his body, remainder to his other sons; provided that if his eldest son died without issue, or not, leaving his wife *enseint* with a child, living the second son, so that the earldom of — descended on the second son, then the said term to remain to the third son and the heirs male of his body, with like limitations to the other sons; the eldest son died without issue, living the second, and this limitation to the third son was held good.

3 Chan. Ca. 2. &c., decreed by my Lord Nottingham, but reversed by North, Lord Keeper, Vern. 163. But upon an appeal to the House of Lords, Lord North's decree was reversed, and Lord Nottingham's established. Chan. Ca. 53. And has been ever since admitted to be law; and note, that executory devises and limitations of the trust of a term are governed alike. Vern. 234; Pollexfen, 15—50. ¶ See note of Lord Nottingham's judgment in the above case, given from his Lordship's MSS. 2 Swanst. 454.¶

If a man possessed of a term devise it to his son; and if he die unmarried, and without issue, to his daughters; and if his son be married, and have no issue then living to enjoy it, then after the death of his son's wife he devise it to his said daughters; the devise to the daughters is void, being a limitation after the death of their brother without issue; for it is not to be taken (as objected) that the dying should be without issue living at his death, and so the contingency to happen within the compass of a life; and if it should be intended of such dying without issue, yet the court held it would be void, according to Child and Bayly's case; for though such a devise hath prevailed in case of an inheritance, as in Pells and

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Brown's case, yet it hath not yet prevailed in case of a term; and the court said they would not extend the devises of chattels to make perpetuities farther than they had been.

3 Lev. 22, 23, Gibbons and Summons. But *qu.* of this case, for it does not seem to be law; and vide the case of Sanders and Cornish, Roll. Abr. 612; Cro. Car. 230, and Cro. Ja. 461, a case cited where A possessed of a term for years devised it to his wife for life, and then that J his son should have the occupation thereof as long as he had issue; and if he died without issue unmarried, in the same manner to another son, the remainder over; this remainder upon the death of the son unmarried was adjudged good; for here the limitation is, if he dies without issue unmarried, then the remainder over, which is upon the matter, if he dies within the term unmarried, for he cannot have issue unless he marries; and this is a possibility which the law will expect, because it will happen in a life; and there is no difference between the occupation or use of a term or the profits of the land, and the land itself or the lease or farm; for a devise of any of them will carry the whole interest. And vide the following cases.

If a term be devised to A and the heirs of his body; and if A die without issue, living B, then to B; this is a good limitation, the contingency arising within the compass of a life.

Salk. 225, pl. 3; Carth. 266; Comb. 208, Lamb and Archer.

A devises to his son, his executors, administrators, and assigns for ever, a leasehold estate; but if he died before twenty-one without issue, in that case he devises it over to his brother; and the question was, whether the remainder over was good? It was objected, that it was a perpetuity, for that the remainder depends on the son's dying without issue; for if he die before twenty-one, though he leaves a child, and that child afterwards die without issue, the son may be said to be dead before twenty-one without issue; yet the court held the remainder good.

2 Vern. 151, Martin and Long.

One F being possessed of a term for years devises it to his wife for life, and after her death to R F for her life, and after her death to T F and his children, and then devises in this manner: and if it shall happen the said T F to die before the expiration of the said term, not having issue of his body then living, then to go over to the plaintiff for the residue of the term; the defendant's title was by an assignment of R F and T F of all their estate, right, title, and interest; R F was dead, and T F died without issue; and the plaintiff brought his bill to have an assignment of the term, pursuant to the will. All that was insisted upon for the defendant to difference this case from the Duke of Norfolk's of a term, and of Pells and Brown's case of a fee, was, that this contingency of his dying without issue was not confined to his own death; but that the words *then living* should relate to the words *before the expiration of the term*, and so this went farther than any of the cases had ever yet been carried; for he might have issue for several generations, and yet if such issue failed at any time before the expiration of the term, then it was to go over, and this in a long term tended plainly to a perpetuity, and therefore ought not to be allowed; but by the devise to T F and his children, and the subsequent words, and if he die without issue, the whole term and interest was vested in him, and he might dispose thereof as he thought fit, and it could not be restrained by the words *then living*, which related only to the words *before the expiration of the term*, and so the remainder over to the plaintiff void. But for the plaintiff it was argued and agreed, that the remainder to him was good by way of executory devise, and that the words *then living* must relate to the time of his death; for otherwise there would be no difference between this and the common

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limitations of a term to one, and the heirs or issue of his body, and if he dies without issue, the remainder to another, which is void; for there it must likewise be intended, if he die without issue before the expiration of the term, or during the term, since after the expiration of the term he can limit no remainders over, because nothing remains then to be limited; but here, it being limited over upon this contingency, if he die without issue then living, viz., at the time of his death, it is good, because this contingency must happen within one life, or not at all; for upon his death it will be certainly known whether he leaves issue or not: if he does, the contingency cannot take place; if he does not, then it may; and this being to happen within the compass of a life, is good as an executory devise, and differs in nothing from the Duke of Norfolk's case, save only that there it was by *proviso*, and also upon the death of another person without issue then living; and here it is upon his own death, which makes no manner of difference.

Abr. Eq. 193, Fletcher's case.

A man possessed of a term for thirty-one years devises it to his son H during his minority, and if he attains to his age of twenty-one years, then to him during his life, if the term shall so long continue, and no longer, and after his death, to such of his issue to whom he shall devise it; but if he die without issue, then to his other son G for the residue of the term. H afterwards died without issue, or without making any disposition of the residue of the term; and the only question was, whether by the words of this will the whole term did not vest in H? and it was decreed, that it did not; for the words *die without issue* have a twofold meaning, either without issue at the time of his death, or without issue, whenever the issue fails; and though in case of an inheritance, if lands are devised to one, and if he die without issue, the first devisee takes an estate-tail by implication, which shall go to his issue, and they shall take in a course of descent to all succeeding generations, yet, to make such a construction in the case of a term, which cannot come to the issue by descent, is unnecessary; and therefore, in such case, the other construction of the words, which is most natural and obvious, shall take place; and it shall be intended only, if he die without issue living at the time of his death; (a) and, consequently, the dying without issue, being confined within the compass of a life, hinders not the remainder over, but it may well take place by way of executory devise, according to former resolutions.

Abr. Eq. 193, 194, Targett and Grant. Vide 2 Vern. 43, 195. The case of Peacock and Spooner, and 2 Vern. 668; Webb and Webb, Abr. Eq. 362; Fitzgib. 317, 320; 1 P. Wms. 432, pl. 121; 10 Mod. 403. ¶ (a) This distinction is now exploded, for it is settled, if the words would, in the case of real estate, have given an estate-tail by implication, they pass the absolute interest in the personal estate. 3 Ves. 99; 6 Ves. 159; 17 Ves. 479; 3 Mer. 183; and see cases *post*, (L) 1, *sub fine*.¶

[One devised money to be laid out in the purchase of freehold estates to be settled on his wife for life; and also gave his wife freehold and leasehold estates for her use; and from and immediately after her decease, he bequeathed the same, and every part thereof in the following manner, viz. to his son R and *his issue lawfully begotten*, or to be begotten, *to be divided amongst them as he thinks fit*: and if my said son shall happen to die, without issue lawfully begotten, my will is, that as well my present freehold and leasehold estates, as the estates hereby directed to be purchased, shall be sold and the money arising therefrom shall be equally divided between

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my brother T R's children, my sister W's children, and my sister P's children. And I hereby order and direct, neither the estate directed to be purchased, nor any of my present freehold or leasehold estates may be sold or disposed of during the life of my wife or my son. One question was, Whether the devise to the brother and sister's children was or was not too remote, as depending upon the son's dying without issue? And it was held to be a contingency with a double aspect; in one event a gift to the children of the son, if he should have any, and if he should not have any child, that then the estate should be sold for the purposes of the will. That he did not mean the estate to go as an estate-tail, but that the children should take distributively, in which case they must take as purchasers, and the consequence was that R took only an estate for life. He had a power to divide, and it was sufficient that the division must take place at the death of R, which was within the rules. Two events were provided for: 1st, There being children of Richard, in which case they would take. 2dly, There being no children, in which case the estates vested in the persons described.

Hockley v. Mawbey, 3 Br. Ch. Rep. 82.]

{D L, being possessed of a term for years, devised it to A for life, remainder to his first and other sons successively in tail, remainder to his daughter, and if A should have neither son nor daughter then to J S. A died, never having had a son or daughter. And the devise over to J S was holden to be good. For though a remainder after an estate-tail of a term is void, when the estate-tail is vested, yet if that is limited on a contingency, which does not happen, and therefore the estate-tail never vests, the remainder is good.

2 P. Wms. 686, Stanley v. Leigh; C. T. T. 245; Sabarton v. Sabarton, 1 P. Wms. 98; Higgins v. Dowler, and the cases referred to by Mr. Cox in the note. 7 Term, 557, Wilkinson v. South; 3 Ves. J. 613, Phipps v. Lord Mulgrave, *acc.*}

||The words "dying without issue," when uncontrolled, mean a general failure of issue; so that if there is a devise of a chattel to A, and if he die without issue, remainder over, the whole interest vests in A.

Burford v. Lee, 2 Freem. 210; Anon. Ibid. 287; Green v. Rod, Fitz. 68; Beauclerk v. Dormer, 2 Atk. 313; Saltern v. Saltern, 2 Atk. 376; Earl of Stafford v. Buckley, 2 Ves. sen. 181; Att. Gen. v. Hird, 1 Br. C. C. 169; Bigge v. Bensley, 1 Br. C. C. 190; Glover v. Strothoff, 2 Br. C. C. 33; Gray v. Shawne, 1 Eden, 153; Jeffrey v. Sprigge, 1 Cox, 62; Everest v. Gell, 1 Ves. jun. 285; Boehni v. Clarke, 9 Ves. 580; Barlow v. Salter, 17 Ves. 480, Elton v. Eason, 19 Ves. 73; Donn v. Penny, 1 Mer. 20; Lyon v. Mitchell, 1 Mad. 467; Kinch v. Ward, 2 Sim. & Stu. 409.

WORDS "DYING WITHOUT ISSUE" RESTRAINED BY IMPLICATION.

But, with respect to executory devises of terms of years, or other personal estates, the Court of Chancery has very much inclined to lay hold of any words in the will to tie up the generality of the expression of *dying without issue*, and confine it to dying without issue living at the time of the persons' decease.

Fearne's C. R. 471.

Thus, in a devise to A for life, remainder to his children, and in default of such issue, over; issue means children.

Pleydell v. Pleydell, 1 P. W. 748. See Amb. 125.

So, where there was a bequest to S absolutely, but by a codicil testator declared it should only be for the natural life of himself and his wife, provided they had no issue; and that at their death it should become a part of

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the residue ;—Sir John Leach, V. C., said, “ The failure of issue is plainly confined to the death of the survivor, by the direction that the bequest to S is to become a part of the residue at their death.”

Rackstraw v. Vile, 1 Sim. & Stu. 604.

But the circumstance of there being a devise over for life, in default of issue of the first taker, will not alone restrain those words.

As where there was a devise to E for life, with remainder in default of issue to C for life, with remainder in default of issue to F for life, with remainder in default of issue to R ; the remainders after the limitation to E were held to be too remote. “ Where the entire interest is given over, the mere circumstance that one taker is confined to a life-interest, furnishes no indication of an intention to make the whole bequest depend upon the existence of that person at the time when the event happens, on which the limitation over is to take effect.”

Boehm v. Clarke, 9 Ves. 581. See 17 Ves. 483.

Where, however, nothing but an interest for a life or lives is given over, a failure of issue must necessarily be intended a failure within the compass of the life or lives.

17 Ves. 483 ; 7 T. R. 589 ; 3 Bing. 17.

Testator bequeathed personal estate to his two natural children, equally between them ; on the death of either before twenty-one, and without issue, his share to go to the survivor ; “ but in the event of both dying without issue,” their shares were given over. Both the children died under twenty-one and unmarried. Lord Erskine, C., held that the gift over was not too remote, as it was intended to take effect if both died under twenty-one and without issue.

Kirkpatrick v. Kirkpatrick, 13 Ves. 476. See *Thackeray v. Hampson*, 2 Sim. & Stu. 214, 217, and Amb. 122.

Testator bequeathed all his personal estate to his daughter, who was an infant, she paying an annuity to his wife. But if the daughter died before twenty-one, the wife was to have 400*l.* ; and from and after the daughter's decease, without issue of her body, testator gave his personal estate to his brother, he paying the 400*l.* Held, that this was a bequest to the brother if the daughter died without issue under twenty-one, and therefore good. It was observed, the wife was to have the 400*l.* if the daughter died under twenty-one, and the brother being to pay it, if she died without issue, the estate must come to him at the same time as a fund out of which it was to be paid.

Balguy v. Hamilton, Mose. 1.

Testator bequeathed unto his daughter all his worldly substance, provided she married with the consent of his executors therein mentioned. But in case she should marry without consent, or die without issue, he appointed that all his said substance should return back to his executors, to be by them distributed among several persons therein named. Held, that the bequest over was to take effect on the death of the daughter without issue then living.

Keily v. Fowler, 6 Br. P. C. 309.

Testator devised a term to his son George and his wife for their lives, and after the decease of the survivor, to the children of George, share and share alike, but if George should die without issue of his body, then over. Held, that the devise over was not too remote ; on the ground that these words

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would only have given an estate-tail by implication, in the case of real estate, and therefore the intention of the testator might be considered.

Doe v. Lyde, 1 T. R. 593; S. C. cited 1 Ves. sen. 286; *Wilkinson v. South*, 7 T. R. 555. But see *Chandless v. Price*, 3 Ves. 99, in which Lord Loughborough said, that the distinction between words which give an express estate-tail and those which give such an estate by implication is exploded; and that in both cases the limitation over is too remote. See, too, 6 Ves. 159; *ex parte Sterne*, 17 Ves. 479; *Barlow v. Salter*, 3 Mer. 183.

Where C, having two nephews A and B, devised the surplus of his personal estate to them, and if either of them should die without children, then to the *survivor*: It was held, that dying *without children* must in this case be taken to be dying without *children then living*; because the immediate limitation over was to the *surviving* devisee.—So, where A devised portions to his four children, payable at their respective ages of 21 or marriage, and in case any of them should die before the time of payment, or *without issue*, then his or their portion to go to the *survivors or survivor*, and his heirs: it was held, this could not be a dying without issue generally, but so as the *survivor* might take; which must be during the life of some or one of them, and so was good.

1 P. Wms. 534, *Hughes v. Sayer*; Chan. Prec. 528, *Nicholls v. Skinner*; {1 Bay. 80, *Keating v. Reynolds*, *acc.* See 9 Ves. J. 580, *Boehm v. Clarke*.}

And where the testator made his wife executrix, and gave her all his goods and chattels, provided that if she should die *without issue* by the testator, *then after* her decease 80*l.* should remain to the testator's brother; the words *then after* were taken to mean *immediately after*, and, consequently, to restrain the dying without issue to the time of her death.

Pinbury v. Elkin, 1 P. Wms. 563. Vide *Paine v. Stratton*, 3 Br. P. C. 257; and *Brooks v. Taylor*, Mosel. 188.

{On the same principle, where a bequest of a term of years was made to "A and the heirs of his body and to their heirs and assigns for ever, *but in default of such issue then after his decease* to B and his heirs," the limitation over to B was holden to be good.

7 Term, 555, *Wilkinson v. South*.}

So, where a term was devised to A for life, remainder to such children as the testator should leave at the time of his death, and if all such children should die without *leaving* any issue, then to B, this was a good executory devise to B, and the words "Without *leaving* any issue" were understood to mean "*leaving any issue* at the time of their deaths." Again, {a} where one devised a personal estate, in trust, to be settled on his daughter or the heirs of her body, but in case his said daughter should die *leaving* no heirs of her body, then over to others; Lord Hardwicke decreed the limitation over good, upon the contingency of the daughter's dying without issue *living* at her death; as he considered the word *leaving* as relating to that time. So in another case, {b} where the testatrix gave to her two nieces F and L each one half of the produce of bank stock, and to *their issue*, and if either of them should happen to die before the legacy became due to her, and leave no issue, the share of her so dying should go to the survivor; the words *and leave no issue* were construed "*leave no issue living* at the time of her death."

3 P. Wms. 258, *Atkinson v. Hutchinson*. Vide same point, 1 P. Wms. 663, *Forth v. Chapman*; {and 9 Ves. J. 197, *Crooke v. De Vandes*. See 7 East, 271, n. (e)}; {a} *Martin v. Long*, Prec. Chan. 15; 2 Atk. 642, *Read v. Snell*. Vide *Fairfax v.*

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Heron, *supra* S. P. as to freehold; {also 3 Term, 143, Porter v. Bradley; 7 Term, 589, Roe v. Jeffery. And see 1 John. Rep. 440, Fosdick v. Cornell;} {b} 3 Atk. 396, Lampley v. Blower.

BY A BEQUEST TO THE SURVIVOR.

A bequest over to the survivor of two persons, after the death of one without issue, *prima facie* affords a presumption that an indefinite failure of issue was not contemplated by the testator; for it will be intended that the survivor was meant individually and personally to enjoy the legacy, and not merely to take a vested interest, which might or might not be accompanied by actual possession.

Thus, where personal estate was bequeathed to A and B, and if either of them should die without children, then to the survivor; it was held, that dying without children must in this case be taken to be dying without children then living, because the immediate limitation over was to the surviving devisee.

Hughes v. Sayer, 1 P. W. 534.

But if the survivorship be necessary only to vest the interest, and to render it transmissible, the objection of remoteness is not at all obviated, and the restrictive presumption does not arise. Thus, where there was a bequest of personal estate to A and B, with a gift over, in case either of them should die without issue, to the survivor, his executors, administrators, or assigns, this gift over was held to be too remote.

Massey v. Hudson, 2 Mer. 130. See Gray v. Shawne, 1 Eden, 157.

§ A testator devised as follows: "I give to my three sons, John, James, and William, all my other lands; also my will is, that if either of them should die without children, the survivor or survivors to hold the interest or share of each or any of them dying without children as aforesaid:" held to pass an estate in fee-simple to the devisees, determinable on the contingency of their dying without issue, and, on that contingency, vesting in the survivor or survivors by way of executory devise.

Richardson et ux. v. Noyes et al., 2 Mass. 56.

When an estate is limited to several and the survivors, a share or interest which has once survived, does not again survive, it follows, that upon the death of the person to whom it survived, intestate, it must descend and vest in the heirs at law.

Lewis v. Clairborne, 5 Yerg. 369.

A BEQUEST OVER "WITHOUT LEAVING ISSUE."

In the case of a bequest of personal estate, it is now settled that the words "without leaving issue" mean, without leaving issue living at the death of the party, to the failure of whose issue the words relate. This is the result of the following cases.

9 Ves. 204. See Daintry v. Daintry, 6 T. R. 307, *contra*, *sed quere*. § The words *without leaving issue behind him*, are equivalent to *without leaving issue at his death*. Ide v. Ide et al., 5 Mass. 500. See as to the meaning of the words "without issue," "dying without issue," Moseby's adm'r. v. Corben's adm'r., 3 Marsh. Kty. R. 289; Moore's Trustees v. Howe's Heirs, 4 Monr. 202; Newton et al. v. Griffith et al., 1 Har. and Gill, 111; Dallam v. Dallam's lessee, 7 Har. & Johns. 220; Pratt's Lessee v. Flamer et al., 5 Har. & Johns. 10; Eichelberger v. Barnitz, 9 Watts, 450.

Devise of a term to wife for life, remainder to such children as the testator

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should leave at his death; and if all his children should die without leaving issue, then to A.

Atkinson v. Hutchinson, 3 P. W. 258.

Devise of a term to A and B, and if either of them die, and leave no issue of their respective bodies, then to C.

Forth v. Chapman, 1 P. W. 663; Lampley v. Blower, 3 Atk. 396; Sheppard v. Lessingham, Amb. 122.

A devise over, "without leaving any issue behind them."

Sheffield v. Lord Orrery, 3 Atk. 282.

A devise of a term to P, and the heirs lawful of him for ever; but in case he should happen to die, and leave no lawful heir, then over.

Goodtitle v. Pegden, 2 T. R. 720.

And a different signification is given to the word "leaving," with respect to real and personal estate, though in the same devise; as to the former, it does not prevent the devisee taking an estate-tail, but as to the latter, as we have seen, it restrains the word issue, so as to include only those who are living at the death of the first taker.

Forth v. Chapman, 1 P. W. 664; Crooke v. De Vandes, 9 Ves. 197.

§ An express devise of land in fee-simple to one, with a devise over, if he die without issue, or without leaving issue, shall be a devise in tail to the first devisee, with remainder over expectant on the determination of the estate-tail; and the words *dying without issue*, or *dying without leaving issue*, are understood as an indefinite failure of issue after the death of the first devisee.

Ide v. Ide et al., 5 Mass. 500.

"WITHOUT HAVING CHILDREN."

But the words "without having children," do not receive the same construction as "without leaving children."

Testator bequeathed a term to A, and if she happened to die without *having* children, then to B. A had children, but they died in her lifetime; it was however held, that the absolute interest vested in A on the birth of a child did not go over on her death, although the children died before her.

Weakley v. Rugg, 7 T. R. 322. See Bell v. Phyn, 7 Ves. 453. § By the words "die without children," is intended a dying without children at the death of the devisee. Morgan v. Morgan, 5 Day, 517.

ALTERNATE BEQUESTS.

Certain moneys were bequeathed, that A should receive the interest during his life, and after his decease, testator gave the said moneys to the issue male of A, and in default of such issue, he gave the same to B, C, and D, share and share alike. A having survived the testator, died intestate and unmarried. Lord Thurlow held, that A was only entitled to a life-interest in the fund; that it was only on a contingency that it would have gone to his issue, who would have taken as purchasers; and that B, C, and D took the fund in the alternative of that contingency.

Knight v. Ellis, 2 Br. C. C. 570. But see Rawlins v. Goldfrap, 5 Ves. 440.

A limitation of the annual produce to a parent, and of the capital to his children, with a gift over, in case the parent dies without children, must mean if there are none at the death of the parent, for then the provision is intended to be made.

Bell v. Phyn, 7 Ves. 459.

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So, where there was a devise of a term to A for life, remainder to his first and other sons in tail, remainder to his daughters as tenants in common; and in default of daughters, or in case of their death before twenty-one or marriage, then to Q, and A died without ever having children;—the devise to Q was held good.

Stanley v. Leigh, 2 P. W. 680; Maddox v. Staines, 2 P. W. 421.

But Sir W. Grant held, that if personal estate were devised to A for life, with a remainder to the heirs of his body, that would give the absolute interest: and no limitation over would take effect.

Browncker v. Bagot, 19 Ves. 582; 1 Mer. 280; and see 7 Term R. 557.

A devise of leasehold estates to R, and to his issue lawfully begotten, to be divided amongst them as he thinks fit; and if R shall happen to die without issue lawfully begotten, the premises are to be sold. Lord Thurlow said, "I think the testator intended and has expressed his intention of giving a contingency with a double aspect; in one event, a gift to the children of R, if he should have any; and if he should not have any child, that then the estate should be sold for the purposes in the will."

Stockley v. Mawbey, 3 Br. C. C. 82.

A devise of leaseholds to S P, and to the heirs of his body lawfully begotten, and to their heirs and assigns for ever; but in default of such issue, then after his decease to T W absolutely. Held to be a limitation, with a double aspect, to S P, and to the issue of his body, if there were any such issue living at his death; if not, then over.

Wilkinson v. South, 7 T. R. 555.

So, there was a similar decision on a bequest to S and her children, and in default of such issue, and in case of her death, then over.

Gawler v. Cadby, Jacob, 346.

But on a devise of real and personal estate to B for life, without impeachment of waste, remainder to the heirs of his body as tenants in common; and in case of his decease without issue of his body, then over;—Sir W. Grant held, that B took an estate-tail in the real estate, and an absolute interest in the personal.

Bennett v. Earl of Tankerville, 19 Ves. 170.

And the same judge made a like decree, on a similar devise to A and his male issue, for want of male issue after him to B.

Donn v. Penny, 19 Ves. 544.

A GIFT EXCEEDING THE LIMITS OF A LIFE OR LIVES IN BEING, AND
TWENTY-ONE YEARS AFTER, TOO REMOTE.

A bequest upon trust, in case W R R (testator's grandson) should die without issue living at his death, to pay and transfer personal estate unto and amongst all and every the brothers and sisters of W R R, share and share alike, upon his, her, or their attaining twenty-five, "if a brother or brothers, and if a sister or sisters, at such age or marriage." Held, that all the brothers and sisters of W R R living at his death were included in this limitation, but that a vested interest was not given till twenty-five, and consequently that the gift was too remote.

Leake v. Robinson, 2 Mer. 363, S. P.; Bull v. Pritchard, 1 Russell, 213.

A devise to A in fee, and if he dies without issue lawfully begotten, to B; the devise to B is too remote, and therefore void.

Den, ex dem. Sutton v. Wood, Conf. Rep. 202.

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Testator devises a negro and a horse to B, and if B should depart this life without heir lawfully begotten of her body, that the negro and horse should belong to C. The limitation to C held to be too remote.

Matthews v. Daniel, 1 Mur. 42; S. C. 2 Hay. 346.

A devises lands to B for life, and after the death to John, son of B, and his heirs for ever, and, if no heir, then over: held that the limitation was too remote, and that the estate in fee vested in John.

Bryant v. Deberry, 2 Hayw. 356.

A devises his estate to his daughter B, and "if B dies without having heirs," then over: the limitation over is too remote, and the whole estate vests in B.

Bryson v. Davidson's Executor, 1 Murph. 143. See *Davidson v. Davidson's Executors*, 1 Hawks, 163.g

A REMAINDER AFTER A BEQUEST TO AN UNBORN CHILD, VOID.

A devise of leaseholds to A for ninety-nine years, if he should so long live, remainder to his first son, then unborn, for ninety-nine years, if he should so long live, and so on in tail-male to such first son lawfully issuing for ever, and for want of such issue of such first son, remainder over.—Held, that A took an estate for ninety-nine years in the leaseholds, determinable on his death; and that upon his death, leaving one or more sons, his first son would take what should then remain of the term, and that all the subsequent limitations were void, as too remote.

Beard v. Westcott, 5 Barn. & A. 801; S. C. Turn. & Russ. 25; and see *Gilb. Us. by Sugden*, p. 260, note (2).

EFFECT OF THE FIRST TAKER BEING RESTRAINED FROM DISPOSING OF BEQUEST.

A bequest to A for life, and at his decease to his executors, administrators, and assigns. A gift over, in case A should attempt to dispose of the property bequeathed, is inconsistent and void.

Bradley v. Peixoto, 3 Ves. 323.

So, if there be an absolute bequest to A, with a gift over, in case he shall die intestate, A has the absolute interest, and may dispose of it in his lifetime.

Cuthbert v. Purrier, Jacob, 415; and see *Ross v. Ross*, 1 Jac. & W. 154.

So, a bequest to W C for life, with a restriction against alienation, and after his decease to the heir male of his body, and so on in succession to the heir at law, male or female, was held to give W C an absolute interest; for although the intention was to give W C only a life-estate, there was nothing to show that "heir-male" was not used in its technical sense.

Britton v. Twining, 3 Mer. 176.]]

(L) Of void Devises; And herein,

1. *Of devising what the Law already gives, or what the Policy of the Law will not admit.*

ALTHOUGH the judges are favourable in their construction of wills, that, if possible, the intention of the testator may prevail, yet where the testator makes the same disposition of his estate as the law would have done, had he been silent; or where his disposition is made in such general terms that his intention is altogether doubtful and uncertain, and cannot be collected

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from the words of the will; or where the testator is establishing a settlement against the reason and policy of the law; in these cases the judges have thought fit to reject the will.

Therefore if a devise be made to J S and his heirs, who is heir at law to the devisor, this is a void devise, and the heir shall take by descent as his better title; for the descent strengthens his title by taking away the entry of such as may possibly have right to the estate, whereas if he claims only by devise, he is in by purchase.

Roll. Abr. 626; Hob. 30; Plow. 545; Godb. 461. || Vin. Abr. *Descent*, (1). || *Parsons et ux. v. Winslow*, 6 Mass. 169; *Enlaws v. Enlaws*, 3 Marsh. 230; *French v. M'Ilhenny*, 2 Binn. 19.

So, if a man devises lands to his wife for life, remainder to J S, who is heir at law in fee; this is a void devise to J S, because after the disposition of the particular estate, the reversion would have come to him by descent, as heir at law.

2 Leon. 101; *Baspole's case*, Hob. 30; Roll. Abr. 626, (1), pl. 2, *Preston and Holmes*.

|| So, where a man devised lands to his wife in fee; and after his death she married again, having previously settled the lands upon herself for life; remainder to T H, her only son by the first marriage, for life; remainder over to his issue in strict settlement; remainder to such persons as she, the wife, should by deed or will appoint. Afterwards she devised *all her estate* to T H, charged with several legacies. Subsequently, T H died without issue, and the question was, whether the land should descend to his maternal or paternal heir: that is, whether the devise, operating as an appointment, vested the lands in him as a purchaser, or he took them by descent. The court of C. P. certified that the lands descended to the maternal heir of T H, for he was in by descent. An appointment by will, it was observed, is subject to the same rules as a common devise.

Hurst v. The Earl of Winchelsea, 1 Bl. 187. See the remarks on this case, *Sugden on Pow.* 323. The same rule applies to copyholds. *Smith v. Trigg*, 1 Str. 487.

The heir does not take by purchase, unless the devise gives him an estate different in quantity or quality from what he would have taken if the land had not been devised. Hence, if land be devised to the heir in fee charged with debts; or with legacies or annuities with power of entry, possession, and perception of the rents to secure payment, the heir takes the land exactly as he would have done had he not been mentioned in the will, and therefore he takes by descent. The right of possession given to the legatees can only be considered in the nature of a security, or means of enforcing the payment of the legacy.

Fearne's Post. 229; *Watk. on Descents*, 268, [174].

Thus testator devised to his eldest son and heir at law in fee, upon condition that he would pay certain sums to testator's other children; and if he refused payment thereof, they, the other children, were to have the estate to them and their heirs. Held, that the heir took by descent.

Hainsworth v. Pretty, Cro. Eliz. 833, 919.

Testator devised lands to his wife *durante viduitate*, with a power of granting building leases, and charged with an annuity to testator's daughter for her life; upon wife's marrying again, testator devised the lands to his only son and heir, charged with the daughter's annuity, and an annuity for the wife for life; after the wife's decease he devised the estates to his son,

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charged with an increased annuity to the daughter; and, after the decease of the survivor of the wife and daughter, he bequeathed 1500*l.* for the children of the daughter, to be paid within one year; and in default of payment thereof, or of daughter's annuity, he devised all the lands to a trustee, his executors, administrators, and assigns, to raise the said sums out of the rents, or by sale or mortgage; "and subject to the said several charges and trust he gave the said lands, after the decease of his wife, to his said son, his heirs, executors, administrators, and assigns." Held, that the son took by descent.

Chaplin v. Leroux, 5 Maul. & S. 14. See Emerson v. Inchbird, 1 Ld. Raym. 728; Clarke v. Smith, Com. R. 72; Allen v. Heber, 1 Bl. 22; Serjeant Williams's note, 2 Saund. 8 d; Co. Lit. 12 b, note (2); Watk. on Descents, 268; 1 Barn. & A. 547.]

A, seised of lands on the part of his mother, devises them to his executors for sixteen years, for payment of his debts, and after devises them to his heir at law *ex parte materná*; this is a void devise to the heir at law; for though it was urged, to support the devise, that if it obtained, the heir of the part of the father might in the end inherit, which he could never do if the devise be rejected; yet they adjudged the devise to be void, because there is no alteration made in the tenure of the estate; nor is the quality thereof anywise altered; but whether the devisee takes either by descent, or the will, it is a fee-simple, and it were but *actum agere* to make him take by will.

3 Lev. 127, Hedger and Row.

But where another estate is created by the will than would descend to the heir at law, or where the quality of the estate is altered by the devise, there the disposition by the will shall prevail, though it be made to the heir at law. Thus, where a man had issue a son and a daughter, and devised that his land should descend to his son, and if he died without issue of his body, then the land to go over, &c.; the son by this will took an estate-tail, though heir at law to the devisor, because here is an estate-tail created by the will; whereas a fee-simple would have descended, which if the devisee were allowed to take, it would make the remainder over void.

Hob. 29, 30, Cownden and Clerk, Moor. 860; Godolph. 461; Roll. Abr. 610; [Watk. on Descents, 271.]

So where a man has issue only two daughters, and devises his lands to them and their heirs; this is a devise to the heir at law, (for so are the daughters,) and yet good, because the devise makes them joint-tenants, in which survivorship takes place; whereas had they taken by descent, they had been coparceners, and therefore the will altering the quality of the estate ought to prevail.

3 Lev. 127; Cro. Eliz. 431; 2 Sid. 53, 780, Packman and Cole.

[So, where A having two daughters, one of whom died, leaving a son, devised his land to the son of his deceased daughter; the son took as a purchaser. For "by this devise there was an alteration of the estate; for if the land had descended, both the daughters would be but one heir, and would take as coparceners; but when a devise is made of all to one, or the son of one of the daughters, then the devisee takes by purchase in a different manner from what would be, in case the land had descended."

Watk. Descents, 274; Com. Rep. 123, ca. 86, and 2 Ld. Raym., Reading v. Royston.

So, if one devise to his eldest son and a stranger, it is a good devise; and they take as *joint-tenants*.

Godb. 94, ca. 105, and see 1 H. Bl. 1, Dally v. King.

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But if the testator devise to his son and a stranger, or two or more of his sons, one only being his heir *in common*, it should seem that the son being heir shall take his portion by descent.

Watk. on Descents, 275; Fearn Post. 130, 132.

Whenever a person devises an estate to his heir at law, and limits a remainder over, the heir shall take *by the devise*, and be in by purchase. But if the particular estate be devised to a stranger, and the remainder over to the heir in fee, the heir is in by descent.

Watk. Descents, 272.

In the case of an executory devise the heir at law shall take the estate by descent, until the contingency arise; for until that event the fee is not affected. Hence, then, a devise to the heir of the same estate which he thus takes is void.

Thus, a person devised to his wife till the heir should attain the age of twenty-four years; and that at that age the heir should have the lands to himself and his heirs for ever; with a limitation over if the heir died under twenty-four. It was adjudged that the heir, having attained twenty-four, was in by descent.

Hinde v. Lyon, Dyer, 124 a, pl. 38; 2 Leon. 11; 3 Ibid. 64, 70, S. P. Doe v. Timins, 1 Barn. & A. 530. See Scott v. Scott, Amb. 383, cont. But see note Ibid. (2d edit.); and 1 Eden, 458, S. C.

If the *quality* of an estate be altered, the devise is not void; as if lands be vested in trustees to pay debts and legacies, and then to convey to the heir at law, the descent is broken, and the heir takes by purchase.

Swaine v. Burton, 15 Ves. 363.]

A devises his land to B for life, the remainder to C in tail, the remainder to the next heir male of the devisor, and the heirs male of his body; B and C died without issue; the next heir of the devisor was a daughter, and she was adjudged to have the land by way of reversion and descent; and though she have a son born afterwards, he shall not take the land from her.

Hob. 33; Perk. 506.

§ When a devise of land is void by the rules of law, the land goes to the heir, and not to the residue devisee, unless such appears to be the intention on the face of the will; (a) because the heir is not to be disinherited but by express words or necessary implication. (b)

(a) Lingan v. Carroll, 3 Har. & M.H. 333. (b) Berry v. Berry, 1 Har. & J. 421. §

|| DEVISES VOID AS TENDING TO A PERPETUITY. ||

Also, devises are rejected that are against the reason and policy of the law. Hence devises, as well as all other settlements which tend to introduce a perpetuity, are void; for wills, though favourably expounded, are yet to be construed according to the common rules of the courts of law and equity. Therefore a devise to J S and his heirs, the remainder to J D and his heirs, is void, because the law in no case will allow a limitation of a fee upon a fee; because by the devise to J S, and his heirs, the devisor has transferred the whole estate to him, and then the limitation over must be void: nor can this devise be good by way of future interest, or a remainder to vest upon a contingency, because no man can say when the heirs of J S will fail; and to allow the remainder to J D to be good upon such a distant contingency, is to perpetuate the estate in the family of J S to preserve a remainder in J D, which probably may never vest.

Co. Lit. 18; Dyer, 33; 3 Chan. Ca. 35; vide *supra*, letter (I).

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¶To determine whether any given limitation be valid, it must first be considered whether it is a *remainder* or an *executory devise*. Now it is a general rule that a limitation which *may* take effect as a remainder shall not be construed an *executory devise*. And this rule is not affected, though the probability is that a contingent estate will not take effect during or by the time of the determination of the particular estate; for it is sufficient if it *may* do so.

Fearne, C. R. 394, and see Gilb. Us. by Sugden, 260, note.

If, then, a testator by his will limit a particular estate for life which vests in possession on his death, and devises an estate in remainder on some contingency which *may* happen during the continuance or immediately on the expiration of the estate for life, it matters not how remote such contingency may be; for, if the remainder vests at all, it must vest before or at the instant of the death of the tenant for life, so that there is no question as to a perpetuity.

See Fearne, C. R. 561, note (h) II.

So, if the particular estate be an estate-tail, testator may limit remainders on contingencies however remote; for neither in this case does the reason of the law as to perpetuity apply; the inheritance is under the control of the tenant in tail, and may be aliened by him.

Fearne, C. R. 522, note by Butler.

But it seems there is one species of contingent remainder, an estate to a child of an unborn person, which the law will not under any modification endure. "An estate may be limited by way of contingent remainder to a person not *in esse* for life, or as an inheritance; yet a remainder to the issue of such contingent remainder-man as a purchaser is a limitation unheard of in law, nor ever attempted, as far as I have been able to discover."

Fearne, C. R. 502. See opinions of Mr. Booth and Mr. Charles Yorke, 2 Cas. & Op. 432; Lord Chancellor Northington, 1 Eden, 415, 416. See *Chapman v. Brown*, 3 Burr. 1626.

"This is called a possibility upon a possibility, which Lord Coke tells us is never admitted by intentment of law."

Fearne, C. R. 251, 561, note (h) II.

But though an estate cannot be limited to the issue of an unborn person to take as purchasers, yet it is certain that successive remainders to persons not *in esse*, who are not in the relation of father and son, may be valid.

Thus:—A devise to Albemarle (a person *in esse*) for life; remainder to trustees during his life to preserve contingent uses; remainder to the first and other sons of Albemarle (he having no issue) in tail-male; remainder to the next younger son or any other younger son of F B (the father of Albemarle, who had then no other younger son than Albemarle) who should attain the age of twenty-one years, for life; remainder to trustees during his life as before; remainder to the first and other sons of the body of such next younger son who should live to attain the age of twenty-one years successively in tail-male; with remainders over.

Albemarle died without issue. F B had another younger son, Thomas, who was born after the death of the testator, and who attained twenty-one in the lifetime of Albemarle. Mr. Booth wrote, "Thomas is tenant for life, with remainder to trustees during his life to preserve the contingent remainders, as far as they are good in point of law." And in another part

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of the same opinion the learned gentleman clearly held, that such contingent remainders subsequent to the estate of Thomas were not valid. Of the same opinion was Mr. Charles Yorke, who thought that Thomas on coming *in esse* took a contingent remainder, and that the remainders over were void. In this case we observe that, notwithstanding the prior contingent estate to the issue of Albemarle, the contingent estate to his unborn brother for life was held good. But here a remark by Mr. Yorke. He said, "A contingent remainder must vest during the life, or immediately upon the death, of the devisee of the particular estate which precedes it, *"such devisee being in esse at the time when the will speaks"*; but it cannot be made to wait or expect the vesting of another estate, prior in limitation, and equally contingent with itself. The law does not allow a contingency to depend upon a contingency, or one possibility to be thus raised upon another." Hence, then, it may be urged, if Albemarle had died after the testator, and before Thomas attained twenty-one, but leaving a son in whom an estate in tail-male would have vested, and then such son had died after Thomas had attained twenty-one and without issue, yet the remainder to Thomas would have been void, because it vested not during the life of Albemarle, but was saved by a possibility, Albemarle's having issue. If this be correct, it is obvious it affords a rule which may oftentimes be of great importance in the construction of devises of limitations of contingent remainders.

2 Cas. & Op. 437; 2 Cas. & Op. 440.

John, Duke of Marlborough, devised real estates to several persons for life, with remainders over to their first and other sons respectively in tail-male, with a clause that, on the birth of each and every son to be born of the tenants for life, certain trustees should revoke the uses limited to their respective sons in tail-male, and in lieu thereof limit the premises to the use of such sons for their lives, with immediate remainders to the respective sons of such sons severally and respectively in tail-male. Lord Northington, C., said, "This clause being directory and compulsory to the trustees, (for every legal direction this court will compel a trustee to perform,) the provision is in substance neither more nor less than this—a clause by which the testator "makes his great-grandson (who was at the time of the making of the will unborn) tenant for life, with a limitation to the sons of such grandson as purchasers in tail." His lordship declared, that the clause of revocation and re-settlement, as tending to a perpetuity and as repugnant to the estate limited, was void and of none effect.

Duke of Marlborough v. Earl Godolphin, 1 Eden, 404; S. C. 5 Br. P. C. 592.

So C M conveyed to the use of himself for life; remainder to trustees for the term of 1000 years; remainder to Sir H M for 99 years, if he should so long live; remainder to trustees to preserve contingent remainders to his first and other sons in tail-male, with remainders over. And the settler directed that the trustees of the 1000 years' term should, after any contract for alienation by any person on whom an estate was thereby settled, raise a sum of money for the person next in remainder. Sir R. P. Arden, M. R., declared the trusts of the term void, as tending to a perpetuity, and being inconsistent with the rights of the several persons to whom estates-tail were limited by the deed.

Mainwaring v. Baxter, 5 Ves. 457.

So, a testator devised real estate in strict settlement, and bequeathed leaseholds to trustees in trust to pay the rents and profits to the persons for

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the time being entitled under the limitations of the real estate; with a power to the trustees at any time, with the consent of the persons so entitled, or if minors at their own discretion, to sell and invest the produce in real estate to the same uses. By virtue of the limitation of the real estate, the first tenant in tail upon coming *in esse* took the absolute interest in the leaseholds; and the question raised was, whether the power of sale should operate so as to prevent the vesting of such absolute interest till a tenant in tail attained twenty-one years. But Lord Eldon, C., declared that the leaseholds vested absolutely in the first tenant in tail. "I think the power of sale is void; for it may travel through minorities for two centuries; and if it is bad to the extent in which it is given, you cannot model it to make it good."

Ware v. Polhill, 11 Ves. 257; S. C. cited 2 Ves. & B. 64; Phipps v. Kelynge, *Ibid.* 57, 62.

But the usual power of sale in a marriage settlement is not void though it may travel through minorities, because it does not suspend the vesting of the absolute estate in the lands. It was not contended in Ware v. Polhill that the first tenant in tail, on attaining twenty-one, might not have disposed of the leaseholds absolutely discharged of the power of sale, but still the power was void.

See Sugden on Pow. 148, (4th edit.)

An executory devise or bequest is void, if by possibility it may postpone the vesting of the absolute estate or interest in the subject given for a longer space than a life or lives in being and twenty-one years after, allowing a few months more for gestation; or for a longer period than twenty-one years and a few months, without reference to a life or lives in being. This vesting of the absolute estate, the possible postponement of which beyond the allowed limits renders the devise or bequest void, "must be understood of an absolute vesting, or of an estate or interest so vested as to be subject to no ulterior limitation by which it is liable to be defeated."

See 9 Ves. 134; 11 Ves. 283; Butler's note, Fearnie, C. R. 516.

As to the period within which an executory devise must vest, see Bengough v. Edridge, 1 Simons, 173, and the cases there cited; also 1 Sand. U. & T. 197. One of the cases here referred to was peculiar. Testator bequeathed leaseholds to his son Thomas, and upon his death without issue male then living, (which happened,) then to the child with which his wife was *enseint*, in case it should be a son, during his life; and after his decease, then to such issue male or the descendants of such issue male as at the time of his death should be his heir at law; and in case at the time of the death of such child, there should be no such issue male, nor any descendant of such issue male, then living, or in case such child should not be a son, then he bequeathed the same to Phillippa Long, her executors, administrators, and assigns. Testator's wife was at the time of the making of his will, and of his decease, *enseint* with a son, who was afterwards born, but who died without issue. Held, that the gift to Phillippa Long was valid and took effect. Here it is evident that this executory bequest might by possibility have postponed the vesting of the absolute interest during the months which the testator's wife was *enseint*, the life of the son, a period for the gestation of such son's issue male if he died leaving issue *en ventre sa mère*, and, lastly, twenty-one years for the minority of such issue male.

Long v. Blackall, 7 T. R. 100.

If a testator devise lands to A for life, remainder to his first and other

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sons in tail-male, remainder to his daughters in tail-general, and in default of *all* the issue of A he creates a charge, it is void for remoteness;—for it is evident the limitation of the charge not being on failure of the preceding estates, but of *all* the issue of A, it could not take effect as a remainder; and, considered as an executory bequest, its vesting might have been postponed far beyond the allowed period.

Bristow v. Boothby, 2 Sim. & Stu. 465; *Morse v. Lord Ormonde*, 1 Russ. 392, and the cases there cited.

It is to be noted in the above case that the power, which any of the persons seised in possession of a prior estate-tail would have, to bar the charge did not sustain it. Mr. Butler writes, "Speaking generally, no period is too remote for the limitation of an executory estate or interest engrafted on an estate-tail previously limited. If land were limited to A in tail, and if A should have no child who attains the age of twenty-seven years, to B, the limitation to B would be good." This position is undoubtedly correct; but the estate to B is good *not* because it might be barred by A, but because it could not in any event prevent the lands being aliened, so as to create a perpetuity. If the limitation had been to A in tail-male; and, if A should have no child who attains twenty-seven, to B, the limitation to B might be barred by the recovery of A, but nevertheless it would be void as too remote. A might have died leaving an only child, a daughter *en ventre sa mère*, and she might afterwards have died under twenty-seven; thus, the vesting of the inheritance might have been suspended for upwards of twenty-six years, if the limitation to B were to be held good. In order to be good, the executory estate must be limited to take effect on failure of the issue *inheritable* to the estate-tail.

Fearne, C. R. 522 note. See *Benson v. Hodson*, 1 Mod. 108.

If an estate were devised to A in tail-male, remainder upon the death of A without issue generally to B, it is apprehended the limitation to B would be valid, but not as an executory devise but as a contingent remainder. It is obvious, however, that the limitation to B would not be good unless the estate-tail were created by the same instrument.

Jones v. Morgan, 3 Br. P. C. 392; *Fearne's C. R.* Appendix; *Banks v. Holme*, Dom. Proc. cited and stated in note, 1 Russ. 394.

Lands were limited to several persons for life successively, with limitations to their issue respectively, in strict settlement, subject to a trust to accumulate the rents during the minorities of tenants for life and in tail in possession, and to pay the produce of such accumulations to such person or persons respectively as should immediately upon the expiration of such minority or respective minorities as aforesaid, or the death or deaths of such minor or minors as aforesaid, be tenant or tenants in possession, and be of the age of twenty-one years. It was held that this trust was void, because the accumulation *might* have continued for ages, and so long would the absolute interest in the accumulated fund have continued in suspense. Sir W. Grant, M. R., stated the effect of the trust to be the same as if an estate had been limited so as to vest only in the first *descendant* of a person in being who might attain twenty-one, which would of course have been too remote, and void.

Lord Southampton v. Marquis of Hertford, 2 Ves. & B. 54, *Marshall v. Holloway*, 2 Swanst. 432.]

A devised his manors, messuages, &c., to the Drapers' company, and their successors, upon trust to convey to B for life, and to his first son and

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all other his sons for life, and to their issue male for life; and for want of such issue to J S for life, and to his issue male for life, &c., and so to a great number of them for life, and so to convey *toties quoties*; and the court held this attempt to make a perpetual succession of estates for life to be vain and impracticable; however, that there ought to be a strict settlement made, and the intent of the testator followed as far as the rules of law will admit of, and therefore directed a settlement to be made, so that such who were in being should be only tenants for life, but where the limitation was to a son not in being, there he must be made tenant in tail-male.

2 Vern. 737, Humberston and Humberston decreed. [1 P. Wms. 332, S. C.; Godolphin v. Godolphin, 1 Ves. 21, S. P.] || See the decree 1 Cox's P. W. 333. It is rather ambiguously worded, but it must be understood to mean that all the persons named in the will who were in existence at the time of the testator's death were made tenants for life, and not persons born afterwards but before the decree. 1 Eden, 423; 4 Ves. 332, 333; 2 Cas. & Op. 441.||

||So where in marriage articles the intended husband covenanted to settle lands for the son begotten on the wife's body, and to the first son of such first son, with remainders over, and there was one son of the marriage, it was decreed he should have an estate-tail.

Hucks v. Hucks, 2 Ves. sen. 568.

So it was thought by Lord Mansfield and Wilmot, Js., in case of a devise to an unborn person for life, remainder to his first and other sons in tail, that the unborn son of an unborn son could not take; and that, to effectuate the general intention of the testator, the word "son" should be construed a word of limitation, and an estate-tail given to the devisee.

Chapman v. Brown, 3 Burr. 1626. See as to the doctrine involved in this and the following case, Butler's note Fearn's C. R. 204.

So, on a devise to the second son of B (unborn) for life, and after his death, or in case he should inherit his paternal estate, then to *his second son* and his heirs male, with divers remainders over; it was held, that to effectuate the general intent of the deviser such second son would take an estate to him and the heirs male of his body, determinable on the accession of the paternal estate.

Nichol v. Nichol, 2 Bl. 1152. And see the cases 1 Powell Dev. 410, note, (3d edit.)

This doctrine of *cy-près* is not applicable to bequests of personal estate.

Routledge v. Dorril, 2 Ves. jun. 357.||

A devised all the rest of his personal estate by leases in trust, or otherwise, to his three nephews, A, B, and C, and makes them executors, and wills, that they shall give bond to each other, that in case either die without issue of his body, to leave at their death all the said chattels and personal estate to the survivors and survivor of them; and the bill was to have the said bonds given, but was dismissed, being an attempt to entail a personalty.

Abr. Eq. 207, Williams and Williams. A pecuniary legacy cannot be limited after a dying without issue. 1 Bur. Rep. 272.

[And that the limitation of a personal estate to one in tail vests the whole in him, is proved by many cases.

Stratton v. Payne, 3 Br. P. C. 257; Pelham v. Gregory, 5 Br. P. C. 435; Duke of Montague v. Lord Beaulieu, 6 Br. P. C. 255; ||17 Ves. 479; 3 Mer. 183.||

Where one devised that all his money in the government fund should be laid out in the purchase of lands, and settled on his eldest son A and *the heirs male* of his body, remainder to the second son C and the heirs male of

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his body; and bequeathed the rest of his personal estate to A and *the heirs male of his body*, remainder over in the same manner; Lord Chancellor held, that the personal estate (viz. the residue after what was to be laid out in purchase of lands) could not be entailed, but the whole vested in the eldest son.

1 P. Wms. 290; *Seale v. Seale*, Pre. Chan. 421.

So, where long exchequer annuities for ninety-nine years were given by will to trustees for the residue of the term, *in trust* for E for so many years of the said term as she should live; afterwards to the plaintiff for so many years of the said term as they or the survivor of them should live; and after the decease of the survivor, *in trust* for the *heirs of their bodies* lawfully begotten, for all the residue of the said term; and for default of such issue, *in trust* for the defendant;—Lord Chancellor King held the remainder over to be void, and that the whole vested in the plaintiffs, to whom the limitation was for life, with remainder to the heirs of their bodies; and accordingly the annuities were decreed to be sold, and the money to be paid to the plaintiffs. In this case the devise was only *in trust*, and yet the rule was the same.

Dod v. Dickinson, Vin. vol. 8, p. 451, pl. 25.

So, where a testator by his will devised that 400*l.* should be put out on good security for his son T, that he might have the *interest* of it for *his life, and for the lawful heirs of his body*; and if it should so happen that he should die without heirs, it should go to his youngest son J B; Lord Hardwicke decreed that the whole vested in the first taker, and the limitation over was too remote.

1 Ves. 133, 154, *Butterfield v. Butterfield*.

Again, R T by will gave the *profits and half-yearly dividends* of 4000*l.* capital bank stock to Sir W P during his life; together with the income and payments of six annuities, payable at the exchequer, to *receive the payments* during his life. And gave his dwelling-house in London, (being leasehold,) and the use of all the furniture and household linen therein, to M C during her life: and gave to L A P (daughter of Sir W P) his dwelling-house and estate at O, and the *use* of all the goods, furniture, and linen there, together with all the cattle and cart horses, and the utensils in husbandry, as well as some other estates and leasehold houses, *during the term of her natural life*. And after the death of M C, he gave to L A P his dwelling-house in London, and the use of the goods therein during her life. And after the death of Sir W P, he gave to L A P the *dividends* on the 4000*l.* bank stock, and all the *payments* growing due on the said exchequer annuities *during her life*; and after her decease, he gave, bequeathed, and devised all the aforementioned land, houses, bank stock, and exchequer annuities to the *heirs male of her body*, lawfully begotten, for ever; together with all the furniture in both his houses; and for *want of such issue*, he gave and bequeathed all the said respective estate, bank stock, and annuities unto W D for life, remainder to the heirs male of his body, remainder over.

Daw v. Pitt (since Earl of Chatham) and *Western*, heard at the Rolls, July, 1766.

Upon the death of R T, L A P entered on the estates devised to her, suffered a recovery, and sold the real estates; afterwards she devised and bequeathed all her real and personal estate to the said Sir W P, (her father,) his heirs, executors, and administrators. Her father surviving her, by his will, after giving several legacies, gave and devised all his real estates, and

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all the residue of his personal estate, (which residue included the leasehold estates, furniture, bank stock, and annuities devised as above to L A P,) unto the defendant W P, his heirs, executors, administrators, and assigns. After the death of Sir W P the plaintiff W D claimed the leasehold estate, bank stock, and exchequer annuities, by virtue of the remainder limited to him in the will of R T; but the master of the Rolls held the limitation over to W D to be void, and that the whole vested in L A P, and therefore dismissed the plaintiff's bill.

But, upon a re-hearing before the Lords Commissioners of the Great Seal, they reversed the order of dismission, and decreed that the plaintiff should have the benefit of the said leasehold estates, bank stock, and exchequer annuities during his life. Afterwards, however, upon an appeal to the House of Lords, the Lords reversed that decree, and thereby established the decision of the Rolls.

June, 1770. Vide *Earl Chatham v. Tothill*, 6 Bro. Parl.; Ca. 450, 1771.

Again, A, possessed of a considerable real and personal estate, (among other bequests,) made one in the following words: "And further, I hereby appoint my said trustees to lay out at interest, upon real and personal security, as they shall think proper, the sum of 4000*l.* sterling, part of my said real and personal estate, and to make payment of the interest of the said sum of 4000*l.* only to R G, the younger son of the said R G, during all the days of his natural life, and to make payment of the principal sum itself to the heirs to be lawfully procreate of his body; but declaring that the above interest shall not be affectable by the debts or deeds of the said R G, (the son,) and in the event of his death, without lawful issue of his body, or of his selling, assigning away, or otherwise disposing of the above interest, or any part of it, my will is, that the said sum of 4000*l.*, together with 1500*l.* sterling further, making in all the sum of 5500*l.* sterling, shall pertain and belong to J H W." One question was, Whether the remainder over of the 4000*l.*, and the legacy of 1500*l.* after the death of R G, (the son,) without issue of his body, were not too remote? It was argued, in support of the limitation, that it was good, from the manifest intention of the testatrix that it should take place upon the event of (the son) R G dying without leaving lawful issue. But on the other side it was contended, that the 4000*l.* was an estate-tail in money executed in R G the first taker, and the cases of *Butterfield v. Butterfield*, 1 Ves. 133, and *Daw v. Pitt*, *suprà*, were cited; and it was said, that the case was too strong to admit of circumstances of the intent of the testatrix to contradict it. And *per Lord Thurlow*, With respect to the 4000*l.* personalty, the cases of *Butterfield v. Butterfield* and *Daw v. Pitt* have confirmed the doctrine upon that subject, that it is too late now to argue upon the distinction of principal and interest, or to insist upon circumstances of the intent; the rule must take place with respect to the 1500*l.* that fell under the same objection. And his lordship decreed the remainder over too remote.

Glover v. Strothoff, 2 Br. Ch. Rep. 33.

Again, where S by his will gave as follows, "*Item*, I give and bequeath to T M S, during the term of his natural life, the interest of 1000*l.* 3 *per cent.* consol. bank annuities, to commence the day after my death, to be regularly paid from time to time, in ten days, or as soon as possible after the same become due; at his decease it is to *devolve* to the heir of his body lawfully begotten, and in default of issue I give and bequeath the same to the heirs

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of A that shall be then living, in equal shares to be divided :” the master of the Rolls held, that the legacy vested absolutely in T M S.

Robinson v. Fitzherbert, 2 Br. Ch. Rep. 127.

But where personalty is not so given, as that the words would create a clear tenancy in tail in land, the law is otherwise.

Therefore, where one, being possessed of a considerable personal estate, made his will in India, of his own handwriting, and gave several legacies, and *inter alia* to the heirs of his brother R W 300*l.*, and gave the residue of his estate to his brother I W, and to his heirs male, *equally to be divided among them, share and share alike* ; three questions arose : first, Whether I W should take the whole, and the words *equally to be divided* be rejected ? Secondly, Whether I W and his sons should take as tenants in common ? Thirdly, Whether the father should take for life, and after his death the residue should go to all his sons equally ? The Lords Commissioners, Smythe and Bathurst, were clear of opinion that, according to the true construction, the father should take the whole for life, and then it should go to his sons equally.

Wilson v. Vansittart, Amb. 562. [And see note, 2d edit.]

Again, D being resident in Calcutta, and possessed of *only* personal property, made her will, and after giving some legacies, gave all the rest, residue, and remainder of her estate, both real and personal, unto L, to be placed at interest until her age of twenty-one years or day of marriage, and then the whole thereof, together with the interest accumulating thereon, to be paid to and for her use, during her natural life ; and, from and immediately after her decease, she gave, devised, and bequeathed the same unto the heirs of her body lawfully begotten, *equally to be divided between them, share and share alike* ; and in default of such issue, or the death of the said L before her said age of twenty-one years or day of marriage, she then gave, devised, and bequeathed the said residue and remainder of her estate unto her, the testatrix’s, brother. The question was, Whether under this will L took an estate for life, or an absolute interest in the personal property ? And it was decreed at the Rolls, that L took only an estate for life in the property in question. And that decree was affirmed on appeal to the Chancellor.

Jacobs v. Amyatt, 4 Br. Ch. Rep. 542.

And it hath been resolved, that if the first estate for life be a trust estate, and the remainder to the heirs of the body a legal estate, the latter will take effect ; because, if such limitation had been applied to land, it would not have created an estate-tail.

Knight v. Ellis, 2 Br. Ch. Rep. 570.]

[Devises to charitable uses are void ; see title “CHARITABLE USES AND MORTMAIN.”]

2. By Incertainty (a) in the Description of the Thing devised.

Devises are void and rejected where the words of the will are so general and uncertain that the testator’s meaning cannot be collected from them, and therefore, where a man by will *gave all to his mother*, it was adjudged that these general words did not carry the lands to the mother ; for since the heir at law has a plain and uncontroverted title, unless the ancestor disinherits him, it were severe and unreasonable to set him aside, where such intention of the testator is not clearly evident from the will ; for that were

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to set up and prefer a dark, and at best a doubtful, title to a clear and certain one. (b)

¶(a) To avoid a will for uncertainty, it is not enough that the dispositions in it are so absurd and irrational that it is difficult to believe they could have been intended by the testator, but it must be incapable of any clear meaning. 2 Sim. and Stu. 295. ¶ Den ex dem. Michau v. Crawford, 3 Halst. 90. (b) Lev. 130; Sid. 191; Raym. 97, Bowman and Milbank. ¶ See Mohun v. Mohun, 1 Swanst. 201, and note 203.¶

If one having lands in fee, and other lands for years, devises all his lands and tenements, the fee-simple lands only pass; but if a man had leases for years only, and no fee-simple lands, by the devise of all his lands and tenements the leases for years pass, for otherwise the will would be merely void.

Rose v. Bartlett, Cro. Car. 293. {The general rule is, that leases for years will not pass by such words. But they will pass, if a plain intention that they shall, can be collected from the will. See 3 P. Wms. 26, Davis v. Gibbs.; Fitzg. 116, S. C.; 2 Atk. 450, Knotsford v. Gardiner; 1 Ves. 271, Chapman v. Hart; 2 Cox's P. Wms. 459 n., Pistol v. Riccardson; 1 H. Black. 26, n., S. C.; Ambl. 356, Lowther v. Cavendish; 1 Bro. C. C. 78, Turner v. Husler; 6 Term, 345, Lane v. Earl Stanhope; 2 Bos. & Pul. 303, Thompson v. Lady Lawley; 5 Ves. J. 476, S. C.; Ibid. 540, Hartley v. Hurle; 6 Ves. J. 640, Watkins v. Lea; 1 Wash. 300, Minnis v. Aylett; 2 Johns. Rep. 522, Johnson v. Stagg.}

¶ Testator devised all his *freehold* houses in A. Street, London. He had leasehold but no freehold houses in A. Street. Held, that the leasehold houses passed; for it was the intention of the testator to pass some houses, and he having no freehold houses there, the word "freehold" should rather be rejected than the will void.

Day v. Trig, 1 P. W. 286.

A seised in fee of lands, and possessed of a renewable church-lease of other lands in D, all in the possession of B and C as tenants, and which lands could scarcely be distinguished, devised all his messuages, lands, and tenements in D which he then stood seised or possessed of or any ways interested in, and which were in the possession of B and C, unto J for life, remainder to H in tail, remainder to R for life with power to jointure, and remainders over in strict settlement; testator bequeathed all his goods and chattels, money and personal estate to J. Held, that the leasehold passed with the freehold.

Addis v. Clement, 2 P. W. 456. See Lowther v. Cavendish, in which leaseholds were from the presumed intention of the testator held to pass by similar words. 1 Eden, 99.

Testator having tithes in fee, and leases of tithes perpetually renewable, devised all his lands, tenements, *tithes*, &c., to A. The limitations were fit for an estate of inheritance. Held, that the leasehold tithes passed.

Turner v. Hustler, 1 Br. C. C. 78.

Testator bequeathed all his personal estate to his wife; then devised all his real estates to her for life, with remainders over. Held, that leaseholds did not pass under the words real estates.

Whitaker v. Ambler, 1 Eden, 151.

A seised in fee of lands in Kent, and possessed of a mortgage term in Essex, devised all her manors, messuages, lands, tenements, hereditaments, or real estate whatsoever in Kent and Essex of which she was any way seised or entitled to. By a residuary clause she gave all her personal estate, and all mortgages, bonds, &c. Held, that the mortgage term passed by the residuary clause.

Davis v. Gibbs, 3 P. W. 26. See Lord Chancellor Eldon's observations upon this case, 2 Bos. & P. 314.

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A seized of lands, &c., in the county of H, and in possession as mortgagee of a leasehold messuage in the town of K, and having other mortgage estates, devised all his freehold, copyhold, and leasehold messuages, &c., in the county of H and town of K; and gave all the residue of his real estate, and all other his estates and interests whatsoever vested in him as mortgagee. Held that the mortgage leasehold at K passed under the first devise. There were, it was observed, mortgages to satisfy the residuary gift.

Woodhouse v. Meredith, 1 Mer. 450.

A devised all his lands and tenements in or near Fowey, but his will was attested by two witnesses only. Held, that though testator should have leasehold it would not pass because there was freehold. The defective execution affords no evidence of the testator's intention.

Chapman v. Hart, 1 Ves. sen. 271; Sampson v. Sampson, 1 Ves. & B. 337.

Testator had 230 acres of freehold and 160 acres of church renewable leasehold, composing one farm, and let to one tenant, at one rent reserved to testator, his heirs and assigns. He devised all his manors, messuages, or tenements, houses, *farms*, lands, hereditaments, and real estate. He gave all the rest and residue of his ready money, rents in arrear, stock, jewels, and personal estate whatsoever. Held, that leasehold passed under the first devise. The court relied upon the word *farms*.(a)

Lane v. Earl Stanhope, 6 T. R. 345. See Hodgson v. Merest, 9 Pr. 556. (a) See Doe v. Earl of Lucan, 9 East, 448.

Testator seized of considerable freehold estates, and of two leasehold farms for a term of 1000 years each, devised all and every his several messuages, lands, tenements, and hereditaments whatsoever, which he was seized of, interested in, or entitled to, to uses in strict settlement.(b) Held that the leasehold did not pass.

Pistol v. Riccardson, 2 P. W. 459, in nota. (b) See Lord Eldon's observations 6 Ves. 641, as to the limitations being inapplicable.

Leaseholds will not pass by the words "messuages, lands, tenements, and hereditaments," unless intention appear that they shall. See Lord Eldon's judgment for a review of the prior cases.

Thompson v. Lawley, 2 Bos. & P. 303.

Testator having leasehold and copyhold in B and copyhold in W, devised his messuages, lands, tenements, and hereditaments in W and B to his wife for life, and after her decease, "all his estate in B" over. After the death of the wife, it was held that the leasehold passed by "*all his estate*." The leasehold and copyhold had been occupied together for some time.

Roe v. Bird, 2 W. Bl. 1301.

A devise of messuages, lands, tenements, and hereditaments, and moneys in the funds, to trustees, their heirs, executors, administrators, and assigns, according to the different estates, and to receive the rents and profits, subject to *ground-rents*, passes leasehold.

Hartley v. Hurle, 5 Ves. 540.

If a lease or leasehold premises be specifically bequeathed, and the lease expires and is renewed in the testator's lifetime, the legatee is not entitled to the renewed lease. But a testator may dispose of the future as well as his present interest in a chattel real; it is therefore a question of intention what is given—whether only the interest which he had at the time of executing the will; or all the interest, though subsequently acquired, which he

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might have at his death in the leasehold premises: that intention is to be collected from the words used.

James v. Dean, 11 Ves. 394, and 15 Ves. 239; *Slatter v. Noton*, 16 Ves. 197. See *Roper on Legacies*, ch. v. § 1.

A assigned premises held under an hospital lease, and all his estate and interest terms of years yet to come and unexpired, benefit and advantage of renewal and property whatsoever, to trustees upon trust out of the rents and profits to renew; then for A for life, remainder for his children, and in default of children for A, his executors, administrators, and assigns; proviso if A paid the rent and procured the renewals, he might take the rents and profits for his own use. A afterwards *devised* the same leasehold premises to the same trustees upon trust for such persons as should be entitled to his freehold estates, which were in strict settlement: with power for the trustees, out of the rents and profits of the leasehold premises, to pay the rents and perform the covenants, as well in the then lease as in any lease thereafter to be obtained; and to renew the lease when requisite. A afterwards renewed the lease and died without issue. Held that the renewed lease passed by the will.

Colegrave v. Manby, 2 Russell, 238.

It has been long established that general words in a devise, as "lands, tenements, and hereditaments," or "all my real estate," are not sufficient of themselves to pass copyholds. But if the testator having copyholds had surrendered them to the uses of his will, that was deemed evidence of his intention, and they were allowed to pass. And although they were not surrendered, yet if the implied or expressed intention of the testator required they should pass by a general devise, a court of equity would in favour of creditors, wife, and children, presume a surrender. (a)

Halsewood v. Pope, 3 P. W. 322; *Byas v. Byas*, 2 Ves. sen. 164; *Hawkins v. Leigh*, 1 Atk. 387; *Goodwyn v. Goodwyn*, 1 Ves. sen. 226; *Tendril v. Smith*, 2 Atk. 85; *Milbourn v. Milbourn*, 2 Br. C. C. 64; *Lindopp v. Eborall*, 3 Br. C. C. 188; *Brooke v. Gurney*, cited 5 Ves. 559; *Judd v. Pratt*, 15 Ves. 395. See *Doe v. The Earl of Lucan*, 9 East, 448. (a) *Hills v. Downton*, 5 Ves. 557.

Now by 55 Geo. 3, c. 192, the will of a copyhold tenant will pass his copyhold tenements as effectually as if he had previously surrendered them to the uses of such will. This act, it is apprehended, merely supplies the formal surrender required by the customs of manors to give effect to a subsequent will: it cannot supply that evidence of intention which a court derived from the fact of a surrender being made. It may then, perhaps, be safely said, that even now general words in a devise will not pass copyholds unless the court can satisfy itself that such words should pass them in order to effectuate the intention of the testator. (b)

(b) See *Doe v. Lucan*, 9 East, 448. ||

So, if a man being seised of a messuage in A, and of a messuage and several lands in B, devises to J S his house in A with all other his lands, meadows, pastures, with all and singular their appurtenances whatsoever in B, yet the house in B shall not pass; for though by a feoffment or lease of lands in D houses shall pass, because to be taken most strongly against the feoffor, &c., and the land passing, the house thereupon must also pass; yet wills are to be taken according to the intention of the devisor; and when he devises his house in A and lands in B, it cannot be presumed that he would have more pass than by the words is expressed.

2 And. 123.

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||But it seems, if a man, having both lands and houses in Dale, devise all his lands in Dale, his houses will pass to the devisee.

Ewer v. Heydon, Moor, 359, pl. 491, and see Godb. 352, pl. 447.||

If a man is seised of lands in a vill, and in A and B, two hamlets within the same vill, and devises all his lands in the vill and in A, and dies, no part of the land in B shall pass; for his naming one hamlet only, fully shows his intent that the lands in the other should not pass.

Dyer, 261.

But where a man, having two several moieties of lands by purchase from the same person, one lying in Kent, and the other in Essex, devised all his moieties in Kent; it was held that both passed, for the words being *all his moieties*, they cannot be satisfied with one moiety only.

Bulst. 117; 2 Bulst. 176; Hob. 173. Vide Noy, 112; Cro. Eliz. 658. {And in other cases, lands have passed by a devise according to the apparent intention, though the testator incorrectly described their local situation or nature. 1 P. Wms. 286, Day v. Trigg; 7 East, 299, Doe v. Danvers; 8 East, 149, Mosley v. Massey; 9 East, 366, Denn v. Kemeys.} ||See 5 Taunt. 323.||

||Testator devised his messuage in High street, wherein his mother inhabited, and all and every his buildings and hereditaments in the same street. Testator had only one messuage in that street, but he had two cottages in a lane not a thoroughfare, to which the only entrance was from the High street. Held, that the cottages passed. Bayley, J., observed, "If the description is precise, and there are premises to satisfy it, and there are also other premises, then the others will not pass. If, however, the description is not precise, if you cannot satisfy the will, unless additional property passes besides that which is described, then you must presume that the testator intended to pass that property, and that his description is inaccurate."

Doe v. Roberts, 5 Barn. & A. 407.

Testatrix devised all her freehold and copyhold estates in or near Latchingdon, near Maldon, in the county of Essex. She had a copyhold estate at Latchingdon, and a freehold field in Maldon, between four and six miles distant from the copyhold. Held, that the freehold field did not pass.

Doe v. Pigot, 1 B. Moore, 274.||

If one seised of land, called Hayes Land, lying in two villis, viz. A and B, devises all his land in A, called Hayes Land, to his youngest son and his heirs; and in another part wills, that if his said son dies without issue, that his wife shall have Hayes Land, and dies, and the son dies without issue, the wife shall have only that part of Hayes Land which lies in A, because no more was devised to the son: but *per* Popham, if the devise had been to the eldest son, and if he dies without issue, perhaps he should have had all, because the eldest son had all, part by devise, and part by descent.

Cro. Eliz. 674.

If a man is seised in fee of two houses in D adjoining the one to the other, and the one is in the possession of A, and the other in the possession of B, which is also the corner house in the street of the town; and he devises his corner house in the possession of A and B; by these words, only the house which is in the possession of B shall pass, which is the corner house, and not the other house which is in the possession of A, though it be next adjoining thereto; for his intent appears to be so.

Roll. Abr. 613; Cro. Car. 447. Vide Styl. 261. {For where a particular thing is once sufficiently described, another description which is added and is incorrect may be rejected as surplusage; but where it is not particularly described, but only in general

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terms, the subsequent description restrains the former. 8 East, 91, *Doe v. Greathed*; 8 Term, 579, *Doe v. Bell*. See title *Grants*, vol. iv. p. 501.]

A sold land to B, but before a conveyance was executed B sold the same lands to C, and then A conveyed to C, and C being thus seised, devised the land to his younger son in these words, *I bequeath to R, my son, all my land which I purchased of B*, whereas, in strictness of law, he purchased them from A, who conveyed them to him; yet this was allowed to be a sufficient description of the land, and, consequently, a good devise of it, because the purchase was really made from B, the money being paid to him.

2 Leon. 120, *Throp and Thompson*.

|| Testator devised his manors, lands, tenements, and hereditaments situate at Sapperton, &c., "*which were given and devised to me by my brother's will*." The fact was otherwise; but Sir W. Grant, M. R., held that the words in italics were not words of intended restriction, but merely an erroneous description, and the lands passed.

Welby v. Welby, 2 Ves. & B. 191.

So, a testator who was seised of copyhold lands, part only of which he had surrendered to the use of his will, devised all his freehold and copyhold lands and hereditaments whatsoever and wheresoever, "the copyhold parts thereof having been duly surrendered to the uses of this my will." Sir John Leach, V. C., said,—“This simply affirms that he had surrendered to the use of his will all the copyhold part of his gift; and because he happened to be in one particular mistaken in the fact affirmed by him, I cannot therefore assume that he had an intention which is neither warranted by the particular expression relied upon nor reconcilable to the other parts of the will.” The unsundered copyholds passed.

Oxenforth v. Cawkwell, 2 Sim. & Sta. 558. But see *Wilson v. Mount*, 3 Ves. 191.

In a devise of a messuage and lands called C farm, *now on lease to F*, the words in italics were not allowed to circumscribe the former description; but a close formerly part of C farm, but not on lease to F, passed.

Down v. Down, 7 Taunt. 343.

So, a devise of "all my B F estate," was not restricted, though the same premises were in the will described as in the county of G only, whereas they in fact extended into the counties of B and G.

Doe v. The Earl of Jersey, 1 Barn. & A. 550; S. C. 4 Barn. & C. 870; S. C. cited 2 Russell, 318.

But where a testator, after reciting that he was seised of divers freehold and copyhold lands in Islington, "and all which freehold and copyhold lands are subject to a mortgage thereof made by me for 1000*l.*," devised all and every his said freehold and copyhold lands;—held that freehold lands in Islington belonging to the testator, but not subject to the mortgage, did not pass.

Pullin v. Pullin, 3 Bing. 47.

A devise in general terms is not restrained by a defective specification.

Chalmers v. Storil, 2 Ves. & B. 222.]

If one devises his house wherein J S dwells, called *The White Swan in Old Street*, to J N, &c., and dies, and at the time of his death and making the will J S occupied the entry only, and three of the upper rooms of the house, and others occupied the garden and other parts of the house, yet all the house passes; for the house imports the whole house, and the sign of the White Swan makes it still more certain.

Cro. Car. 129; *Jon.* 195, S. C.

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||But on a devise of all my messuages in T now in my occupation, and testator had two messuages in T but only one in his occupation, held that that one only passed.

Doe v. Parkin, 5 Taunt. 321.

So, too, in Press v. Parker, the court held that the words "in the occupation of" were not merely words of description, but denoted the quantity of the gift.

2 Bing. 456. See Bodenham v. Pritchard, 1 Barn. & C. 350, a similar decision on the words "as then enjoyed by him."

A being tenant for years of a house, gardens, stables, and coal pen, made the following bequest, "I give the house I live in and garden to B." Held that the stables and coal pen passed, though they were used for trade as well as for the convenience of the house.

Doe v. Collins, 2 T. R. 498.

A testator devised all his manors, messuages, and lands, tenements and hereditaments, whether freehold, leasehold, or copyhold, in the parishes of M, C, and W, or elsewhere in the kingdom of England. Testator had no property in England except a house and lands in the parishes enumerated; but he had a manor and about 7000 acres of land with an old mansion-house in Wales. *Quere*, whether the devise passed the Welsh estate?—Lord Eldon, C., refused to compel a purchaser to take a title to that estate under the will.

Okeden v. Clifden, 2 Russell, 309.||

If a man is seised of a messuage and two acres of land in A, and of two acres of meadow in B, and hath used and occupied the two acres of meadow, being four miles distant from his said house, together with his said house and lands in A, and devises the house *cum omnibus et singulis pertinentiis suis adinde spectan.* to J S, the two acres of meadow shall not pass; for by the words *cum pertinentiis* lands pass not, (a) but such thing only as may be properly appertaining; otherwise, if the words had been *cum terris pertinentibus*, for then the lands used therewith should have passed.

Cro. Car. 57; 1 P. Wms. 603. [(a) But see the case of Doe v. Martin, 2 Bl. Rep. 1148, where, in compliance with the manifest intent of the testator, land was holden to pass with a house under the word appurtenances. And in the case of Gulliver v. Poyntz, 3 Wils. 141, under a devise of *messuages, with all houses, barns, stables, stalls, &c., that stand upon or belong to the said messuages*, lands which were purchased with the messuages, and which, as well as the messuages, were in the testator's possession at the time of making the will, were allowed to pass.] ||And see Co. Lit. 5 b, and Harg. note 1; Buck v. Norton, 1 Bos. & P. 53.||

||Lands will not pass under the word "appurtenances" in its strict technical sense; they will pass if it appears that a larger sense was intended to be given to it.

Per Eyre, C. J., in Buck v. Norton, 1 Bos. and P. 53.

Under a devise of a rectory with the messuages, lands, &c., thereunto belonging, lands which had for a long period been occupied with the rectory were held to pass.

Ongley v. Chambers, 1 Bing. 483. See Townsend v. Champernown, 1 You. & Jer. 538.||

If A devises several pecuniary legacies, and also some lands, and then devises all the rest and residue of his money, goods, and chattels, and other estate whatsoever, to J S, whom he makes executor, he having other lands they shall pass by the will.

Chan. Ca. 262.

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¶ Testator devised all the rest and residue of his estate whatsoever and wheresoever to his wife. Held that certain land, being the only real estate which testator had, passed by this devise. Lord Mansfield observed, the word "estate" carries every thing, unless tied down by particular expressions.

Roe v. Harvey, 5 Burr. 2638.

In a subsequent case similar words passed real estate, though they were accompanied with limitations peculiar to personal property.

Doe v. Chapman, 1 H. Bl. 232. But see Doe v. Hurrell, 5 Barn. & A. 18.

(See further as to the construction of the words "estate," "property," "effects," &c., &c., *division* (C) *ante*.)

Under the phrase "*personal estates*" real property may pass, if it is clear that such was the testator's intention.

Doe v. Tofield, 11 East, 246.

And where by a will, giving the estate a local description and a name, the property was mistakenly called leasehold, the testator's freehold was held to pass, there being no other property answering the description.

Dean v. Kemeys, 9 East, 366.

So, the word *legacy* has been allowed to comprise real estate.

Hardacre v. Nash, 5 T. R. 716. See Silberschildt v. Schiott, 3 Ves. & B. 45, 50.¶

But if a man seised in fee of three tenements, and possessed of divers goods, and of a lease for years, devises one tenement to one of his sons, and another tenement to one of his daughters, and then adds, *Item, I make my two sons executors of all my goods, movable and immovable, and all my lands, debts, duties, and demands*; by this clause, no estate in the three tenements of which the devisor was seised in fee passed to the executors by force of the words, *and all my lands*; because that these words might well be satisfied by the lease for years of land which passed by it.

Roll. Abr. 613. ¶ See Clement v. Cassy, Noy, 48.¶

{A devised to his wife his *house and goods*, with all his *lands, goods and chattels*, whatsoever and wheresoever, for her life, and after her death to two younger sons till they should attain the age of 15, for their education. He then devised his aforesaid *house, goods and chattels*, equally to be divided between all his sons and daughters. Under the last clause in the devise the *lands* did not pass. The court observed they never knew an instance in which the subject of devise was supplied on account of a supposed omission; that, indeed, no mistake in a will ever could be rectified by the court, unless it could be first demonstrated that such mistake did exist; and that in the present case, however strongly they might conjecture what the devisor intended to have done from the previous devise to his wife and younger children, yet it was not of necessity to intend that he meant to have added the word *lands* in the last clause of his will.

3 Bos. & Pul. 375, Roe v. Walker.}

A devised in the following manner: *I make my niece executrix of all my goods, lands, and chattels*; the testator had a real and personal estate, but no leases or interest for years in any lands whatsoever; and the question was, Whether any or what estate passed in the lands by this devise? And my Lord Chancellor was clearly of opinion, that the real estate did not pass by these words; and that the word *lands* was not (as objected) useless, and to be rejected, for that in all probability there might be rents in arrear of those lands, which would pass to the niece by her being made executrix.

Abr. Eq. 209, 210; Piggot and Penrice, Pr. Ch. 471; ¶ Doe v. Gillard, 5 Barn. & A. 785; Thomas v. Thomas, 3 Barn. & C. 125.¶

(L) Of void Devises, &c.

If A devises certain lands to his youngest son in fee, and devises all his lands in D to his wife for life: *Item*, I give to her for life the lands which I hold of G T. *Item*, I give to her all the lands which I purchased of J S. *Item*, I give my lands to my son E and his heirs for ever; not only the lands purchased of J S, but also the reversion of all the others, pass by these words.

Skin. 130, pl. 5, Barrow and Gameath.

If A being seised of the manor of B, and of other lands in the county of S, devises the manor of B for six years, and part of the other lands to J S in fee; and then comes this clause, and the rest of my lands in the county of S, or elsewhere, I give to my brother, &c.; by this devise he shall have the reversion of the manor.

Wheeler v. Walroon, Allen, 28; 3 Atk. 492, S. C. cited, and S. P.

A seised in fee devised a certain house by name to J S for life; and by another clause he devises to his wife, the better to enable her to pay his legacies, all his messuages, lands, tenements, and hereditaments *not above disposed of*. Adjudged, that by these words the reversion of the house devised to J S passed.(a)

2 Vent. 285, Willow and Lydcot, adjudged upon a writ of error in the Exchequer Chamber; Carth. 50, S. C., where it is said to have been adjudged in King James II.'s time, that the reversion did not pass; but a note is added, that these were King James's judges, and that Mich. 1 W. & M. it was adjudged, that the reversion passed; which judgment was affirmed in the Exchequer Chamber by all the judges; and the rather, because it appeared that the heir at law had 20*l.* *per annum* devised to him; so that he being taken notice of, the intent was more apparent. Vide Lev. 212, S. P. adjudged, and 3 Mod. 228, which seems contrary, but has been denied to be law. ||(a) Morgan v. Surman, 1 Taunt. 289, S. P.]]

A seised in fee, devised Black Acre to B for life, and devised to C all his lands not before devised, to be sold, and the money to be divided between his younger children: the question was, Whether the reversion of Black Acre passed by the devise of all his lands not before devised? And it having been referred to the judges of the Common Pleas, they unanimously agreed and certified, that the reversion was well devised.

2 Vern. 461; Rooke and Rooke, decreed accordingly, Pr. Ch. 202, S. C.

[A having devised a farm to J S for life, and, after other legacies, devised all other his personal estate, lands, tenements, and hereditaments, not before devised, to the defendant; it was made a question, Whether the reversion of that farm passed by this general devise? *Per Cur.*—The reversion well passed.

Kingsman v. Kingsman, 2 Vern. 559.] {See 1 Wash. 262, Cole v. Clayborn.}

A, by virtue of several settlements being tenant in tail, after possibility of issue extinct, of some lands, remainder in fee to trustees, in trust for him and his heirs; and as to some other lands being tenant for life, remainder to his first and other sons, remainder to trustees in fee, in trust for the right heirs of B, whose heir A was; and as to other lands being tenant in tail, remainder to the right heirs of his father, whose heir he likewise was; and being likewise seised of a very considerable real estate of his own purchase, and possessed of a large personal estate, made his will, and devised some part of his lands to his wife for life, and gave several legacies, and having no issue, devised all other his lands, tenements, and hereditaments, *out of settlement*, to his nephew, provided he took on him his surname, subject to raise 4000*l.* in case the testator left a daughter;—and it was held, that all

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the estates thus settled passed by the will, notwithstanding the words *out of settlement*, for the word *hereditament* comprehends a remainder or reversion, as well as an estate in possession.

2 Vern. 691, between Sir Litton Strode and Lady Russel, decreed by my Lord Chancellor, assisted with the master of the Rolls, Trevor, C. J., and J. Tracey.

So where A, being seised in fee of lands in D, upon the marriage of his eldest son settled those lands on him in tail-male, remainder to his own right heirs; and being seised in fee in possession of other lands in M L, and N, devised all his messuages, lands, tenements, and hereditaments in M, L, N, or *elsewhere*, not by him formerly settled, for the payment of his debts; and after debts paid, then to J S a second son, and his heirs for ever, and died, and soon after the eldest son died (not having barred the remainder) without issue male, but left several daughters; it was held, *first*, That the word *elsewhere* was a sufficient description of the lands in D, though of a greater value than those in M, L, and N; that it was of itself a significant and expressive term; and the rather so in this case, because there were no lands or outskirts not particularly enumerated to which it could be applied but to those in D. *Second*, That the words, *messuages, lands, tenements, and hereditaments*, were sufficient to pass the reversion of the lands in D, notwithstanding the exception, or restrictive words *not formerly settled*.

Abr. Eq. 211, Chester and Chester, decreed by my Lord Chancellor, assisted by Raym. C. J., Reynolds, C. B., and Price, J.; 3 P. Wms. 56, S. C.; ¶Glover v. Spendlove, 4 Br. C. C. 337; and see and distinguish Goodtitle v. Miles, 6 East, 494. And see Attorney-General v. Vigor, 8 Ves. 293.¶

[One devised all his estate, &c., in the counties of G and W, and *elsewhere in the kingdom of England*, to trustees, subject to certain charges thereon, and limitations in his marriage settlement, in trust to stand seised of the said estates in G and W, or *elsewhere*, to certain uses. His estates in G and W were his only estates charged or mentioned in his marriage settlement; but he was also entitled to the reversion of certain estates in the counties of O and M. It was holden, that this reversion passed by the words, "*elsewhere in the kingdom of England*."

Freeman v. Duke of Chandos, Cowp. 363.

One seised for life, with remainder in tail to his first and other sons, of a considerable estate in the county of N, and being also seised in fee of the manor of C, and a small estate at P in the county of G, and entitled to the reversion in fee of another estate in that county, after several estates-tail in different persons, one of whom had a son aged eighteen years, devised "all that his manor of C, &c., and also all that his capital messuage, and all and every his lands, tenements, and hereditaments whatsoever, situate and being in or near P or elsewhere in the said county of G, to his executors, in trust to sell, and to divide the money arising from the sale equally among his younger children," of whom he had three. It was resolved, that this remote reversion passed to the trustees.

Atkyns v. Atkyns, Cowp. 806.]

¶A general residuary clause, applicable to real estate, carries a reversion or any other real interest of any kind whatsoever, whether known or unknown to the testator, provided it be not manifestly excluded. This exclusion must be proved either by it being repugnant to the particular provisions of the testator's will, or to his general intent, that the reversion should pass.

2 Bos. & P. 609.

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A was tenant for life, and had the reversion in fee, expectant upon the decease and failure of issue of B, of certain lands; of which lands A had granted a lease to D, which was defeasible by C or his issue. A was also seised in fee in possession of other lands. A by will devised if C and his issue would confirm D's lease, and on its expiration grant a similar lease to his (A's) wife, that his (A's) unsettled lands should, after the decease of his wife, be to the same uses as the settled lands; and all the rest of his real estate he devised to his wife in fee. Held, that the testator's reversion passed to his wife by this residuary clause.

Goodright v. Downshire, 2 Bos. & P. 600. Though the purposes for which a devise is made are immediate, that will not prevent a reversion passing. *Attorney-General v. Vigor*, 8 Ves. 256.

Lands were settled to the use of Panton for life; remainder to his first and other sons in tail; remainder to his daughters in tail; remainder to duchess of A for life; remainder to duke of A for life; remainder to marquiss of L in fee. The marquis (then become duke of A) seised in fee in possession of large estates, devised some of them specifically. He then gave an annuity to the duchess for her life, and two other life annuities, and charged them upon all his lands and hereditaments not thereinbefore devised. He then devised all his lands and hereditaments, and other his real estate, not thereinbefore devised, so charged with the annuities as aforesaid, to Denshire in fee. Held, that the reversion passed.

Doe v. Weatherby, 11 East, 322, and see *William v. Thomas*, 12 East, 141.

Testator being in possession of lands settled upon himself for life; remainder to his wife for life, remainder to children of marriage in tail, remainder to himself in fee; and of other land of which he was seised in fee absolutely; devised all his land of which he was in the immediate possession to his wife for life, remainder to his daughter in fee. Testator had only one child, the daughter mentioned in his will. Held, that the land in settlement passed, though the devise was to a person entitled to take under the settlement.

Doe v. Bartle, 5 Barn. & A. 492.

The words "all my late father's lands," include land settled by the father upon a son in fee, but which had descended upon the devisor.

7 Barn. & C. 384.

Testator devised to M W the income of four snares in the corn market for his life; and all the rest of his estates, with all moneys, &c., to be divided equally between E S and others. Held, that the word *estates* passed the reversionary interest in the shares.

Fletcher v. Smiton, 2 Chitty's Cas. temp. Lord Mansfield, 558.

A devise of rents and profits carries the land itself. So a devise of a ground-rent passes the reversion.

Maundy v. Maundy, Str. 1020; *Kaye v. Laxon*, 1 Br. C. C. 76; *Allan v. Backhouse*, 2 Ves. & B. 74.

Premises is a word of reference, and may comprise a variety of subjects, having no connection among themselves.

Doe v. Meakin, 1 East, 456.

So, a testator having given four tenements and a garden to his daughter, and half his books, in a certain event directed "her part aforesaid" to be equally divided amongst his four brothers and sisters. Held, that "her part aforesaid" carried *all* that was given to the daughter.

Doe v. Gell, 4 Dowl. & R. 387.

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Nor will a general residuary devise carry a reversion which is in the same will devised to the testator's right heirs, unless under special circumstances.

Smith v. Saunders, 2 W. Bl. 736.

But the whole interest of the devisor, not before disposed of, may pass by a residuary devise to one to whom an estate for life was before given.

Jackson v. Hogan, 3 Br. P. C. 388. See 2 N. R. 343, and 3 Brod. & B. 85.]

[But notwithstanding these cases, general sweeping words will not carry a reversion, where the testator's intent manifestly appears to the contrary from the whole complexion of the will.

Strong v. Teat, 2 Burr. 912; 1 Bl. Rep. 200, S. C.; 5 Br. P. C. 496, S. C.; Roe v. Avis, 4 Term Rep. 605;] [Goodtitle v. Miles, 6 East, 494; Welby v. Welby, 2 Ves. & B. 195; Doe v. Bartle, 5 Barn. & A. 492; Church v. Mundy, 12 Ves. 426.]

{ A having an estate of his own in the county of B and another in C, and having also the legal but no beneficial interest in an estate in D devised to him in fee, in trust to dispose of it among his four sons in such manner and proportions as he should direct by deed or will, devised "all his estates of what nature or kind soever in the county of B and county of C or elsewhere in the kingdom of England, *after payment of his debts, &c.*" to a younger son. And it was held that the trust estate did not pass by this devise. For though the words were comprehensive enough to include it, they were restrained by the words *after payment of his debts*, which showed that the testator only meant to give that in which he had a beneficial interest, and which he had the power of charging with the payment of his own debts.

8 Term, 118, Roe v. Reade; 9 East, 273.—So, if any other charge is made inconsistent with an intention to include it. 10 Ves. J. 101, *Ex parte Morgan*.—It was evidently the opinion of the court of K. B. in Roe v. Reade, that, had the restrictive words relied on been omitted, the trust estate would have passed. And the weight of authority appears to be in favour of the principle that the estate of a mere trustee will pass under a general devise, unless a different intention can be collected from the will. But the doctrine on the subject has been very fluctuating. In several cases the contrary rule has been adopted;—that such an estate will not pass by general words, unless the intention that it should pass plainly appears. See 2 P. Wms. 198, Marlow v. Smith; 1 Atk. 605, Casborne v. Scarfe, and Mr. Sanders's note; 1 Bro. C. C. 197, Pickering v. Vowles; 3 Ves. J. 348, Duke of Leeds v. Munday; 5 Ves. J. 341, n.; 4 Ves. J. 147, *Ex parte Sergison*; 5 Ves. J. 339, Attorney-General v. Buller; 6 Ves. J. 577, *Ex parte Brettell*; 8 Ves. J. 417, Lord Braybroke v. Inskeep.}

If A devises lands to B in D, S, and T, and all his lands elsewhere, and he hath a mortgage of lands, not lying in D, S, or T, which is of more value than the lands in D, S, and T, the mortgaged lands will not pass, for he could not be thought to mean to comprehend lands of so much value under the word *elsewhere*, which is like an &c. that comes in *currente calamo*.

2 Vent. 351, Sir Thomas Littleton's case decreed; but the reporter says there were other circumstances in the case which showed it was not his intention that the mortgaged lands should pass; and Vern. 3, S. C., it appears, that there were some small parcels of land not specified, and of the same nature of those devised; to which the court held the word *elsewhere* was applicable, and not to the mortgaged lands, which were of a different nature, and of greater value; and that the testator had charged the lands devised with a rent-charge of 80*l. per annum*, which he could never intend should issue out of lands which were every day redeemable. [See Okeden v. Clifden, 2 Russell, 309.]

[Where a testator seised of lands in fee, and possessed of a term for years in B, devised all his lands, tenements, and *real estate* whatsoever in A and B, or elsewhere, of which he was *any way seised or entitled to*, to J S and his heirs, and in a subsequent clause of his will disposed of the rest of his

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personal estate, and of all his *mortgages, bonds, specialties, and credits*; it was adjudged, that the term did not pass to J S.

Davis v. Gibbs, 3 P. Wms. 26.]

By a general devise of all lands, tenements, and hereditaments, mortgages in fee, though forfeited, will not pass; nor will they pass by such a general devise, though the equity of redemption is *after* the making of the will foreclosed or released.

2 Vern. 623. { Vide 3 Ves. J. 725, 730; 5 Ves. J. 300; 8 Ves. J. 256, Attorney-General v. Bowyer. }

|| It seems to be now settled, that a trust or mortgage estate will pass by a general devise, unless a contrary intention can be collected from expressions in the will, or from the nature of the purposes or objects of the testator. Any purpose or expression inconsistent with his duty as a testator or mortgagee is sufficient to show that he did not intend the estate to pass. Testator was mortgagee in fee of two estates, and had obtained a decree for an account, but had not got the final order of foreclosure at the time of making his will. He was seised in fee of other estates absolutely, and he devised all his estates in general terms to uses in strict settlement, and also devised all estates vested in him as mortgagee, upon the trusts to which they were subject. Before his death he obtained the final order of foreclosure. Held, that the mortgage estates did not pass by the general devise, because, at the time of the making of the will, they could not be subjected to the uses in strict settlement, and that they did not pass under the devise of the mortgaged estates, because by the foreclosure the testator became absolute owner of them.

Lord Braybrooke v. Inskip, 8 Ves. 417. See 8 Ves. 276; 2 Powell, Dev. ch. 9, (3d edit.); Thompson v. Grant, 4 Madd. 438.

A testator, who was a mortgagee, devised all the rest and residue of his *freehold, leasehold, and copyhold estates in possession or reversion*, together with all his goods, chattels, &c., *mortgages* and debts, to a legatee, *subject to the payment of his debts, &c.*, and also appointed the legatee executor of his will; held that the legal estate in the mortgaged premises did not pass to such legatee, but descended to the heir at law; because, although the words of the devise would, standing alone, have been sufficient to have carried the legal estate in the mortgaged premises, which may be so devised, yet being qualified by the subjection to the payment of debts, a purpose to which the money secured was alone applicable, and not the premises, it must be taken not to have been the intention that the legal estate should pass.

Silvester v. Jarman, 10 Price, 78. See in the matter of Horsfall, M'Clel. & You. 292.]

A having settled all his estate of inheritance upon his wife for life, for her jointure, makes his will, and thereby devises several pecuniary legacies to several persons, and then says, "All the rest and residue of my estate, chattels real and personal, I give and devise to my wife, whom I make sole executrix;" and the only question was, Whether by this devise the reversion of the jointure lands passed to the wife? And my Lord Keeper, having taken time to consider of it, delivered his opinion, that it did not, because the precedent and subsequent words explain his intent, to carry only his personal estate; for in the first part of his will having given only legacies, and no land whatsoever, the words all the rest and residue of his estate are relative, and must be intended estate of the same nature with that he had

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before devised, which was only personal; for having before given no real estate, there could be no rest or residue of that out of which he had given away none; then the words *chattels real and personal* explain the word *estate*, and show what sort of an estate he meant, and make the devise as if he had said, all the rest of my estate, whether chattels real or personal, &c. and so confine and restrain the extended sense of the word *estate*.

Abr. Eq. 211, 212; Markant & Twisden, Gilb. Eq. Rep. 30.

[But where a testator devised to his wife, to whom he had before given life-estates in part of his lands, all the rest, residue, and remainder of his goods, chattels, and personal estate, *together with his real estate, not therein before devised*, it was holden, that these words, *together with the real estate*, carried the land and inheritance; for though there are cases where it has been doubted, whether the word *estate*, joined to goods, &c., will carry the real estate, yet when a testator says, *together with my real estate*, it puts it out of all doubt. In the case of Markant v. Twisden, *suprà*, the words were *chattels real and personal*; and chattels real are not called so as being real estate, but because they are extractions out of the real, as Lord Chief Justice Holt called them.

Ridout v. Pain, 3 Atk. 486.]

|| Testator devised the rents of one house in A to C B for life, and after the decease of C B he devised same rents, *together with* the rents of all other his houses in A, unto his three nephews for their lives; and after the decease of the survivor, he devised all his said houses to trustees upon trust to sell. And testator devised, after giving a pecuniary legacy, all other his estate to C B in fee. Held that the nephews, on the death of testator, took an immediate estate for their lives in all the houses, except that devised to C B for his life.

Doe v. Brazier, 5 Barn. & A. 64.

It is clear the word tenement or hereditament will pass an *advowson*.

3 Atk. 460; 2 Ves. jun. 477; 4 Bing. 290.

In a devise of a perpetual advowson, the word "perpetual" may be considered as descriptive of the property, and not of the *quantum* of interest intended to be devised: and therefore a devise, "I give my son R the perpetual advowson of H and my manor of S," gives only a life-estate in the advowson.

Pocock v. Bp. of Lincoln, 2 Brod. & B. 27.

The word *farm* will pass all such premises as are let together, though they consist of different descriptions of estate, as freehold, copyhold, &c.

Holdford v. Pardoe, 2 W. Bl. 975; Lane v. Earl of Stanhope, 6 T. R. 345; Doe v. Lucan, 9 East, 448; Thompson v. Lawley, 2 Bos. & Pull. 317.

A testator having a messuage and lands, which in two leases, one prior and the other subsequent to his will, he had demised as the C farm, excepting a certain close formerly part of the farm, (and which close testator kept in his own occupation,) devised his messuage, farm, and lands, called the C farm, then on lease to M F. Held that the close excepted in the leases passed to the devisee.

Down v. Down, 7 Taunt. 343; 1 B. Moo. 80, S. C., and see Goodtitle v. Southern, 1 Maul. & S. 299. *Sed vide* Doe v. Parkin, 5 Taunt. 321, which, however, is distinguishable.

Testator gave residue to his wife, "requesting she would at her death leave 200*l.* to each of the Miss Nortons, and leave the remainder of her

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property to his nephews, G. and W. Eade." Sir John Leach, V. C., said, "If the testator had requested his wife, at her death, to leave the remainder of his property to G. and W. Eade, there would have been a clear trust in their favour, because the remainder of the testator's property could have been ascertained. I cannot say that, by the remainder of *her* property at her death, he meant the remainder of *his* property. His request as to the uncertain property of which she might be possessed at her death, cannot create a trust."

Eade v. Eade, 5 Madd. 118. As to devises of remainder of testator's estate or property, see Ball v. Kingston, 1 Mer. 314; Surman v. Surman, 5 Madd. 123, 1 Powell, Dev. 352, (3d edit.) and cases there collected.||

§A request by testator that a handsome gratuity should be given to his executors is void for uncertainty.

Jubber v. Jubber, 9 Sim. 503.

Testator, who resided in India, gave a legacy "to T P, who resided at A when I left England, or to his heirs, executors, administrators, or assigns;" T P died in testator's lifetime. Held that the bequest over was void for uncertainty.

Waiter v. Templer, 2 Sim. 524.g

3. By Incertainty in the Description of the Person to take.

||A devise is void if the object of testator's bounty is not sufficiently denoted. But if devisee be described by two circumstances, as relationship and name, or name and residence, and either the one or the other may be affirmed of a known person, and the other cannot, this error does not render the devise uncertain and void; for there is only one person who can claim, and he comes within the description given by the testator, though he does not satisfy it altogether. But if there be two known individuals to whom parts of the description given of the devisee respectively apply, it is a question which is intended; and if their claims are nearly equal, the devise is uncertain and void.||

If A devises lands to the eldest son of J S, by the name of William, when in truth his name was Andrew, the devise is (a) good.

Abr. Eq. 212. §Smith v. Smith, 4 Paige, 271; S. C. 1 Edw. 189.g (a) A devise to the eldest son of J S is good, or to his second or youngest; so a wife is a good name of purchase without a Christian name, and so it is if a Christian name be added and mistaken, as Em. for Emlyn, and to Robert Earl of, &c., though his name was Henry. Co. Lit. 3.—A devise to the stock, family, or house is good, and it shall be intended of the heir. Hob. 33, Dy. 333 b. [Upon the same principle, if lands be devised to the *posterity* of A—the lineal heir, if there be any, shall take them under the word *posterity*; but if A die without issue, and there be no lineal heir of A, the collateral heir of the whole blood shall take them. 2 Eq. Ca. Abr. 290—297.—And a devisee may be described as the next of the name of the testator, and the next relation of his name, whether it be male or female, shall take as devisee described thereby. Bon v. Smith, Cro. El. 532.—So, a devisee may be described as next of kin. Thus it was adjudged, where one devised lands in tail, the remainder to the *next of kin of his name*, that his brother's daughter should take by that description. Jobson's case, Cro. El. 576.—And nearest relation of the name is likewise a good description of the devisee, and operates as *nomen collectivum*: and in these cases where *nomina collectivae* are used to describe the devisee, the term used comprehends all the testator's family that are nearest to him in the degree mentioned. Pyot v. Pyot, 1 Ves. 335.—And if the devisor explains who he means by nearest relation, persons may take under that description who are not strictly so circumstanced in point of kindred.—As, if lands were devised to be divided between the nearest relations of the testator; namely, the Greenwoods, the Everetts, and the Downs; the Everetts it seems might take, though not in the same degree of relation as the Greenwoods and Downs, nor within the degree of nearest relationship. Greenwood v. Greenwood, cited in 1 Br. Ch. Rep. 52.—If one,

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being married, make his will, and thereby describe his devisee by the term nearest relation, according to the statute of distributions, his wife cannot take thereby; for she is no relation to her husband in the sense in which that word is here used, because it is transferred to a personal sense, and as if he had said kindred; and kindred, in the statute, means kindred by blood only, and the wife is no relation by blood or affinity. The wife *non affinis est sed causa affinitatis; affinis ab eodem stipite*. Davies v. Bailey 1 Ves. 84; Worsley v. Johnson, 3 Atk. 759; Skin. tit. *Cognatio Parentela*. Calvin's Lexicon.—And there would be no difference in such a case as that last mentioned, whether the terms used by the testator were, "my relations generally," or, "my own relations." In both cases, relations by blood only are included. And if the reference to the statute of distributions be omitted in such a devise, the wife cannot even then take within the description of a near relation; for, in the case of Thomas and Hale, Lord King determined, upon the authority of Lord Macclesfield, in the case of Brown and Brown, that the word "relations" should be confined to such relations as were within the statute of distributions, because of the uncertainty of the word "relations." 2 Eq. Ca. Abr. 332, q. 368, Ca. temp. Talb. 251.]

[So where one, having a reversion in fee expectant on an estate-tail, devised it to William Pitcairne, *eldest son* of Charles Pitcairne, in tail-male, remainder over, and died; it was insisted, on a bill exhibited by the eldest son, to have the writings, and to receive the profits, &c., that the devisee had no title, because his name was not William, but Andrew; but the court was of opinion that the plaintiff should have relief: the reason of which was, that there were other words, viz., *eldest son* of, &c., sufficient to point him out with certainty.

Pitcairne v. Brase et al., Finch Chan. Rep. 403; and vide Dallison, 78, 8; Owen, 35; Rivers's case, 1 Atk. 410. {7 East, 299, Doe v. Danvers; 3 Ves. J. 322, Campbell v. French; and see 6 Ves. J. 42, Smith v. Coney.}

So, where a devise was to Margaret, the daughter of W K, and her name was Margery, it was held that she should take thereby, *quia constat de personâ* by the description.

Gynes v. Kemsley, 1 Freem. 293.]

[[Testator bequeathed to the Rev. Charles Smith of R. There was a Rev. Richard Smith, incumbent of R, and also a Captain Charles Smith, known to testator. Held that the former was intended. Here the profession and residence stated in the description applied to one, and the Christian name only to the other.

Smith v. Coney, 6 Ves. 41.

Testator devised to his granddaughter, Mary Thomas, of L. Testator had a *granddaughter*, Elinor Evans, of L, and a *great-granddaughter*, Mary Thomas, of G, a place some miles from L;—Held that this devise was void for uncertainty. The relationship and the evidence were in favour of the claim of Elinor Evans, and the name only of that of Mary Thomas; but the distinction between granddaughter and great-granddaughter is not great, and the name seems more important than the residence.

Thomas v. Thomas, 6 T. R. 671.

Testator devised to "my nephew R C, the son of Joseph C." It appeared that testator had two nephews named R C; one the son of John, and the other the son of Thomas C. Here then the name and relationship belonged equally to *two* persons, and the superadded description was inapplicable to either. So that, there being two persons equally answering the description in the will, the rule of law admitted parol evidence to show which was intended. (a) On the evidence, R C, son of John, took.

Careless v. Careless, 19 Ves. 600; 1 Mer. 384, S. C. And see Beaumont v. Fell, Vol. VI.—19

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2 P. Wms. 141; 1 Powell, Dev. 487, (3d edit.,) and cases there collected. (a) 19 Ves. 654; 1 Ves. sen. 337.

Testator devised to S D for life, with remainders over in the usual way to his first and other sons and daughters in tail; remainder to G H, the eldest son of J H, for life, with remainders over as before to his sons and daughters; remainder to S H, the second son of J H, for life, with remainders as before to his sons and daughters; remainder to J H, the third son of J H, for life, with remainders as before to his sons and daughters; with remainders over. S H was the *third* son, and J H the *second* son of J H.—The Court of C. P. gave judgment on a special verdict that S H, being rightly named, was entitled to take, though wrongly described as the *second* son. The case being carried into K. B. by writ of error, a *venire de novo* was awarded, in order that evidence might be adduced to enable a jury to find whether the mistake was in the name or description.

Doe v. Huthwaite, 2 B. Moo. 304; S. C. 3 Barn. & A. 632.—If testator devises to W, eldest son of C W of T, and the eldest son is named Andrew, yet he shall take. Com. Dig. "*Estates by Devise*," (I). See Stockdale v. Bushby, 19 Ves. 381; Coop. 229, S. C.; Doe v. Westlake, 4 Barn. & A. 57.]

[So, if one devise land to the wife of J S, and J S die, and she take to husband J D, and then the devisor die, she shall take the land; and yet she is not the wife of J S when the devisor dies, nor shall she take it as his wife; but the intent is, that she who *was* the wife of J S at the time of making the will should have it, and the person is clear by the description.

10 Mod. 371; 1 Vin. Abr. tit. *Dev.* T. B. pl. 2; Plowd. 344.

Again, if a man had devised land to Alexander Nowel, dean of St. Paul's, and to the chapter there and their successors, and Alexander had died, and a new dean had been made, and afterwards the devisor had died, the land had vested in the new dean and chapter; and yet it would not have vested according to the words, but according to the intent; for the chief intent was to convey it to the dean and chapter and their successors for ever, and the single person of Alexander Nowel was not the principal cause, though it might have been one of the causes of the devise.

Vin. Abr. tit. *Corp.* G. 6, pl. 11, tit. *Devise*, W. c. pl. 4; Plowd. 344.

Upon the same principle it was decreed by Lord Somers, where one, his wife being *enseint* with a child, (was taken sick and made his will, and thereby devised that if his wife should have a posthumous daughter she should have 500*l.*, &c.,) had a daughter born, and afterwards died; that this daughter, though born in the life of her father, was a posthumous child within the meaning of the will.

Jaggard v. Jaggard, Pre. Ch. 175.]

[|Testator after making several bequests to Thomas Brailsford, described as "the son of my nephew, Samuel Brailsford," and without mentioning any other Thomas Brailsford, devised an estate in remainder to "the said Thomas Brailsford and his assigns for his life, and after his decease to the said Thomas Brailsford, son of my nephew, Samuel Brailsford, his heirs and assigns for ever." It appeared that testator, besides his great-nephew, Thomas Brailsford, had a nephew Thomas Brailsford. Held, notwithstanding the peculiarity (a) of giving by the same devise an estate for life, and also an estate in fee to the same person, that the great-nephew was entitled to both estates under the devise, in remainder.

Chambers v. Brailsford, 18 Ves. 368. Affirmed on appeal to Lord Chancellor Eldon, 19 Ves. 652; 2 Mer. 25, S. C. (a) See 15 Ves. 103; 9 East, 405.]

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If a man has issue two sons, and devises his land to his son, without specifying which he means, this is void for the uncertainty; for to construe it a devise to the eldest, is to make it an impertinent devise, that being no more than *actum agere*; and to construe it a devise to the youngest, seems still more unreasonable, because that is to disinherit the heir at law without an apparent intention of the testator to warrant it, and to set up a doubtful title in destruction of a clear one.

Cro. Eliz. 742. {Devise to testator's brother and *sister's family* void for uncertainty; the testator having had two sisters, one of whom was living and had children, and the other was dead leaving issue, and the court not being able to collect from the will whom he meant by *sister's family*. 3 East, 172, Doe. v. Joinville.}

If a man has two sons named J, and devises to his son J all his lands, this is a void devise for the uncertainty, unless it can be proved that the testator meant one of them in particular—by the elder son's being beyond sea, probably dead, &c.; for these circumstances clear up the intent of the testator, and such averment is (a) admitted, because it is consistent with the will; and the construction and judgment thereon must be genuine, because taken from the words of the will.

5 Co. 68. (a) But for this, vide head of *Evidence*.

If a man hath issue two sons and two daughters, and devises his land to his wife for life, and that after her death the same shall remain to his issue; this is a void devise as to the remainder; for having several children, it is (b) uncertain what issue intended.

Cro. Eliz. 742, Taylor and Sayer. (b) But vide Raym. 83, S. C. cited and denied to be law; and that it should go to the eldest son, for issue is *nomen collectivum*; and so is 3 Lev. 433, and 6 Co. 17.

2 A legacy was given to a legatee in the name which she had many years assumed; the court directed an inquiry who was the person meant.

Neathway v. Ham, Tam. 316.g

|| "ISSUE."—This word *prima facie* takes in all descendants; but if upon fair reasoning, deduced from the words of the will, it appears that testator used it in a more confined sense, that sense must be given to it.

Leigh v. Norbury, 13 Ves. 340; Bernard v. Mountague, 1 Mer. 424; Davenport v. Hanbury, 3 Ves. 257.

Testator bequeathed to several persons, and in case of their death before him, he willed that the lawful issue of every one of them so dying should have the legacy which their respective parents, if living, would have had. From this clause, (the word "parent" being considered in its ordinary sense as father or mother,) and other expressions in the will, Lord Eldon decided that *issue* should be confined to *children*.

Sibley v. Perry, 7 Ves. 522.

"Issue is an ambiguous term. It may mean, and frequently does mean, children only; it may mean all descendants; but in this case has not the testator himself distinctly explained what he meant? By confining the disposition to children and grandchildren, he has in effect said, that by 'issue' he meant children of children. Speaking of no other issue, the inference is, that no other was in his contemplation. It would be against all rules of construction, to control the operation and effective part of a clause by ambiguous words occurring in the introductory part of it. The words in the operative part of the clause, 'children and grandchildren,' are unambiguous: are they to be controlled by the ambiguous word 'issue,' which occurs only in the introduction?"

Verba Sir W. Grant, M. R., 3 Ves. & B. 67.

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In a limitation to the first male issue, lawfully begotten by the said J A G, "male issue" was held to mean "sons."

Hampson v. Brandwood, 1 Madd. 387.¶

If a man has issue eight daughters by three several venters, and one son, and devises his land to his youngest daughter, the remainder to his son in tail, the remainder to his two daughters by the middle venter for life, the remainder *proximo de sanguine* of the devisor, and dies, and after the eldest daughter has issue, and dies, and after the son, and all the other daughters, except the two daughters by the middle venter, to whom it was given for life, die without issue, the issue of the eldest daughter shall have it

Palm. 303; vide Styl. 240.

¶Testator devised, after several limitations, "unto the first and nearest of my kindred, being male, and of my *name and blood*, that shall be living at the determination of the several estates hereinbefore devised, and to the heirs of his body lawfully begotten." The being of a man's *kindred* is being of his *blood*, as the word consanguinity, which is the same as kindred, imports. Being of a man's kindred *and* of his blood, must, to give some force to the addition, mean, being of that blood which with some propriety may be called *his*; namely, that which in tracing an heir is considered the most worthy. Being of a man's kindred and blood, then, ascertains a certain stock or family; and being male, and of a name, certain individuals in that stock or family. "First" and "nearest" may, perhaps, be considered as meaning the same thing. The "name" required must be inherited, and not merely assumed, by virtue of the king's license.

Leigh v. Leigh, 15 Ves. 92. See Doe v. Plumptre, 3 Barn. & A. 474, as to the construction of the words, "the nearest of kin of the name;" and see 5 Barn. & A. 544; 1 Dow. & R. 187; 2 Swanst. 375.

"FAMILY."—A devise to A for life, remainder to testator's *family*, operates as a devise to the heir at law of testator.

Hob. 33; Wright v. Atkyns, 17 Ves. 255, S. C.; Coop. 111, S. C.; 19 Ves. 299, S. C.; 1 Turn. & Russ. 156; M'Leroth v. Bacon, 5 Ves. 166; Barnes v. Patch, 8 Ves. 604; Doe v. Smith, 5 Maul. & S. 126. As to the words "the members of my family," see Hill's Executors v. Bowman, 7 Leigh, 650.¶

But if a trust be created, or power given, which requires or implies a selection from a class of persons, and the class be designated as the *family* of testator, in such a case the term has not received a legal definition. Thus, a testator devised to his mother, her heirs and assigns for ever, in the fullest confidence she would, at her decease, devise the property to his family. In this devise, Lord Eldon thought that the context showed that "family" must mean a class.

Wright v. Atkyns, *suprà*; Turn. & R. 158; and see Cruwys v. Colman, 9 Ves. 319.

A limitation to Arnold, or his nearest relative in the male line, was confined to the issue of Arnold and his brothers.

Woolmore v. Burrows, 1 Simons, 519, 529.

"RELATIONS."—Testator devised all his freehold estates to his wife for her life, and at her decease to be equally divided amongst the *relations* on his side. Held, that the word "relations" having received a construction as to personal estate, viz. those entitled under the statute of distributions, that it should have the same signification when applied to real estate; and that in the case above, the next of kin of the testator, at the time of his death, whether in the maternal or paternal line, were entitled.

Doe v. Over, 1 Taunt. 263; S. C. cited 19 Ves. 301; and see cases cited 3 Swanst.

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319, and *Crosley v. Clare*, *ibid.* 320, in note; also *Turn. & Russ.* 161, and title *Legacies, post.*, (B).

Testator gave real and personal estate to A in fee, with an executory devise to her nearest *relation* of the name of Pyot (a), his or her heirs, administrators, executors, and assigns. Held, that "relation" was *nomen collectivum*, and that persons constituting the stock of the Pyots, who were nearest, should take, females who had changed their name included; the continuance of name not being regarded by testator.

Pyot v. Pyot, 1 Ves. sen. 335, S. C., from MS.; 6 Cru. Dig. 195. (a) It was "of the Pyots" Mr. J. Lawrence said, 15 Ves. 99; and it appears by Mr. Belt's supplement to Ves. sen. 161, that the words "of the name" are not in the registrar's book.

Testator gave the residue of his fortune to be laid out in land, as contiguous as practicable to Stradone, to be added and CLOSELY ENTAILED to the family estate there, in the possession of his relative Thomas Burrows. By a codicil testator declared, "My object in wishing to improve the Stradone estate is to have a head to the family. Should Thomas Burrows die without leaving male issue, or dispose of Stradone out of the family line, it is my desire that the residue of my fortune should go to Arnold B., son of Colonel B., or to his nearest relative in the male line." The Stradone estate was in settlement, by which Thomas Burrows was tenant for life, remainder to his first and other sons in tail-male, remainder to his daughters as tenants in common in tail, with cross remainders between them in tail, with the ultimate remainder to Thomas Burrows in fee. Thomas Burrows had one son living at the death of testator, who was named Robert. The settlement of estates purchased with the residue of testator's fortune, was directed to be to the use of trustees and their heirs for the life of Thomas Burrows, in trust for him; remainder to the use of Robert Burrows for life; remainder to trustees to preserve, &c.; remainder to first and other sons of Robert, in tail-male; remainder to every other son of Thomas, in tail-male; remainder to Arnold B. for life; remainder to trustees to preserve; remainder to his first and other sons, in tail-male; remainder to a brother of Arnold, for life; remainder to trustees; remainder to his first and other sons, in tail-male; remainder to every other son of the father of Arnold, in tail-male; remainder to Arnold in fee.

Woolmore v. Burrows, 1 Simons, 512.

Testator devised all his real and personal estate, subject to his debts and other charges, to his wife for life; and that after her decease the same should be divided according to the statute of distribution in that case made and provided. Held, that the devise over of the real estate was not sufficient to designate the persons intended to take, and was therefore inoperative.

Thomas v. Thomas, 3 Barn. & C. 825.

"CHILDREN."—This word cannot be extended to include grandchildren, or issue in general, unless the object of the testator, as expressed in his will, would otherwise totally fail.

Royle v. Hamilton, 4 Ves. 437; *Reeves v. Brymer*, 4 Ves. 692; *The Earl of Orford v. Churchill*, 3 Ves. & B. 69; *Radeliffe v. Buckley*, 10 Ves. 200.

Upon a devise to a man and his children, it was held, that if there were no children at the time, the father would take an estate-tail, and "children" would mean "issue;" for it was evident something was intended for children; but none being *in esse*, they could take nothing except through the father; and he could transmit to them nothing, unless he had an estate of

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inheritance. It was necessary, therefore, to construe the word "children" issue, on account of the general apparent intention.

10 Ves. 200, Wyld's case cited; and see *ibid.* 201, for cases in which it appeared that testator used children in the same sense as issue.

Under a devise to all the children of A, living at his decease, except B, a posthumous child was held to be included.

Clarke v. Blake, 2 Ves. jun. 672; and see 1 Ball. & B. 486.

Testator devised to the first son of A, who was not heir at law to A;—Held a good devise to the second son.

Marwood v. Darrell, Cases temp. Hardw. 91.

A devise to "descendants" is not restrained, but includes all who can trace their pedigree from the ancestor named.

Crosley v. Clare, Amb. 397, S. C.; 3 Swanst. 320, in note; Butler v. Stratton, 3 Br. C. C. 367. See Turn. & Russ. 162.

Under a bequest to A's and B's families, the children are entitled exclusive of their parents, and *per capita*.

Barnes v. Patch, 8 Ves. 603; See Doe v. Joinville, 3 East, 172.

Testator devised to W. Head, only surviving son of Sir T. Head, for life, with remainders in tail to his children; and for default of such issue to the first, second, and all and every other son and sons of the said Sir T. Head, lawfully to be begotten. W. Head was not the only son of Sir T. Head; he had a brother who was known to testator at the time of making his will. Held that the brother, though born before the date of the will, should take, as included in the limitation, to the first, second, and other sons; the words "to be begotten," meaning the same as "begotten," and embracing all those whom the parent should have begotten during his life, *quos procreaverit*.

Doe v. Hallett, 1 Maul. & S. 124.¶

If a man devises all his lands to one of his cousin Nich. Amherst's daughters, that shall marry a Norton within fifteen years, and dies, and Nich. Amherst having three daughters, one of them marries a Norton within the fifteen years; this is a good devise to her, notwithstanding the uncertainty, and the law supplies the words, *who shall first marry*.

Raym. 82, Bate and Amherst, adjudged.

If a man devises lands to J S in trust for A, and the heirs of his body, remainder to B for life; and further wills that if A die without issue, and B be then deceased; then, and not otherwise, he gives the lands to J N and his heirs; though A dies without issue, and B survives, yet after the death of B, J N shall take, for the words, if B be then deceased, express the testator's meaning that B should be sure to have it for life, and also show when J N should have it in possession.

2 Vent. 363.

A devises lands to trustees in fee, in trust to pay debts and legacies, and after those debts paid, then to sell; and if any of the testator's name would buy, such person to have the lands 200*l.* less than the value; one of the testator's name brings a bill for this benefit of pre-emption, but not till the testator had been dead twenty-five years; but the bill was dismissed; for if two of the testator's name should claim the benefit of the devise, who must have it?

Vern. 362, Huckstep and Mathews.

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A devised lands to trustees, in trust to his daughter for life, remainder to the second son of her body to be begotten in tail-male, and so to every younger son ; and in default of such issue male, to her eldest daughter, and to the first son of her body, taking upon him the name and arms of the testator ; and adds further, that he did not by his will devise the estate to the eldest son, because that he expected that his daughter would marry so prudently, as that the eldest son would be provided for ; the daughter married, and had issue a son, who died in twelve months after his birth ; she afterwards had another son born, after the death of the first ; this second must take according to the words of the will, though contrary to the intention of the testator.

2 Vern. 660. Trafford and Ashton, decreed. ||See this case cited and commented upon by Lord Ellenborough, C. J., in *Driver v. Frank*, 3 Maul. & S. 58.||

A, B, and C, being aliens and brothers, A has issue a son, and B and C are naturalized, and B purchases lands, and devises them to the heir of his brother A and his heirs, and B dies, leaving A and his son ; the devise is void for the uncertainty who is intended thereby, for A, being an alien, can have no heir, or however, being living, can have none during his life ; but per Glyn, C. J.,—If it had been found that the son of A was the reputed heir of A, though A was an alien, yet his son might have taken by this devise.

Sid. 23, 51, Forster and Ramsey.

A man had issue a son and a daughter, the daughter was married and had issue two daughters ; the father devised, that all his lands should descend to his son, provided that if his son died without issue of his body, then my land to go to my right heirs male of my name and posterity for ever ; the son died without issue ; and upon ejectment between the brother of the devisor and the daughters, this was held a void devise, because neither could claim under the description of the will ; not the brother, because, though he was of his name, yet he was not his (a) heir ; and though the daughters were his heirs, yet they were not of his name, and so not within the words of the will, and consequently the limitation void for the uncertainty.

Hob. 29, 30, Cownden and Clerk, Moor, 860, S. C. (a) This resolution is founded on a rule laid down in the old books, viz., That he who taketh by description or purchase as heir must be heir-general, or complete heir : for instance, if lands are devised to the heirs of J S, and J S is living at the death of the testator, the devise is void, for *non est hæres viventis* : so, if lands are devised to the right heirs male of J S, and the heir of J S is a female, the devise is void ; or if the devise were to the heirs female, and the right heir had been a male, it would be void in the same manner ; to which purpose vide Moor, 860 ; Co. Lit. 24 b ; 2 Leon. 70 ; Dyer, 99 ; Hob. 33 ; 1 Co. Archer's case ; 1 Co. 103, Shelley's case ; [Ford v. Lord Ossulston, Mich. 7 Ann. B. R. Hargr. Co. Lit. 27 b, note ; Dawes v. Ferrars, 2 P. Wms. 1 and Pr. Ch. 589, and Mr. Hargrave's notes in his Co. Lit. 24 b, 27 b, 164 a.] But notwithstanding these authorities, this doctrine has been shaken by the following more modern resolutions, in which it is held that a special heir may take by purchase ; and that a description of a person by the name of heir, though not heir-general, operating with the intention of the testator, is sufficient to ascertain the person to take. Vide Abr. Eq. 214, 215 ; Beaumont and Long, 2 Vern. 729 ; Newcomen and Barkham. ||See, too, cases cited 2 Jac. & W. 107, and Fearn's C. R. 214.||

If a man devises lands to A and his heirs, during the life of B, in trust for B, and after the decease of B to the heirs male of the body of B now living, B having one son then living ; by this devise a remainder is immediately vested in the son, for the words *heirs male now living*, in a will, are

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a full description of the son, who then was the heir apparent of B, and known by the devisor (who was his uncle and godfather) to be so.

2 Jon. 99, adjudged between James and Richardson in B. R., but reversed in the Exchequer Chamber; but the judgment of reversal was reversed in the House of Lords, 2 Lev. 232, S. C. and per Levinz, this point was tried again upon a new ejectment; and like judgment given as at first in B. R., which was confirmed in the Exchequer Chamber, and likewise in the House of Lords, Vent. 334, S. C., by the name of Burchet and Durdant. 2 Vent. 311, S. C.; Raym. 330, S. C.; 3 Keb. 32, S. C.; Pollex. 457, S. C.

[S, after devising hereditaments to trustees for twenty-one years for the payment of debts, &c., settled the same on the first son of his body lawfully begotten, and the heirs male of the body of such first son lawfully issuing, and, for default of such issue, to his cousin J S for ninety-nine years, if he should so long live, remainder to his first and other sons in tail-male, and, in default of such issue, remainder to the *heirs* male of the body of the testator's aunt E L lawfully begotten, and for default for such issue, remainder to his own right heirs. The testator also gave a legacy to his said aunt E L, *whereby he took notice, that she was living, and that she had three sons, A, B, and C, to whom he gave a legacy of 500*l.** He likewise gave to D B, who was his heir at law, *an annuity out of the said hereditaments of 150*l.** per annum, and to *her* children 500*l.* a-piece. Afterwards the testator died without issue, as did also J S; upon which the question was, Who was entitled to the testator's real estate, whether his heir at law D B or A the eldest son of the testator's aunt E L? And one objection taken to the claim of A was, that E L his mother being living at the testator's death, there was no *heir* of E L, nor could be whilst she was living; and that *heir*, being a legal term, could be understood only in a legal sense, unless some other word or words accompanying it should determine the sense otherwise, as *heir apparent*, or *heir now living*; and it was said, that the word *begotten* did not determine the sense to be special; because the word *begotten*, or to be begotten, had the same legal construction; and it did not appear that the devisor had any intention to confine the devise to the issue male of E L then living, much less to A only, who would take as the heir described by this devise. But it was adjudged in the Exchequer, which judgment was afterwards reversed in the Exchequer Chamber; and that reversal reversed in the House of Peers, that A was entitled under this devise: and the principal reasons upon which the court of Exchequer founded their judgment, and upon which the House of Lords affirmed it, were, because it was evident, from the whole will, that he was the person *manifestly* designed to take by the appellation of the *heir* male of the body of the testator's aunt E L lawfully begotten, before the heir-general of the testator, who was to take no more *than an annuity* so long as there should be issue male of his aunt; and then although the word *heir*, in the strictest sense, signified one who had succeeded to a dead ancestor, yet, in a more general sense, it signified an heir apparent, which supposed the ancestor to be living. Then, when the testator also took notice, that E L the ancestor was living at that time, and gave her a legacy, he could not intend that the first son should take *strictly as heir*, which was impossible if *she* was living, but, as heir apparent he might intend him to take.

Darbison on dem. Long v. Beaumont, 1 P. Wms. 229; 1 Brown. Parl. Ca. 489.

Again, B devised to M his wife, *inter alia*, an annuity of 10*l.* per annum, charged upon the estates in question for eighty years if she so long lived, on condition that she claimed no dower; and, after the decease of M his wife,

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devised annuities of 40s. per annum each to his daughters E N, M T, and A H for ninety years, if they should respectively so long live; also to his daughter M W, the wife of W, another annuity of 40s. per annum for seventy years, if she and the testator's only son R B should jointly so long live, the said term of seventy years to commence at the expiration of the term of two years thereafter given in the estates to his said daughter M W, and the death of M his wife, and, subject to the same annuities, gave the estates to his daughter M W for two years from and after his decease, with remainder to R B his son for ninety-nine years if he so long lived, and subject to such ninety-nine years term, he devised the same to his son R B and his heirs male and to the heirs of his daughter M W jointly and equally, to hold to the heirs male of R B lawfully begotten, and to the heirs of M W jointly and equally, and their heirs and assigns for ever; and, for want of heirs male lawfully begotten of the body of the said R B at the time of his decease, he devised the same, charged as aforesaid, *to the HEIRS and assigns* of the said M W, lawfully begotten of her body, to hold to the *HEIRS and assigns* of the said M W for ever. He then devised a leasehold house to his daughter J S, and made his daughter M W sole executrix and residuary devisee of all his personal and real estate. The testator died, leaving M his widow, since deceased, R B his only son and heir, and five daughters, viz. M, I, E, A, and M W; and R B the son had, at the time the will was made, a son R and two daughters; and M W the testator's daughter then had one son, and, after the testator's death, she had another son, both living, and no other children. On the death of the testator, M W entered into the whole of the estate, and held the same for two years, after which R B the son entered, and held the whole during his life. R B died, leaving his only son R; upon which M W entered into the whole of the estates: and, on an ejectment brought by G on the demise of R son of R B, against M W, the question was, Whether the plaintiff was entitled to recover? And it was contended, that R's devise to the heir of M W in the event that had happened was void; for, at the expiration of the particular estate by the death of R the son, living the daughter M W, nobody could take as heir of M W, for *nemo est hæres viventis*. But, by De Grey, Chief Justice, the question is, Whether here is a *sufficient description* of the person to make the son of M W take as *her* heir *living the mother*. The intention of the testator is clear, that the same favour should be extended to the heirs of M W as to the heirs male of the body of R. He took notice that the daughter was living, *by leaving her a term and a subsequent annuity*, and meant a present interest should vest in her heir, that was, her heir apparent, during her life. He therefore did not think the lessor of the plaintiff was entitled to more than a moiety of the estates. Gould, Blackstone, and Nares, justices, were of the same opinion. Blackstone thought that, as the testator had *varied* the tenure of M W's annuity from that of the three other sisters, *their's* depending on their own single lives, and *her's* on the joint lives of herself and her brother R, it was plain the testator had in his contemplation that *she might survive* R, as, in fact, she did; and, therefore, the word *heir* must be construed as equivalent to *issue*, in order to make him take in her lifetime, agreeable to the intent of the testator.

Goodright on dem. *Brooking v. White*, 2 Blackst. Rep. 1010.]

A devised in this manner:—I give to my eldest heir male, and his heirs male for ever, all my lands in such a place; and if there be a female, she to have 12*l.* per annum as long as she lives; the testator had two sons, the

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eldest of which died in his lifetime, leaving issue; and it was adjudged, that the lands should go to the second son, and not to the daughter of the eldest, though she was heir-general.

Abr. Eq. 214, Baker and Hall, adjudged in C. B.; 1 Ld. Raym. 185, S. C., by the name of Baker v. Wall, Pr. Ch. 468, S. C. cited by Lord Chancellor.

J S devised to trustees in trust, after debts and legacies paid, to convey to A his cousin, and the heirs male of his body, and for want of such heirs male, then to the heirs male of the body of B his great-grandfather, and for want of such heirs male, to his own right heirs for ever, and gave to his sister 2000*l.* to be put out at interest during her life, she to receive the interest, and after her death to her children, and died; and soon after A died without issue; and C being heir male of B, the testator's great-grandfather, but not heir-general, there being a daughter of an elder brother, the question was between him and the testator's sister, and the heir at law, who had the 2000*l.* devised to her, Whether the devise was void, or not? and my Lord Chancellor held the devise good, and that C should take as a person sufficiently described and intended by the testator.

2 Vern. 729, Newcomen and Barkham, and this matter well debated. [1 Eq. Abr. tit. *Devises*, 215, pl. 14, S. C.; Pr. Ch. 442, 461, S. C., by the name of Brown v. Barkham. On a bill of review brought before Lord Hardwicke, in November 1741, the decree in this case was affirmed; but according to a note of it in Hargr. Co. Lit. 27 b, his Lordship considered the case as an exception to the general rule. But the opinion of Lord Cowper has been since confirmed by a decision of the Court of King's Bench on a case sent by the Court of Chancery. The question arose on both a will and a deed, Whether A took by purchase under the description of *heir male of the body* of B, not being heir-general? B being in the deed the *grantor*, the court certified that A took an estate-tail by *descent*; but they added in the certificate, that if a *third person* had been the grantor, they should have thought that A would have taken by *purchase* as heir male of the body of B: and they also certified, that he did so take under the will. Wills v. Palmer, 5 Burr. 2615. And the same point was resolved on a marriage settlement in the case of Evans v. Weston, in the Exchequer, M. 1774, and H 1775.]

||Testator devised, after several limitations, (but none of which gave a vested freehold,) "to the heirs male of the body of his aunt Elizabeth Long, lawfully begotten; and in default of such issue, remainder to testator's own right heirs." Testator noticed that Elizabeth Long was then living, and that she had three sons, for he gave them all legacies: he gave also an annuity charged on the estate devised to his heir at law. Elizabeth Long survived testator; and, therefore, if the estate to her heirs was a contingent remainder, it failed, for there was no preceding freehold to support it. It was, however, held, that "heir" in this case should be considered as "heir apparent," and that the eldest son of Elizabeth Long should take under the remainder.

Darbison v. Beaumont, 1 P. W. 229; 1 Br. P. C. 489, S. P., in Goodright v. White, 2 W. Bl. 1010. See these cases cited and examined by Littledale, Holroyd, and Bayley, Justices, in Doe v. Perratt, 5 Barn. & C. 61, *et seq.*

Testator devised to several persons successive estates of freehold, with remainder "to the first male heir of the branch of my uncle R C's family, who lived at H." R C was dead at the time testator made his will, and left no son, but five daughters, all married. Held by Littledale and Holroyd, Js., that the eldest son of the daughter who died first was the "first male heir." But Mr. J. Bayley thought that the testator meant the male descendants of R C to take, according to their proximity to R C, and the seniority of their lines, without reference to the question, whether their

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mothers were living or not; and, therefore, that the eldest son of the eldest of the daughters who had a son was entitled.

Doe v. Perratt, 5 Barn. & C. 48.

Testator requested his wife to devise to such of his father's *heirs* as she might think best deserved her preference. It seems that those who answered the description at the wife's death were entitled.

1 Simons, 558, 565.

Testator devised to the eldest son of his son for life, and for want of heirs in him, to the right heirs of himself, the testator, *his son excepted*. Held *Dom. Proc.* that no person took any estate under this limitation, and that it was inoperative.

Doe v. Pugh, 3 Br. P. C. 454, S. C.; *Fearne C. R.* App. 573, and cited; 2 Mer. 348, and 2 Jac. & W. 102.

A seised in fee of estates derived from his maternal ancestor, Samuel Rolle, to whom he was heir at law, settled them upon himself for life, remainder to the heirs of his body, remainder as he should appoint, remainder to the use of the right heirs of Samuel Rolle. Held by Sir W. Grant, M. R., and by the Court of K. B., Bayley, J. *diss.*, that the remainder to the right heirs of S R vested in the settlor as right heir of S R. *Contrà*, Sir Thomas Plumer, M. R., held that such remainder was contingent, and would vest in the person who happened to be the right heir of S R, at the expiration of the prior estates.

Cholmondeley v. Clinton, 2 Mer. 173, S. C.; 2 Jac. & W. 1; 2 Barn. & A. 626.

A devise to the right heirs of husband and wife is a devise to such person as answers the description of heir to both, *i. e.* a child of both.

Roe v. Quartley, 1 T. R. 630.

Testator devised all his estates, except S, to certain persons successively, in strict settlement, with the ultimate remainder to his own right heirs. He also devised S to *some* of the same persons successively, in strict settlement, but in a different order of succession, with remainder "to such person and persons, and for such estate and estates as should at that time, [*i. e.* on the death and failure of issue male of the lastly-named devisee of S,] and from time to time afterwards, be entitled to the rest of his real estate, by virtue of and under his will." Held, that the ultimate remainder in fee of the estate S vested by descent in the person who was the testator's heir at the time of his death, and did not remain in contingency under the will till the death of such lastly-named devisee without issue, as aforesaid.

Doe v. Maxey, 12 East, 589.¶

[A devise is never construed absolutely void for uncertainty, but from necessity; for, if there be a possibility to reduce it to a certainty, the devise is good.]

¶2 Sim. & Stu. 295.¶

One seised in fee of a house at Ludgate, devised the same "to S and his brothers successively for their lives;" and then the testator, after mentioning another matter, went on and said, "And as for my house at Ludgate, I do not leave it to S nor his brothers afore to be entered on and enjoyed till one month after their marriages." S, at the time of making the will, had two brothers, R and O; S was the eldest, R the second, and O the third son; R died in the lifetime of S and O; and the question was, Whether this was a good devise, or void for uncertainty? And it was

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argued against the devise, first, that it was void for uncertainty, by reason of the word *successively* not showing which should take first, and which second in succession: second, that the condition in relation to marriage made it more uncertain; for till marriage none could take; and suppose the second brother had married, and neither of the other two, who must have taken? Certainly none of them; for if he that was married should take first, then that would overthrow the other construction of *successive*, that the oldest ought to take first, and then the second, and then the third. *Sed per totam curiam*, the will was good and certain enough; for, being in the case of brothers, the common law was a guide to the exposition of the word *successive*, viz., that the eldest should, after his marriage, enjoy it first for his life, then the second, and then the third; and the court agreed, that the clause about marriage made no alteration in the exposition of the will, but only added a restriction to the devise, which before was general; and, therefore, that if the second son had married before the eldest, yet he could not have taken by this devise.

Ungly v. Peale, 2 Ld. Raym. 1312; 10 Mod. 103; 2 Eq. Ca. Abr. 358; 8 Vin. Abr. tit. *Dev.*, D. Ca. 19. *Note.* This case was first adjudged in C. P., and that judgment afterwards confirmed on writ of error in K. B.]

||Testator, having a brother with a wife and children, a sister with a husband and children, and several nephews and nieces by a deceased sister, after giving legacies to all these persons, devised the residue of his estate to his wife for life, remainder as to one moiety "to his wife's family," and as to other moiety, to "his brother and sister's family," equally to be divided between them, share and share alike. Held, that the devise was void for uncertainty.

Doe v. Joinville, 3 East, 172.

A devise in these words, "I leave and bequeath to all my grandchildren, and share and share alike," held void as uncertain, both in the object and objects of the bequest.

Mohun v. Mohun, 1 Swanst. 201.

The description "child," "son," "issue," every word of that species must be taken *primâ facie* to mean *legitimate* child, son, or issue. But if a testator devises to his children, and by a sufficient description superadded, or by necessary implication, arising from the language or provisions of his will, it appears he meant *illegitimate* children, persons who, by extrinsic evidence, are proved had, at the date of the will, acquired the reputation of being children of the testator, will be entitled.

1 Ves. & B. 462. *β* Gardner v. Heyer, 2 Paige, 11. See Sherman v. Angelo, 1 Bail. Eq. 351.*g*

Testator devised to "the children which I may have by Ann Lewis." Lord Eldon thought, upon a consideration of the will, that this expression, though obviously future, was intended to describe illegitimate children in existence at the date of the will.

Wilkinson v. Adam, 1 Ves. & B. 422. See many prior cases cited and examined in this.

It is settled illegitimate children may take under a general description, and as a class, provided it be clear the testator intended his description to apply to such children, and it be proved that at the date of the will they have attained the character of children by reputation.

Beachcroft v. Beachcroft, 1 Madd. 430; Lord Woodhouselee v. Dalrymple, 2 Mer. 419; Bayley v. Snelham, 1 Sim. & Stu. 78.

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Testator devised to all the children of his late son Thomas Swaine, deceased, as tenants in common. Thomas S left three children; one legitimate, and the others illegitimate. Lord Eldon said, "No person except the legitimate son can take under this devise, for this reason, that the will itself does not prove that the testator meant an illegitimate child."

Swaine v. Kennerley, 1 Ves. & B. 469; Harris v. Lloyd, Turn. & Russ. 310.

An illegitimate child cannot take under the general description of "the child of which A is *enseint* by me;" for to show who was the person to take, might require indecent evidence. "You shall not be allowed to prove whose the child is, but only whose it is reputed to be." The gift failed, on account of its requiring proof that the object of it was the child of the testator.

Earle v. Wilson, 17 Ves. 528; 1 Mer. 152; 1 Ves. & B. 435, 466.

But if an illegitimate child *en ventre sa mère* be described as "the child with which A B is now pregnant," it may take under that description.

Gordon v. Gordon, 1 Mer. 141.]

Where lands were devised to a parish to be confined to the use of the inhabitants of the town in which the parish was situated, and part of the inhabitants of the parish were inhabitants of another town; held, that the devise was void, because a part of the members of the parish were not a corporation, and they could not take as tenants in common.

Barker v. Wood, 11 Mass. 419.

Bequest "to the fellows and demies of Magdalen College, Oxford," upon the happening of a particular event: Held void for uncertainty.

Attorney-General v. Sibthorp, 2 Russ. & My. 107.

Legacy to Guernsey Hospital. There were two hospitals in Guernsey, and the master reported he could not find which hospital was intended. Held, that the legacy was not void for uncertainty, but was well given to a charitable purpose.

Simon v. Barber, 5 Russ. 112.]

4. By the Devisee's dying in the Lifetime of the Devisor.

If a man devises lands to A and his heirs, and A dies in the lifetime of the devisor, the heir of A shall take nothing by the will; for the heirs of A were not named as immediate takers, but only to express the quantity of the estate that A should take.

Plow. Com. 345, Bret and Rigden; [Goodright v. Wright, 1 Str. 25, and 1 P. Wms. 397, S. P.; Warner v. White, Dougl. 344, and 1 Br. Ch. Rep. 219, note, S. P.; Hodgson v. Ambrose, Dougl. 336, S. P.; Doe v. Kett, 4 Term. Rep. 601. And the law is the same in the devise of a copyhold. Busby v. Greenslate, 1 Str. 445; Duke of Marlborough v. Lord Godolphin, 2 Ves. 77. And that a new publication of the will after the death of A would not make such a devise good. See 4 Term Rep. 601; 2 Lev. 243; Sir T. Jon. 135; Sir T. Raym. 408; 1 Mod. 267; 2 Mod. 313; Pollex. 546; 1 Vent. 341.]

If a man devises lands to A his second son, and to the heirs of his body, and after his death without issue, then to B his third son, in tail, &c., if A hath issue and dies in the lifetime of the devisor, and then the devisor dies, B shall have the lands presently; for the devise to A being void, it is as if it had never been made.

Cro. Eliz. 422, 423; [S. P. Wynn v. Wynn, 6 Br. P. C. 95; White v. Warner, 11 East, 551 in note; S. C. 3 Br. P. C. 433.]

(L) Of void Devises, &c.

||So, if there be a devise to A in tail, remainder to B in tail, remainder to the right heirs of A, and A and B die in the lifetime of testator, the heir of A cannot take under the ultimate remainder; because, by the rule in Shelley's case, that remainder would have vested in A, and his heir could only have taken by descent. And this remainder cannot vest in the heir as a purchaser, though in the event void as to A, because the construction of a will must be according to the import and meaning of the words at the time of making the will, (a) which in the present case was plainly to devise a fee-simple to A by way of remainder.

Goodright v. Wright, 1 P. Wms. 397; S. C. 1 Str. 35; 10 Mod. 370. (a) 1 P. Wms. 400; Doe v. Underdown, Willes' Rep. 293.

So, if there be a devise to A for life, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of A, remainders over; and A dies in the lifetime of testator, his issue can take nothing. Nor is it material whether the first devisee be the heir of testator or a stranger; in either case the next in remainder takes upon his (the first devisee) dying in the lifetime of testator.

Hodgson v. Ambrose, Dougl. 337, S. P.; Doe v. Colyear, 11 East, 548; 11 East, 557, note.]

If a man devises to A and his heirs, to the use of C and his heirs, and C dies in the lifetime of the devisor, his heir can take nothing; but the devise will be to the use of the devisor and his heirs.

Leon. 253; Cro. Eliz. 243, Hartop's case.

But if there be a devise to A for life, remainder to B in fee; though A dies in the lifetime of the devisor, B shall take; or if A refuses, he shall take.

Plow. 344; Cro. Eliz. 423; Co. 101 a.

If a man devises his lands to his wife for life, and after to his four daughters and heirs, equally to be divided between them, share and share alike, to hold to them and their heirs for ever; and one of the daughters dies, having issue a son, and then the devisor dies, the will is void for a fourth part.

2 Sid. 53, 78, Packman and Cole.

||But where testator devised "to the sisters of John Howard, to hold the same to them, their heirs and assigns forever, as tenants in common, and not as joint-tenants;" the court, conceiving from the scope of the will that he, the testator, "looked to the class, and not to the number of individuals who might happen to compose it," held, that an only sister who survived the testator took the whole. It seemed that the testator was ignorant as to the family of John Howard, who had three sisters, but two of them were dead before testator made his will.

Doe v. Sheffield, 13 East, 526; and see Doe v. Scott, 3 Maule & S. 300.]

So, if A has issue two daughters B and C, and he devises some tithes and money to B, and gives legacies to her children; but declares that she having married without his consent, she should have no part of his real estate, and devises his real estate to C in tail, remainder to B for life, and to her first, &c., and C dies in the lifetime of the testator, leaving issue; though afterwards A makes a codicil to his will, and devises some particular legacies out of his personal estate, yet, as that does not amount to a republication of his will, B must have the lands immediately after the death of

(M) Of void Conditions in a Devise.

the devisor, though contrary to the intention of the devisor, the authorities being so.

2 Vern. 722, Hutton and Simpson; [Pr. Ch. 439; S. C. by the name of Symphon v. Hornsby; Doe v. Kett, 4 Term Rep. 601.]

If a man devises lands to A and B and their heirs, and A dies in the life of the devisor, B shall take the whole lands.

Carter, 4, 5, Davis and Kemp. || 8 Vin. Abr. "Devise," (W. c.) 373, pl. 14.||

||In a case where there was a devise of a testator's real estate to his mother and sister as joint-tenants, and the sister was dead at the time of making the will, Mr. Madocks, of Lincoln's Inn, in 1777, advised as follows: "Although the sister was dead when the will was made, yet I think that the mother took the whole, as the estate devised to them was in joint-tenancy."||

*What circumstances are necessary to devises by the 32 H 8, c. 1, and 34 & 35 H. 8, c. 5, and 29 Car. 2, c. 3, and what shall be a revocation and a new publication, vide tit. "WILLS AND TESTAMENTS."

§5. By the birth of a child.

If a remainder in lands be devised to all the sons of a tenant for life, then born, and to be born, the remainder will vest on the death of the testator, in the sons then born, and will open and let in any sons that may afterwards be born.

Dingley et al. v. Dingley, 5 Mass. 535.

6. By devise of after-purchased lands.

Lands purchased after making the will do not pass. A testator must have a legal or equitable title in the lands at the time of making the will.

McKinnon v. Thompson, 3 Johns. Ch. 307; Livingston v. Newkirk, 3 Johns. Ch. 312; see Burke v. Young's Lessee, 2 S. & R. 387, 388; Johnson v. Hanly, 1 Tayl. 305; Cogdell v. Cogdell, 3 Des. 346; Jiggets v. Maney, 1 Murph. 258; Hays v. Jackson, 6 Mass. 149; Kendall's Executor v. Kendall, 5 Munf. 272; Jiggets v. Maney, 1 Murph. 258; Johnson v. Hanley, 1 Taylor, 305.

7. Miscellaneous cases of void devises.

A testator must be seised of the estate devised, at the time the devise is made, or it will be inoperative.

Smithwick et al. v. Jordan, 15 Mass. 115.

A devise to the poor children of a county or a congregation is void, as the persons intended cannot be ascertained.

Dashiell et al. v. The Attorney General, 6 Harr. & Johns. 1; S. C. 5 Harr. & Johns. 399.

(M) Of void Conditions in a Devise.

Where there is a devise in fee simple, on condition that the devise do not alien, the condition is void.

Hawley et al. v. The Inhabitants of Northampton, 8 Mass. 3.

In general a condition annexed to a devise or bequest for life, by which it is to be divested by the marriage of the devisee or legatee, is to be considered as intended merely *in terrorem*, and is therefore void. But when the particular devise or bequest is expressly given over, unincorporated with any other subject, so as to create an interest in another person, the condition will be effectual. In the latter case, however, the giving over must be immediate, so as to take effect at the time of the marriage, otherwise the condition will be void.

Parsons et ux. v. Winslow, 6 Mass. 169.

A devise of "all my right," &c. "to my children in case the same continue to inhabit the town of H, otherwise not," will pass a fee, and the condition is void, being repugnant to the nature of the fee.

Newkirk v. Newkirk, 2 Caines, R. 345.

(A) What a Legacy properly is.

A limitation over after an indefinite failure of issue in the first taker is too remote, and void.

Riddick v. Cohoon, 4 Rand. 457.

Bequest of leasehold property, on condition to assign part to a charity, legatee discharged of the condition.

Poor v. Mial, 6 Mad. 32.g

LEGACIES.

||See generally Roper on Legacies, last edit.||

In treating of Legacies, we shall consider,

(A) What a Legacy properly is: ||And herein of Donations *Mortis Causa*.||

(B) Where a Legacy shall be said to be well given: And herein,

1. *What Words make a good Bequest.*

2. *What shall be a sufficient Description of the Person to take.*

||1. When Children living at the Date of the Will shall alone take.

2. When Children living at the Death of the Testator shall take.

3. As to Children *en Ventre sa Mère*.

4. When Children living when the Fund becomes divisible are alone entitled.

5. Younger Children.

6. The term "Children" may include Grandchildren and other Issue, if the intention were so.

7. When natural Children shall take, see *ante*, "LEGACIES AND DEVISES," (L)
3. *in finem*, and 1 Roper on Legacies, 70 *et seq*.

8. Heirs.||

3. *What shall be a sufficient Description of the Thing given, and what shall be said to be bequeathed.*

§(B 2) Of Legacies for Life with Remainder over.g

(C) What shall be an Ademption or Extinguishment of a Legacy.

(D) Where a Legacy shall be presumed to be a Satisfaction of a Debt or Duty owing from the Testator.

(E) Of Legacies vested or lapsed: And herein,

1. *Where it shall be a lapsed Legacy by the Legatee's dying in the Lifetime of the Testator, and where in such Case it shall vest in another Person, to whom it is limited over.*

2. *Where a Legacy shall be said to be vested or lapsed, being to be paid at a future Time, to which the Legatee did not arrive.*

(F) Of conditional Legacies, and how far the Condition must be complied with, otherwise the Legacy will be forfeited.

(G) Of specific and pecuniary Legacies, and the Difference between them.

§(G 2) Of accumulative and substitutional Legacies.g

(H) Of abating, refunding, and giving Security for that Purpose.

(I) Of Residuary Legacies and Legatees.

(K) Of the Payment of Legacies: And herein,

1. *What shall be a good Payment, and to whom to be made.*

2. *At what Time a Legacy is to be paid.*

3. *Where the Legatee shall have Interest and Maintenance in the mean Time.*

(L) Of the Executors' Assent to a Legacy.

(M) Legacies, in what Court, and how properly recoverable.

(A) What a Legacy properly is ; ¶ And herein of Donations *Mortis Causâ*.¶

A (a) LEGACY is defined a gift or bequest of a (b) particular thing by testament, in which an executor is (c) named, or by a writing in nature thereof, called a codicil, in which no executor is named.

Swinb. 17, Godolph. 271. (a) The word *devise* is specially appropriated to a gift of lands, the word *legacy* to a gift of chattels, though both are used promiscuously. Godolph. 271. β The word *legacy* used in a will often refers to real as well as personal estate; it must be explained according to the intention of the testator. Common people apply the word *legacy* to land as well as money, and in this case it was held that it should be so applied. Den ex. dem. Holmes v. Mitchell, 2 Murph. 228; S. C. 1 Car. L. R. 107. γ (b) For if a man dispose or transfer his whole right or estate upon another, this, according to the civil law, is called *hereditas*, and he to whom it is transferred is termed *hæres*; but, by our law, he only is called *heir* who succeeds to lands and tenements. Godolph. 271, 272. (c) But though a writing in which a person expresses his mind to grant such and such things after his death, cannot be called a testament, unless an executor is named, yet it is of force and effect sufficient to pass what he therein declares, and administration shall be granted, with the said writing or codicil annexed, to the next of kin, and such administrator is obliged to observe the directions of such writing, and pay the legacies as far as he has assets. Vide tit. *Executors and Administrators*.

A *donatio causâ mortis* is a gift *in præsentî*, to take effect *in futuro* after the party's death, and is in nature of a legacy, and waits upon the death of the testator, and is ambulatory and open till his death, and may therefore be revoked, as a will may, but has no dependence on the will; and therefore, by a general revocation of all former wills, seems not to be revoked, without added, and all gifts, legacies, &c. But if one just before his death give any money, or other goods, to another absolutely, this is not a *donatio causâ mortis*, because not revocable; otherwise, if he had said, *This shall be yours, if I die*, or any thing to that purpose.

Swinb. 22; Prec. Chan. 269, 300. [In considering the doctrine of donations *mortis causâ*, one cannot help remarking how closely the decisions of the courts of this country have followed the Imperial Constitutions. Bracton, in treating of this subject, uses the very language of the Roman law. Lib. ii. c. 26. It seems, therefore, not to be altogether improper, or to be digressing too far from the limits of our work, to enter into a short comparison of the Imperial and English laws upon this subject.

A donation *mortis causâ* is described in the Institute, "*Cum quis ita donat, ut si quid humanitatis ei contigisset, haberet is, qui accipit; sin autem supervivisset is, qui donavit, reciperet; vel si eum donationis pœnituisse, aut prior decesserit is, cui donatum sit.*" And in another part, "*Cum magis se quis velit habere, quam eum, cui donat, magisque eum, cui donat, quam hæredem suum.*" So with us, a donation of this kind must have relation to the death of the donor, is perfected by his death, and until his death is merely conditional, liable to be defeated by the death of the donee in the lifetime of the donor, by the revocation of the donor; and, as Bracton states it, by the donor's recovery, or escape from the danger he apprehended himself to be in; and see acc. Lawson v. Lawson, 1 P. Wms. 441, but see Hill v. Chapman, 2 Br. Ch. Rep. 612, *seml. contr.* And as with us, if it be not made with reference to death, if it be to take effect presently, if it be revocable, it is then not a donation *mortis causâ*, but a donation *inter vivos*, and therefore cannot have place between husband and wife; (and a proper donation *mortis causâ* may, like a legacy, pass between persons in that relation.) Tate v. Hilbert, 2 Ves. jun. 111; 4 Br. Ch. Rep. 286, S. C.; Lawson v. Lawson, 1 P. Wms. 441; Miller v. Miller, 3 P. Wms. 356; so, by the Imperial law, "*Ubi ita donatur mortis causâ, ut nullo casu revocetur, [MORS] (which must be supplied,) causâ donandi magis est, quam mortis causâ donatio; et ideo perinde haberi debet, atque alia quævis inter vivos donatio; ideoque inter viros et uxores non valet.*" D. L. 39, tit. 6, l. 27.—By both laws a donation of this kind may be made by a person in *periculo mortis*, not only from sickness, but from whatsoever other cause. D. L. 39, tit. 6, l. 3, 4, 5, 6; Bract. lib. 2, c. 26. And as, by the English law, it is subject to the debts of the donor, and fraudulent as against creditors, Drury v. Smith, 1 P. Wms. 406, so by the Imperial law, "*Sicuti legata non debentur, nisi deducto ære alieno, aliquid supersit; nec mortis causâ donationes debentur; sed infirmantur per æs alienum. Quare, si immodicum æs alienum interveniat, ex re mortis causâ sibi donatâ nihil aliquis consequitur.*" D. L. 35, tit. 2, l. 66, § 1.

(A) What a Legacy properly is.

"*Et si debitor consilium creditorum fraudandorum non habuisset, avelli res mortis causâ ab eo donata debet. Nam cum legata ex testamento ejus qui solvendo non fuit, omnimodo inutilia sint; possunt videri etiam donationes mortis causâ factæ rescindi debere, quia legatorum insolor obtinent.*" D. L. 39, tit. 6, l. 17.—Whether, by the Imperial law, a delivery either actual or symbolical of the subject of the donation were absolutely necessary, nowhere distinctly appears, and hath indeed been a matter of controversy among civilians. Whether by our law, an actual delivery *be in all cases requisite*, hath not yet been adjudged; in general, it certainly is so. *Ashton v. Dawson*, Sel. Ca. in Can. 14; *Drury v. Smith*, 1 P. Wms. 404; *Hedges v. Hedges*, Pr. Ch. 269; *Ward v. Turner*, 2 Ves. 441; {and 9 Ves. J. 1, *Bryson v. Brownrigg*.} And a mere symbolical delivery will clearly be of no effect; unless, indeed, the symbol be such as enables the party to come at the possession of the thing which it represents, such as the key of a trunk which contains the thing given. *Jones v. Selby*, Pr. Ch. 300; 2 Ves. 443. Hence it hath been determined, that the delivery of a promissory note, not payable to bearer, *Miller v. Miller*, 3 P. Wms. 357, and of receipts for S. S. annuities, *Ward v. Turner*, 2 Ves. 439, is not a sufficient delivery to effectuate a gift of this kind of the money due on the note or of the annuities, the property neither in the note nor in the stock passing thereby; and yet the delivery of a bond, though a *chase in action*, hath been holden to amount to a gift (*mortis causâ*) of the debt itself. *Snellgrave v. Bailey*, 3 Atk. 214. But see 3 P. Wms. *ubi supra*.—That a donation *mortis causâ* was good without delivery, where it was evidenced by writing, was admitted by the Imperial law.—*QUIDAM* (which must be supplied) *avunculo suo debitori mortis causâ donaturus quæ debebat, illa scripsit. TABULÆ, VEL CHIROGRAPHIA TOT, UBICUNQUE SUNT, INANES ESSE; neque eum solvere debere. Quæro, an hæredes, si pecuniam ab avunculo defuncti petant, exceptione doli mali tueri se possint?* *Marcellus respondit, posse: nimirum, enim contra voluntatem defuncti hæres petit ab eo.* D. L. 39, tit. 6, l. 28. And with us in a late case, Lord Chancellor Loughborough, in speaking on this subject, is reported to have said, "It is not necessary in this case to discuss, whether delivery is necessary in all cases. Perhaps, it might not be difficult to conceive that such a gift might be by deed or by writing. It is clear it could not be by mere parol; because saying, '*I give*,' without an act, does not transfer the property. So far I concur with the reasoning of Lord Hardwicke, in *Ward v. Turner*. It might be considered, if the case should arise, whether there would be any objection to a formal deed. I should think it not within the jurisdiction of the ecclesiastical court, and that the property so given is not to be possessed by the executor." *Tate v. Hilbert*, 2 Ves. jun. 120. And an instance of such a gift by deed occurs in the case of *Johnson v. Smith*, 1 Ves. 314. Indeed, a devise of lands seems to be nothing else but a conveyance or disposition *mortis causâ*. 1 Burr. 429.—A delivery to a third person to hold in trust for the donee, to be given to him in the event of the donor's death, was allowed to be sufficient by the Imperial law; D. L. 39, tit. 6, l. 8, § 2; but it may be doubted, whether it would be so by our law, by reason of the maxim, *donatio perficitur possessione accipientis*, Jenk. 109, ca. 9, whence gifts with us have the semblance of contracts.—To effectuate gifts of this kind the Emperor Justinian required the testimony of five witnesses, Cod. lib. 8, tit. 57, l. 4,—a caution which hath been thought reasonable, and in some degree followed by our own courts; *Ward v. Turner*, 2 Ves. 438; though it must be admitted, that such a gift has been supported upon the testimony of only one witness. *Hill v. Chapman*, 2 Br. Ch. Rep. 612.—By the Roman law, every thing was capable of being the subject of a donation *mortis causâ*, but by our law the necessity of delivery excludes all those things, the property wherein does not or cannot pass by delivery; 3 P. Wms. 357; 2 Ves. 436, 437; though if, according to the inclination of Lord Loughborough's opinion, *supra*, such a donation may be effectual by deed or writing without livery, it seems to follow, that even those things which are of too complex a nature to pass by delivery, such as the whole or residue of personal estate, may be so disposed of.]

|| *A donatio mortis causâ* is a gift made by a man during his last illness or in peril of death, which is perfected by an actual delivery, but which is revocable during the donor's life, and is only intended to be absolute in case of the donee's surviving.

Tate v. Hilbert, 2 Ves. jun. 111; S. C. 4 Br. C. C. 286; *Bunn v. Markham*, 7 Taunt. 224; S. C. 2 Marsh. 532; S. C. cited 2 Barn. & A. 553; *Walter v. Hodge*, 2 Swanst. 29; *Wells v. Tucker*, 3 Binn. 370; *Nichols v. Adams*, 2 Whart. 17-g

Such a gift is subject to the donor's debts in case of a deficiency of

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assets,(a) and to legacy duty;(b) but it does not vest in executors, nor is it subject to the jurisdiction of the ecclesiastical court.(c)

(a) Smith v. Casen, 1 P. W. 406; 2 Ves. sen. 434. (b) 36 Geo. 3, c. 52, § 7. (c) Thomson v. Hodgson, 2 Str. 777. See 2 Ves. sen. 439; 2 Ves. jun. 120; 1 P. W. 441.

The gift must be made with a view to donor's death; but this is implied if made during his last illness.

Tate v. Hilbert, 2 Ves. jun. 111; S. C. 4 Br. C. C. 286; Gardner v. Parker, 3 Madd. 184.

There must be an actual delivery, or at least such a delivery as gives the donee possession of the gift.

A selection of a mortgage and a bond from other securities, and a placing of them in a separate drawer, accompanied by a declaration that they were for a particular person, is not a sufficient delivery.

Bryson v. Brownrigg, 9 Ves. 1.

A verbal gift of a coach and two horses, but no delivery, held not sufficient.

Miller v. Miller, 3 P. W. 356, 358.

Delivery of the key of the place wherein bulky goods are deposited, has been held sufficient.

Ward v. Turner, 2 Ves. sen. 443.

The delivery of bank notes,(d) promissory notes payable to bearer,(e) exchequer notes,(e) exchequer bills endorsed in blank,(e) or any security,(g) the mere possession of which will entitle the donee to the money specified, may be a good *donatio causâ mortis*.

(d) Miller v. Miller, 3 P. W. 357; Hill v. Chapman, 2 Br. C. C. 612. (e) See Wookey v. Pole, 4 Barn. & A. 1. (g) See Gorgier v. Mieville, 3 Barn. & C. 45.

A check on a banker, though payable to bearer, cannot be delivered as such a gift, for it is revoked by the death of donor, and the money vests in the personal representative.

Tate v. Hilbert, 4 Br. C. C. 286.

A mortgage deed,(h) receipts for South Sea annuities or stock,(i) a promissory note not payable to bearer,(k) cannot pass as a *donatio causâ mortis*, for the possession of such securities will not enable the donee to recover the money secured. But a bond (l) is an exception from this rule.

(h) Duffield v. Elwes, 1 Sim. & Stu. 243; but see Hurst v. Beach, 5 Mad. 351, where the delivery is to the mortgagor. (i) Ward v. Turner, 2 Ves. sen. 431; see also 3 Madd. 185. (k) Miller v. Miller, 3 P. W. 356. (l) Gardner v. Parker, 3 Madd. 184.

If the donor resume the gift, it is revoked.

Bunn v. Markham, 7 Taunt. 224. See 2 Ves. sen. 433.]

If one, by his will in writing, devise a certain legacy in money, and afterwards say to his executor, *I have by my will given such particular legacies; I would have you increase the same to such a sum*; this, by the civil law, is termed *commissum fidei*, and a good legacy.

Cro. Ja. 345, 346; 2 Buls. 207; Godb. 246; but vide now the statute 29 Car. 2, c. 3, and tit. *Wills and Testaments*.

If a man covenants with J S to pay him 20*l.*, and afterwards by will he devises to him 20*l.* in discharge of the said covenant, this is not a legacy suable in the spiritual court, but remains still a debt, recoverable at common law.

2 Leon. 119.

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But if A covenants with J S that he will pay 20*l.* apiece to B, C, and D, and afterwards he devises 20*l.* apiece to B, C, and D, in discharge of this covenant, these are good legacies, and recoverable in the spiritual court, the covenant in this case being with a stranger, and therefore B, C, and D have no remedy, but by applying as legatees.

2 Leon. 119, Davies and Percie's case; and vide *infra*, letter (M).

(B) Where a Legacy shall be said to be well given: And herein,

1. *What Words make a good Bequest.*

HERE we must observe, that although in grants and deeds of gift the law requires a set form of words, yet in last wills and testaments, which are presumed to be made at the time when the testator is *inops concilii*, the law regards chiefly the intention of the testator, and therefore any words, which manifest his intention to create or give a legacy, will be sufficient for that purpose.

Godolph. 281; 2 Vern. 467.

As, if a man by his will says, *I do give, bequeath, devise, order, or appoint to be paid, given, or delivered*; or, *My will, pleasure, or desire is, (a) that he shall have and receive, or keep or retain*; or, *I dispose or assign, or leave such a thing to such a one*; or, *Let such a person have such a thing*; these, or the like words, are sufficient to create a good bequest.

Godolph. 281. [(a) If a testator *desire* his executor to give another 200*l.*, without prescribing any time of payment, it is a good bequest. *Brest v. Offley*, 1 Ch. Rep. 246. For where the property and the person are ascertained, *recommendatory* bequests are considered as *imperative*. *Harding v. Glyn*, 1 Atk. 469; *Richardson v. Chapman*, 1 Burn's E. L. tit. "*Bishops*," p. 230; 5 Br. P. C. 400; *Earl of Bute v. Stuart*, 5 Br. P. C. 534; *Palmer v. Scribb*, 2 Eq. Ca. Abr. 291; *Harland v. Trigg*, 1 Br. Ch. Rep. 142; *Wynne v. Hawkins*, *Ibid.* 179; *Nowlan v. Nelligan*, *Ibid.* 489; *Pierson v. Garnet*, 2 Br. Ch. Rep. 45, 230; *Malim v. Keighley*, 2 Ves. jun. 333, 529.] {7 Ves. J. 85; 8 Ves. J. 380; 9 Ves. J. 319; *Cruwys v. Colman*, *Ibid.* 546; 10 Ves. J. 536; 1 Cain. 84; *Van Dyke v. Van Beuren & Vosberg*.}

So, if the testator says, *I depute such a thing to A B*, or, *I assign such a thing to C D*; these are good bequests or legacies.

Godolph. 282. Where it is said, that a legacy may be given by signs, becks, or nods; by the head, hands, or eyes; or by showing a pleased or displeased countenance, or by other motions of the body; because the law regards more the meaning and intention than the words of the testator. Godolph. 282, 283.

So, if a man by will gives 100*l.* besides the cloak, &c.; this is a good bequest of the cloak, &c., as well as of the 100*l.*

Godolph. 282.

So, if a man says, *Out of the 100*l.* which I bequeathed A, I give B 50*l.**; this is a good bequest of the 50*l.* to B, because only a false demonstration in an immaterial circumstance, which shall not vitiate the legacy; but in this case A takes nothing; for words of diminution shall never be construed to give a legacy by implication.

Godolph. 282.

But if the demonstration be totally false, as if the testator says, *I bequeath to A the 100*l.* which I have in my chest*, and there is not any money in the chest, the legacy is void.

Godolph. 282.

If the testator says thus, *If my son A marries B, let not my executor give*

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him 100*l.*; these words, on A's not marrying B, are said to be sufficient to give him the 100*l.*

Godolph. 283.

||So, testator bequeathed to his niece 1000*l.*, to be paid at his death, if she were then married; but if not, then the interest for her life or until she married; *but if she died unmarried*, the legacy was to lapse. Niece was *not* married at death of testator, but married soon after; she was held entitled to the legacy.

Crowder v. Clowes, 2 Ves. jun. 449.

So, a bequest of maintenance during minority, with power to advance 200*l.* of principal, with a bequest over if the minor should die under age, was held to vest the principal in the minor absolutely on attaining twenty-one.

Wainwright v. Wainwright, 3 Ves. 558; Goodright v. Hoskins, 9 East, 306.

Again, if testator bequeaths his residue to trustees for his son till twenty-one, and then the trust to cease, the son is absolutely entitled on attaining twenty-one.

Peat v. Powell, 1 Eden, 479; Hale v. Beck, 2 Eden, 229.

Testatrix gave residue to her niece, to be paid and expended by her at her discretion, for the education of her son F G, and that she should not thereafter have to account to her son or any person: and among other legacies, testatrix gave 200*l.* to her niece. Sir T. Plumer decided, that the niece was entitled to the residue, subject to a trust, to apply such part to the education of her son as the master should approve.

Hamley v. Gilbert, Jacob, 354, and see Hammond v. Neame, 1 Swanst. 35.

Testator gave interest to be paid to educate M M, and M M was to have the interest so long as she lived single, and no child; and when it pleased God to call her, the money was to go to testator's brother's children. Held, that M M, though she married and had a son, was entitled to the interest for her life.

Bird v. Hunsdon, 2 Swanst. 342, and see Crawford v. Trotter, 4 Madd. 361.||

If a legacy be given by the testator to the son of one who is indebted to him, and the testator add these words, *I should or would leave him more, if his father had paid me what he owes me*, it is held, that if afterwards that son happens to be his father's executor, he is by these words freed from that debt which his father owed the testator.

Godolph. 284.

If there be a devise of a personal thing to A for life, directing him at his death to give it to B; this amounts to a devise of the use of it only to A for life, remainder to B.

2 Vern. 467.

[A testator made a testamentary paper in the following words: "I give and devise unto my loving wife H N all my real and personal estate; I make no provision expressly for my dear daughter (the plaintiff,) knowing that it is my dear wife's happiness, as well as mine, to see her comfortably provided for; but in case of death happening to my said wife, in that case, I hereby request my friends S and H to take care of, and manage to the best advantage for my lovely daughter H N, all and whatsoever I may die possessed of." The executors proved this testamentary paper, and got in the personal estate of the testator to the amount of 7,947*l.* 10*s.*, with which they

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purchased 11,000*l.* 4 *per cent.* annuities. On a bill filed by the daughter, praying, that the whole of these annuities might be transferred, and secured to the use of the plaintiff, subject to the life-estate of her mother, and be declared to belong, subject to such life-interest, to the plaintiff, Lord Thurlowe directed the whole fund to be transferred to the Accountant-General, the whole annual produce to be paid to the defendants (the mother and her second husband) so long as they should continue to maintain the plaintiff, with liberty to her to apply, if they should discontinue such maintenance.

Nowlan v. Nelligan, 1 Br. Ch. Rep. 489.] {See also, on the construction of a legacy to "A and" or "or in case of his death to his children." 6 Ves. J. 557, Turner v. Moor.; 1 Bro. C. C. 393, Billings v. Sandom; Pre. Ch. 78, Trotter v. Williams; 2 Ves. J. 501, Lord Douglass v. Chalmer; 4 Ves. J. 160, Henckley v. Simmons; Ibid. 435, Corbyn v. French; 5 Ves. J. 806, King v. Taylor; 8 Ves. J. 12, Cambridge v. Rous.; Ibid. 410, Webster v. Hale.}

|| WORDS OF RECOMMENDATION, DESIRE, &C., CREATE A BEQUEST, OR RATHER RAISE A TRUST.

But it is necessary that the words be imperative, and the objects and property certain. Thus a bequest of 2000*l.* to R M generally, with a "*desire*" that at his death he would give it over, R M dying in testator's life, the parties to whom it was to be given over were entitled.

Mason v. Limburg, cited in Vernon v. Vernon, Amb. 4; and see 1 Turner, 157.

So, a "*desire*" that legatee would appoint amongst a class. The legatee did not appoint: on her death the class were held entitled.

Harding v. Glyn, 1 Atk. 468; S. C. stated 5 Ves. 501, cited 8 Ves. 571.

So a devise, testator "*not doubting*" but that devisee would dispose of same amongst his children.

Massey v. Sherman, Amb. 520.

So in case of a devise and bequest, testator "*knowing*" that devisee would provide for his daughter; with a *request*, in case of devisee's death, that A and B would take charge of estate for the daughter.

Nowlan v. Nelligan, 1 Br. C. C. 489.

So, where testator "*requested*," (a) "*recommended*" (b) legatee to dispose of the gift among certain persons.

(a) Pierson v. Garnet, 2 Br. C. C. 226; cited 8 Ves. 573; 10 Ves. 536; (b) Malim v. Keighley, 2 Ves. jun. 333; and see 1 Sim. & Stu. 387; 18 Ves. 41.

So where testator, after charging the rents of an estate, "*authorized and empowered*" J B to dispose of residue among such of the children of S as he should think fit; J B died in testator's lifetime, yet the children were held entitled.

Brown v. Higgs, 4 Ves. 708; 8 Ves. 561; 18 Ves. 192.

So, where the words were "*will and desire*," with a power of selection.

Birch v. Wade, 3 Ves. & B. 198; see also Tibbits v. Tibbits, 19 Ves. 656; Jacob, 317; Forbes v. Ball, 3 Meriv. 437; Broad v. Bevan, 1 Russell, 511.

So, where the words were "*entreat*," (c) "*desire*," (d) with a power of selection.

(c) Prevost v. Clarke, 2 Mad. 458; (d) Conwys v. Colman, 9 Ves. 319.

Bequest of residue to Miss E S, under the following restrictions:—If Mr. Ince should marry and have children, she will give 500*l.* *per annum* to her niece H S, and afterwards divide the remaining property among the brothers and sisters equally; "unless any one shall be afflicted with vice or prodi-

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gality, in her opinion, let him or her not have a shilling of what she can leave." Held to be an interest vested in the brothers and sisters, subject to be defeated by an appointment by E S.

Robinson v. Smith, 6 Mad. 194.

But if the words of recommendation, &c., are not imperative, but simply empower a gift to be made to the objects specified, nothing passes to or vests in them till the power is executed.

Thus, testator gave his wife several houses, but did not give her any interest in the general produce of his estate, and then proceeded: "I further empower my wife to give away at her death 1000*l.*: 100*l.* to E T; 100*l.* to C D; and 800*l.* to R L." The wife died without making any appointment. Held, that nothing passed to these legatees.

Bull v. Vardy, 1 Ves. jun. 270. See Meggison v. Moore, 2 Ves. jun. 630; Paul v. Compton, 8 Ves. 375.

And the court will not allow any words recommendatory, or precatory, or expressing the hope or confidence of the testator to create a bequest, or raise a trust, unless the fund or property to which they refer is certain or ascertainable. Thus, if after a bequest to A such words refer to, "so much as shall remain," (a)—"so much as he shall have at his death," (b)—"what shall be left," (c)—"all that is remaining that he has not necessary use for," (d)—"the remainder of his (A's) property, after giving 200*l.* to each of the Miss Nortons," (e)—the court will not attach a trust upon so uncertain a *residuum*.

(a) Attorney General v. Hall, Fitzg. 314; cited 1 Ves. sen. 9. See Pushman v. Filleter, 3 Ves. 7; Wilson v. Major, 11 Ves. 205; and see 1 Mer. 314; (b) Bland v. Bland, Pre. Ch. *ed.* Finch, 201; (c) Wynne v. Hawkins, 1 Br. C. C. 179; (d) Strange v. Barnard, 2 Br. C. C. 586; (e) Eade v. Eade, 5 Madd. 118, affirmed on appeal by Lord Eldon. See 1 Sim. 540; Curtis v. Rippon, 5 Madd. 434.

So, the same decision was made where testatrix gave her fortune to B, and if he died without issue, she recommended it to him to do justice to A and her children; but if any unforeseen accident should make the whole or any part acceptable to himself, he might dispose of it as he thought proper.

Le Maitre v. Bannister, Pr. Ch. *ed.* Finch, 201, note.

So, where the words were, "I bequeath to my son Isaac Jacobs the sum of 60*l.* per annum for ever; also to provide for the two daughters of my child Hannah, and the remainder of my property to the two children of my daughter Sukey." Held, that the daughters of Hannah took nothing.

Abraham v. Alman, 1 Russell, 509.

It is necessary, too, that the *objects* of the recommendation be distinctly ascertained, as well as the property.

Harland v. Trigg, 1 Br. C. C. 142; Meredith v. Heneage, 1 Simons, 542, 559.

Testator bequeathed all his worldly substance to his wife upon trust, for the following purposes, and then gave several legacies and proceeded:—"The remainder of what I die possessed of, after payment of the aforesaid debts and legacies, I leave to my dear wife, recommending to her, and not doubting, as she has no relations of her own family, but that she will consider my near relations, should she survive me, as I should consider them myself in case I should survive her." Held, that the wife took the residue absolutely.

Sale v. Moore, 1 Simons, 534.

"Whenever any person gives property, and points out the object, the

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property, and the way in which it shall go, that does create a trust, unless he show clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it."

Verba Lord Alvanley, M. R., in *Malim v. Keighley*, 2 Ves. jun. 335; 1 Simons, 565

Again, where testator, after giving his real and personal estates to his wife in fee, said, he had so given the same to her, unfettered and unlimited, in full confidence that, in her future disposition thereof, she would distinguish the heirs of his late father, by devising the whole of his estate together and entire to such of his father's heirs as she might think best deserved her preference. Held, that no trust was created.

Meredith v. Heneage, Dom. Proc. A. D. 1824, 1 Simons, 542.

It was admitted, too, in the above case, that an *entreaty* by the testator that his wife would at her decease settle part of the real estate, for securing to Jenny Piggott a competent income, "leaving the amount of such income to the entire discretion of my said wife," was not imperative upon the wife. Lord Eldon observed, "There was a certainty as to the person, but not as to the quantity of property to be given."

1 Simons, 553; *Ibid.* 565.¶

A devises his land to B in fee, paying 400*l.*, whereof 200*l.* to be at the disposal of his wife, in and by her last will and testament, to whom she shall think fit to give the same; these words vest an absolute interest in the wife, so that, though she dies intestate, her administrator shall have the 200*l.*

2 Vern. 181, *Robinson v. Dugate*; and vide *Hob. 9.* ¶*Maskelyne v. Maskelyne*, Amb. 750; *Hixon v. Oliver*, 13 Ves. 108.¶

¶So, where testator gave 2000*l.* to his son James, payable at twenty-one; "and in case James should not receive or dispose of by will or otherwise, in his lifetime, the said 2000*l.*, it should go to the heir in tail for the time being of S estate." Held, that James took absolutely, and though he died before he received the legacy, it did not go over, but went to his representative.

Ross v. Ross, 1 Jac. & W. 154.

But when an estate for life is given to the legatee, though followed by a declaration that he may dispose of the fund by will, the absolute interest will not vest in him, and if he does not appoint the fund, it will not vest in his representatives.

Nannock v. Horton, 7 Ves. 392.¶

If a man gives legacies to his children, to be paid at twenty-one or marriage, and if any of them die before twenty-one or marriage, the legacy of such child to be disposed of to two or more of the children then living, in such manner as his wife (whom he makes executrix) shall think fit, and one of the children dies under age, and unmarried, the mother (*a*) may appoint such legacy to any one of the other children, and it will be good.

2 Vern. 513, *Thomas and Thomas*. {So, where the words of the power were "to and for the use of such child and children of J G, and for such estate and estates as J G should by deed or will appoint, and for want of appointment to all and every the child and children of said J G;" 1 Term. 432, *Swift v. Gregson*; 6 Ves. J. 793, *Kenworthy v. Bate*, S. P.; or "to and amongst such of my relations as shall be living at the time of my decease, in such parts, shares, and proportions as my wife shall think proper." 1 Term. 435, n., *Spring v. Biles*: or, "to any of his children," &c.; 1 P. Will. 149. *Tomlinson v. Dighton*: or, "amongst all or such of his children," &c.; 1 Atk. 389. *Macey v. Shurmer*: or, "to such of my children," &c.; 1 Mod. 189. 2 Lev. 104, *Liefe v. Saltingstone*; the words were held to show a manifest intention

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to give a power to appoint to any one or more of the objects described. 5 Ves. J. 857. But if the party to whom the power is given makes no appointment, and the execution of it devolves on the Court of Chancery, that court will distribute the fund equally, as it has not any discretion to select among the objects. 7 Ves. J. 124, Longmore v. Broom; 4 Ves. J. 708; 5 Ves. J. 495; 8 Ves. J. 561, Brown v. Higgs.} (a) But if an executor has a general power to distribute a sum of money amongst children at discretion, and he makes an unreasonable or indiscreet disposition, it will be controlled in a court of equity. 2 Vern. 513.—As, where a man having two daughters, one by a former wife, and another by a second wife, devised his estate to his wife, to be distributed between his daughters as his wife should think fit, and she having given 1000*l.* to her own daughter, and but 100*l.* to the other; the court decreed an equal distribution. Vern. 355, Cragrave and Perrost; and vide 2 Vern. 421, S. P. [Alexander v. Alexander, 2 Ves. 640; Menzey v. Walker, Ca. temp. Talb. 72, S. P.] {A power of this kind requires such a distribution that every one of the objects may have a share. In a court of law, any share, however small, is considered sufficient. But it is otherwise in a court of equity; in which, however, the rule on this subject has not been uniform. Lord Nottingham's opinion was, that the distribution should be equal among all the objects, unless a good reason for a different distribution appeared. That is not the rule which now governs, or, it is said, ever did govern, except in his time. In a number of cases it is stated that the distribution may be unequal—that the inequality may be great—that it is not necessary to assign any reason for it, until it becomes such as to render some of the shares illusory; which is not allowed, but the share of each party, though it need not be equal, must be a substantial share. But the cases furnish no rule to ascertain what share is substantial, and what illusory.—Regret has frequently been expressed in chancery, that that court had departed from the rule adopted by the courts of law.—2 Ch. Ca. 228, Craker v. Parrott, cited 1 Vern. 355, by the name of Cragrave v. Perrost, and in 9 Ves. J. 395, 396; 1 Vern. 66, Gibson v. Kinven; Ibid. 355, 414, Wall v. Thurborne; 2 Freem. 198, Clarke v. Turner; 1 Bro. P. C. 34, (vol. iv. p. 1, in 2d ed.,) Warburton v. Warburton; Pre. Ch. 256, Astry v. Astry; 1 Ves. 57, Maddison v. Andrew; Ibid. 209, Coleman v. Seymour; Ambl. 660, Burrell v. Burrell; 1 Ves. J. 299, Boyle v. Bishop of Peterborough; 3 Bro. C. C. 243, S. C.; 2 Ves. J. 336, Bristow v. Warde; Ibid. 351, Wilson v. Piggott; 4 Ves. J. 771, Vanderzee v. Aclom; 5 Ves. J. 362, Spencer v. Spencer; Ibid. 849, Kemp v. Kemp; 9 Ves. J. 382, Butcher v. Butcher; 10 Ves. J. 31, Bax v. Whitbread; 12 Ves. J. 123, Mocatta v. Lonsada; Ibid. 126, Dyke v. Sylvester. If the person having the execution of the power has provided for any of the objects in some other way, a share, which would otherwise have been illusory, will be sufficient. 2 Ves. J. 336, Bristow v. Warde; 5 Ves. J. 367, 368, Spencer v. Spencer; Ibid. 445, Long v. Long; Ibid. 861, Kemp v. Kemp; 12 Ves. J. 124, Mocatta v. Lonsada.} [Butcher v. Butcher, 9 Ves. 382; S. C. 1 Ves. & B. 79.]

If a man devise 40*l.* to be paid J S, by him to be disposed of in such manner as the testator should, by a private note, acquaint him with, and die without such appointment, this is said to be a good bequest to the party.

2 Chan. Ca. 198, Martin and Clerk.

But it has been held, if A by will gives a house at F to B, his wife, for life, and declares that he will dispose of the goods and furniture in that house, after the death of B, by a codicil, and makes B residuary legatee of all the *residue of his personal estate whatsoever not before disposed of, or reserved to be disposed of by his codicil*, then makes two codicils, but takes no notice of the goods and furniture in the house at F, and makes his wife one of his executors, that the wife should not have the absolute interest in the goods and furniture in the house at F, but that it should be distributed after her death as an undisposed interest, and she to have her widow's part thereof only.

3 P. Wms. 40; Trin. 1730, Davers and Dewes et al., decreed. [See Roper, vol. ii. 587; Attorney General v. Johnstone, Amb. 577; Baker v. Hall, 12 Ves. 497.]

If one devise his land for payment of his debts and legacies, and devise 400*l.* apiece to two of his sisters, and to his third as much as his executor

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shall think fit; the third shall have 400*l.* also, and be made equal to her other sisters, if the estate will hold out.

2 Vern. 153, Wareham and Brown. ¶ See *Wainwright v. Waterman*, 1 Ves. jun. 311; *French v. Davidson*, 3 Madd. 396.

{A testator gives 1000*l.* to his niece, to be paid immediately after his decease, if she should be then married; if not then married, the interest to be paid to her for life, to be calculated and paid to the day of her death or marriage; and if she should die unmarried, the principal of the legacy to lapse for the benefit of the person entitled to his real estate. The niece, marrying after the testator's death, is entitled to the legacy by necessary implication.

2 Ves. J. 449, *Crowder v. Clowes*. And see 3 Ves. J. 558, *Wainwright v. Wainwright*; 4 Ves. J. 51, *Philips v. Chamberlaine*; 5 Ves. J. 801, *Upton v. Lord Ferrers*.}

2. What shall be a sufficient Description of the Person to take.

1. When Children living at the Date of the Will shall alone take.

It seems agreed, that if a man devises legacies to all his children and grandchildren, that this extends only to those who were *in esse* at the time when the will was made; for then the will speaks, and none born after are to be let in, unless there had been future words in the will, *to all his children or grandchildren which should be born or be living at his death*.

Dyer, 177; *Co. Litt.* 112 b; *Preced. Chanc.* 470; 1 P. Wms. 340; 2 Ves. 84. But, in 2 Vern. 105, where a man devised 20*l.* apiece to all the children of his sister, it is there said to have been decreed, that a child born after the will, and before the death of the testator, should take, the word *children* comprehending all. ¶ When a fund is to be divided under a will, persons claiming the fund under a general description are entitled, if they can bring themselves within the description at the time when the fund is to be divided. *Vanhook v. Rogers's executors*, 3 Murph. 178.*g*

If a man devise the surplus of his estate to his grandchildren living at his death, grandchildren born after his decease shall not take it; for if he had so intended it, he would not have restrained it to children living at his death.

2 Vern. 710, *Musgrave v. Parry*. ¶ A bequest of a sum generally, to be equally divided among the children of A, those only shall take who are in being at the death of the testator. *Pemberton v. Parke*, 5 Binn. 607. But a child *in ventre sa mère* is, for this purpose, in being, and shall take a share. *Swift v. Duffield*, 5 S. & R. 38.*g*

[A residue of personal estate was bequeathed to the testator's brother H and *all* his children, to be divided amongst them, share and share alike: H had several children; the testator dies; and six months afterwards another child is born. Lord Talbot held, that this child could not take.

Webb v. Webb, Hil. 1735, cited in 1 Ves. 112.

A testator bequeathed 2000*l.* to all the children of his nephew J H, who should be living at the death of A; and afterwards bequeathed the moiety of the residue of the personal estate to all the children of J H, payable at 21 or marriage. The question was, Whether children born after the death of the testator could take? And the court were of opinion that as to the 2000*l.* they should, if born before the death of A, upon the particular words of the will; but as to the residue, those only who were living at the death of the testator could take.

Hale v. Hale, 6 Geo. 2, cited *ibid*.

A testatrix devised lands to trustees in trust to sell for payment of her debts, and gave all the residue arising by such sale, and all her personal

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estate among all the children respectively, male or female, of her brother and sister H. They had only four children at the time of making the will, and after the death of the testatrix another was born. Lord C. B. Parker, sitting for Lord Chancellor, held, that this after-born child was not entitled to any share under the will.

Heath v. Heath, 2 Atk. 121.

A testator gave a legacy of 3000*l.* to his daughter J, wife of C, for the use of her younger children, to be by her distributed among them in such manner, shares, and proportions; as she should think fit; and if no appointment should be made by her, then equally to be divided between her younger children, and to survive, if any of the children died under age or unmarried. The question was, Whether the legacy should be for those younger children only, whom the testator's daughter had at that time by that husband; or, whether the younger children by any future husband should also take? By Lord Hardwicke, As to any children that may be born of a second marriage, they could not be intended: for the daughter having four children by C at the making of the will, if after his death she married a second husband, having a great estate settled on the eldest son of that marriage, that son within the description of a younger child would be contrary to the intent. But the words could not take in the children born subsequent to the making or death of the testator, being a present legacy. It might be different had he given it to her for life, and afterwards to her younger children; because then it would be contingent, and a devise over: but here it is present; and the same as if he had said, equally to be divided, unless she appoints; being a vested interest and immediate gift to them, subject to the power of variation given to the mother. Nor does the clause of survivorship make any difference, being still vested. This legacy, then, both in the intent and words, is present to them, and not to be extended to those born after his death; and it can only mean children living at the making of the will; or, at farthest, at the death of the testator.

Coleman v. Seymour, 1 Ves. 209.

W H bequeathed 200*l.* to the younger child of his son W, or, if more than one, then to such younger children, equally to be divided, and to be paid at their respective ages of 21, and if any die before 21, then to survive to the others; and for want of such younger child or children, or their not attaining 21, then the 200*l.* to go to the eldest child of his son W, to be paid at 21. Two of the daughters were born in the life of their grandfather, and both came of age; and the question was, Whether a daughter born after the testator's death should be let in for a third equally with them? And the master of the Rolls held, that she should not, for that in this case the provision was expressly appointed to be paid at 21, and therefore it must be construed to be vested in those living at the death of the testator, and cannot go farther.

Horsley v. Chaloner, 2 Ves. 83.

A testator, after several legacies, gave to the children of his niece A I the remainder and residue of his estate, which he directed to be paid into a bank or stock, and the interest to be paid yearly for such learning as that sum would defray, and at the age of 20 years to be divided equally between them, and if she had only one child, it should have the whole; but if his niece had no children, the interest was to be paid to her or her husband during the term of seven years, and then the whole sum was to be delivered

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to her or her husband. A I had four children living at the death of the testator, and, after his death, had a fifth child born. Lord Camden was clear of opinion, that the interest vested at the death of the testator, being given *per verba de presenti*; and that the after-born child was excluded.

Isaac v. Isaac, Amb. 348.

A testator devised all his goods and chattels to J C and J H to be sold to pay his debts, and the overplus (if any) to be employed to the best use of their children begotten by the testator's daughters M C and E H, equally to be divided between them. The Chancellor held, that the division was to take place at the testator's death, and therefore that all children born in the lifetime of the testator took, but not those born after his death.

Roberts v. Higman, 1 Br. Ch. Rep. 532, note.

E P gave her real estates to trustees for 500 years, upon trust, for raising 200*l.* for better securing her debts and other purposes, with remainder to trustees for 1000 years, in trust to repay the 200*l.* and raise annuities, and subject to the terms she gave the estate to *all and every the child and children* of her brother T G and the heirs of the body and bodies of such child or children, as tenants in common, if more than one, in equal proportions; and in case of failure of issue of the bodies of such child or children whose issue should so fail, to every the remaining child or children of the said T G and to the heirs of the body and bodies of all and every such child and children, if more than one, to take as tenants in common; and if there should be a failure of issue of all such children, or if there should be but one such child, then to such remaining or only child; in default of such issue, to her brother T G for life, with remainders over. And she directed the remainder of her personal estate to be placed at interest, and subject to annuities, she gave it to all and every the child and children of her brother T G who should live to attain 21; such children, if more than one, to take equally; if only one, then such only child; and if there should be no such children, or none who should attain 21, then she desired her personal estate, and the rents and profits of her real estate, to be distributed amongst her next of kin. T G had two children, R and E, born before the death of the testatrix, and three children, S, T, and E, born after her death. A bill was brought by the daughter of S, one of the after-born children, who died before 21, claiming the benefit of her mother's supposed share of the real estate of the testatrix, as heir of the body of her mother. Lord Thurlowe was of opinion, that there was no point of time in this case to which the words *all and every the child and children of T G* could be confined, except the death of the testatrix, and therefore determined, that the plaintiff's mother S, who was born after the death of the testatrix, could have no share.

Singleton v. Singleton, 1 Br. Ch. Rep. 542, note.

G L bequeathed to his wife M L the residue of his real and personal estate for life; and after her death, he gave the same to the children of Mr. John Ayton and his wife Jane, to be equally divided between them the said Jane Ayton's children, and not any children of any other marriage by either party. At the death of the testator and his widow, J A, S A, and M A, (since dead,) were the only children of John and Jane Ayton, then born; but they had afterwards three other children. Sir L. Kenyon declared, that the interest in the residue of the testator's personal estate vested absolutely in the three children of John and Jane Ayton, who came into *esse* during the life of M L, and that those born after were not entitled to a share.

Ayton v. Ayton, *ibid.*

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A testator disposed of a residue upon trust to apply the rents and profits of his houses in, &c., and the dividends of his money in the public funds, and all other his personal estate for the maintenance and education of all the children of his three daughters, until the youngest of such children should attain 21; and in case of the death of any of them before the youngest should attain 21, who should have been married, and should have at his or her decease a child or children, he directed, that such child or children should be entitled to the same share which their deceased parents would have received in case they had respectively lived till the youngest of such child or children should have attained 21; and when such youngest child should have attained 21, then testator gave one full and proportionable share of the capital thereof to the proper use of such his said grandchildren as should be then living, and the child or children of such as should be dead. The question was, Whether the plaintiffs, who were the children of testator's three daughters born at the time of his decease, were to take exclusively of the defendants, who were born after his death? Lord Thurlowe held, that the gift was confined to the death of the testator.

Hughes v. Hughes, 3 Br. Ch. Rep. 352.

A testator gave a legacy to the children of his *late sister*, M C. At the date of the will, there were three children of M C living, but one of them afterwards died in the lifetime of the testator. It was contended, that one-third of the legacy given to the children of M C lapsed into the residue. But the master of the Rolls, Sir R. P. Arden, was of opinion, that by the words *children of M C*, were meant such persons as should be children at the death of the testator, though M C was dead at the date of the will, and decreed accordingly.

Viner v. Francis, 2 Br. Ch. Rep. 658.

T H gave a legacy of 500*l.* to be paid to his grandson T P, the son of M P, if he lived to be 21, and in case he should die before, then to the other child or children of his daughter, equally, arriving at such age. T P, the grandson, died under the age of 21 years, and there being no child or children of M P living at the testator's death, it was insisted that the 500*l.* ought not to be raised for after-born children, but sunk into the *residuum* of the testator's estate for the benefit of the residuary legatee. But by Lord Hardwicke—It is plain the grandchildren born after the testator's death are entitled, for as they were not *in esse* in his lifetime, the testator must have had in his view future children of his daughter.

Haughton v. Harrison, 2 Atk. 329.

A testator gave a legacy of 300*l.* to the children of his sister S, to be paid by his executor, and equally divided, share and share alike, at their respective ages of 21, or marriage, with interest at 4 *per cent.*, and failing the share of any, to the survivors; and failing the share of all, to his sister G. The question was, In whom this legacy should vest, whether in the only child of S, alive at the making of the will, or also in those since born or to be born? Lord Hardwicke thought it was meant for the benefit of all the children S should have; for the testator, knowing she had but one then, has yet given it to children, and has pointed out survivors; and gives it over to another branch of the family; which he could not mean, till all failed.

Maddison v. Andrew, 1 Ves. 57.

A woman devised to the son and two daughters of her nephew F E, 10*l.*

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apiece by name; then gives 300*l.* to E P, to be paid at her age of 21, or marriage; and interest in the mean time for her maintenance and education: but if she died before 21 or marriage, then to the younger children of her nephew F E, equally to be divided between them. Some of the younger children were born before, some after the making of the will, and some after the death of the testatrix. Lord Hardwicke thought, that the testatrix meant that the legacy should be divided when it vested, and therefore should go to such as should be younger children at the death of E P, before 21 or marriage.

Ellison v. Airey, 1 Ves. 111.

{J W devised to his natural son, and in case of his marriage with a certain person, or his dying without issue, then to the testator's nephew for life, and after his decease, then "for and amongst such person and persons, his and their heirs, &c., as shall appear and can be proved to be my next of kin, in such parts and proportions as they would by virtue of the statute of distributions have been entitled to my personal estate, if I had died intestate." The Court of King's Bench decided, that the distribution should be made among those who were the testator's next of kin at the time of his death, (who alone were entitled to take by the statute of distributions in case of his intestacy,) though the nephew, to whom a prior life estate was given, was one of them.

3 East, 278, Doe v. Lawson.

A testator bequeathed 5000*l.* in trust for his daughter A, for life, and after her decease for such child or children as she shall leave at her decease, in such shares as she shall think proper; and in case she shall die, leaving no child, then as to 1000*l.* for her executors, administrators, or assigns, and as to the remaining 4000*l.* in trust for such person or persons "as shall be my heir or heirs at law." The testator died, leaving A and two other daughters his coheirresses at law {} and next of kin at the time of his death; and afterwards A died without issue. And Lord Alvanley was of opinion, that the description was to be taken with regard to the time of the testator's death; and consequently that A, though she had an interest for life in the whole fund, and her executors were to take 1000*l.* out of it, was entitled with the other daughter to a share of the 4000*l.*

5 Ves. J. 399, Halloway v. Halloway. {} In consequence of this union of characters, it was unnecessary to decide who were meant by *heirs at law*, but Lord Alvanley was much inclined to think, that if he had been under the necessity of deciding the point, he should have held them heirs *quoad* the property; that is, next of kin. Vide 1 Hen. & Mun. 212. Robinson's Admr. v. Brock.

Leasehold property was bequeathed in remainder in trust for a child *en ventre*, if a son, for life, and after his decease for such of his issue male as should be his heir at law at his death; if no such then living, for such persons as should *then* be the *legal representatives* of the testator. A son being born and dying without issue, the limitation over was established in favour of the next of kin of the testator at the time of distribution.

3 Ves. J. 486, Long v. Blackall; 5 Ves. J. 402, 403, S. C. cited.

T D bequeathed the residue of his estate to his daughter M O, who was his only child, for life, and to her children at their ages of 21; and after the decease of his daughter and of her children under that age, to "go and be distributed among his relations in a due course of administration." M O died after the testator's death, a widow, and without issue. The

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claim of grand-nephews and grand-nieces, who were the testator's next of kin at her death, was preferred to those of her representatives, and of the persons who would have been his next of kin at his death had his daughter died before him.

8 Ves. J. 38, *Jones v. Colbeck*.}

W A devised his real estate to trustees and their heirs to the use of H, his daughter, for life, with remainder to the heirs of her body; and after her decease without issue, in trust to sell, and to divide the money equally between all and every the children of his sister E, the wife of B, and of his sister M, the wife of J, at their respective ages of 21. The sisters had each of them several children born in the lifetime of the testator; and E had a daughter born about eleven months after the testator's death, but in the lifetime of H his daughter, who afterwards died without issue. The question was, Whether such after-born daughter was entitled to a share of the money? And Sir Tho. Clarke, master of the Rolls, seemed very clearly of opinion, that she was entitled. He observed, that all cases of this kind depend upon their own peculiar circumstances: that this is the case of a trust, where the court will be more liberal in making a construction than in the case of a legal estate: that as the children are not named, there does not appear to be any predilection: that the testator describes his sisters as being then wives: that the words used are as general as possible, viz. all and every the children: and that this is to be considered as a devise of money, and nothing could vest at the testator's death, but it is a disposition of a remote interest, after the death of H without issue.

Bartlett v. Hollister, Ambl. 334; 1 Br. Ch. Rep. 530, note, S. C.

A testator devised the residue of all his real and personal estate to trustees for the use of the heirs male of J A; in default of such issue, to the use of the heirs male of R A; and in default of such issue male, to the use of all and every the grandchildren of J A and S M, as tenants in common. By a codicil of the same date with the will, he directed the trustees to pay the interest and produce of his real and personal estate to his wife S A, and to the said J A and S M during their lives, with survivorship. Eight grandchildren were alive at the date of the will: a ninth was born before the testator died: twelve more were born after his decease; and all in the lifetime of R A, who died without issue. It was holden, that as the twenty-one grandchildren were all alive at the death of R A, all were equally entitled.

Baldwin v. Karver, Cowp. 309.

A testatrix, having given by her will several annuities, gave, after the decease of the annuitants, 50*l.* each, to the children of D R.—D R had then seven children, and he had also a daughter born after the death of the testatrix, but in the lifetime of the surviving annuitant. Lord Thurlow decreed, that this after-born child must be let in to take.

Attorney-General v. Crispin, Ambl. 386.

A N devised her real estate to trustees, upon trust to permit her nephew, T C, to receive the rents for his life, and after his death to sell the estate, and divide the money among all and every the child and children of T C at the age of 21. She also gave her personal estate to the same trustees, in trust to divide the same between all the children of her said nephew at the age of 21; she directed her nephew to maintain the children out of the rents and profits, and gave the trustees power to apply any part of the inte-

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rest of the personal estate for the maintenance of the children. The question being, Whether a child born after the death of the testatrix was entitled to a share of her estate? Sir T. Sewell held that she was; he said that this is the case of a trust; that there is nothing to confine it to children born in the lifetime of the testatrix, and the interest is a future one. Here is no direction what is to become of the interest of the personal estate; but there is a direction to apply any part for maintenance. This is a strong addition to the case of *Bartlett v. Hollister* (*supra*); the personal is immediately the property of the children, though not immediately given to them; if it were a power to apply, the interest would be unnecessary. The children are to have the interest with the principal, except what is applied under the power.

Congreve v. Congreve, 1 Br. Ch. Rep. 530, N. B. Lord Thurlow says, that this case seems a very strange determination; because when the first child attained twenty-one, the division must be made. 3 Br. Ch. Rep. 355.

S D gave 5000*l.* to purchase stock, the interest to M for life, then to the testator's brother W D, at his decease to the testator's godson S; *and at his decease, if before he is of age, to be divided among his brothers equally.* S the testator's godson died in the lifetime of his father W D and in the lifetime of the testator, leaving at the time of his death two brothers, who were the two only sons of W D at the date of the will, and at the time of the death of the testator; but he had another son A D, born some time afterwards. Lord Thurlow was of opinion, that he was obliged to say the words in the bequest of 5000*l.* to the brothers of S were not confined to those who were his brothers at the time of making the will: that the testator must have had in contemplation other sons coming into being; that his intention appeared to be to make an aggregate description of a part of the family of W by the name of brothers of S, as if he had used the words male children of W; that he made use of the word *brothers* merely by relation to the antecedent, the name of S used in the former part of the bequest, and that he could not otherwise have described the sons of W but by a circumlocution. He therefore declared that A, being born before the time of the distribution of the fund, was entitled to a share of the 5000*l.*

Davism v. Mello, 1 Br. Ch. Rep. 537; {5 Ves. J. 136, *Middleton v. Messenger*; *acc.*}

A testator gave to the children of his sister J G, wife of T G, 350*l.* with interest for the same, to be paid them respectively in equal shares and proportions as they should respectively attain 21; and in case any of them should die under 21, then their share should go to the survivors and survivor. At the death of the testator, J G had two children, the plaintiffs; she had afterwards another child: the plaintiffs were both infants; and the court was of opinion, that the youngest child, being born during the infancy of the other two, though after the death of the testator, might be entitled to a share.

Gilmore v. Severn, 1 Br. Ch. Rep. 582.]

{If a legacy is given in trust for "all the children of A when and as they shall severally attain sixteen," the eldest, as soon as he attains sixteen, is entitled to receive his share: and as the share of each must then be ascertained, all who are born afterwards are necessarily excluded. But all who are born at that time, though after the death of the testator, are entitled to a portion.

3 Bro. C. C. 401, *Andrews v. Partington*; *Ibid.* 416, *Pulsford v. Hunter*; 2 Ves. J.

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690, *Prescot v. Long*; 3 Ves. J. 730, *Hoste v. Pratt*; 6 Ves. J. 50, *Godfrey v. Davis*; *Ibid.* 345, *Barrington v. Tristram*; 10 Ves. J. 152, *Whitbread v. Lord St. John*; 11 Ves. J. 238, *Gilbert v. Boorman*. Vide 5 Ves. J. 335, *Mills v. Norris*; *Ambl.* 448, *Shepherd v. Ingram*.

So, wherever a testator gives any legacy or benefit to any person, not as *persona designata*, but under a qualification and description at any particular time, the person answering the description at that time is the person to claim: and if there are any persons answering the description, they are not to wait to see whether any other person shall come *in esse*, but it is to be divided among those capable of taking when, by the tenor of the will, he intended the property should vest in possession, whether they were born before or after his death. And if there are then no such persons, a limitation over shall take effect, though others within the description may afterwards come *in esse*.

6 Ves. J. 43, *Godfrey v. Davis*; 8 Ves. J. 375, *Paul v. Compton*.)

If a man devise the surplus of his estate to his grandchildren living at his death, grandchildren born after his decease shall not take it: for if he had so intended it, he would not have restrained it to children living at his death.

2 Vern. 710, *Musgrave v. Parry*.

[A testator left 20,000*l.* to his executors, in trust to dispose thereof in such proportions, &c., as they should think fit, amongst such of the testator's relations as should not be worth 2000*l.*, and should apply within two years after his (the testator's) death. A claim was made on behalf of a child born after the death of the testator, who was of consanguinity; but such child, though *en ventre sa mère* at the testator's death, was holden not to be within the description.

Bennett v. Honywood, *Ambl.* 708.

So, it was determined by Sir L. Kenyon, when master of the Rolls, that a child, *en ventre sa mère*, should not take under a bequest to the children of A living at the death of the testator. But in a subsequent case of a similar devise, Lord Thurlowe said, that though he admitted the child not to be within the strict meaning of the words; yet, the solid ground of construction is to consider whether such a child is not within the intention of the testator to provide for all the children of A? His lordship added, he would talk to his honour on the subject, and if he persisted in his opinion, the question must go to law. It is to be presumed that his honour did persist in his opinion, for the question did go to law, and the Court of Common Pleas determined in favour of the posthumous child.

Cooper v. Forbes, 2 Br. Ch. Rep. 63; *Clarke v. Blake*, *Ibid.* 320; 2 H. Bl. 399, and 2 Ves. jun. 673.

One devised the surplus of his estate to his children and grandchildren. It was holden, that a grandchild *en ventre sa mère* at the testator's death should not take; but it was at the same time said, that if a devise were to my children and grandchildren living *at my death*, a child *en ventre sa mère* might, in such case, be so far regarded as to be looked upon as living.

Northey v. Strange, 1 P. Wms. 341. That a posthumous child is within a provision in a settlement for such children of the marriage as should be living at the death of the father; see *Miller v. Turner*, 1 Ves. 85; *Beale v. Beale*, 1 P. Wms. 244.

So, where one devised his estate, *in case he should leave no son at the time of his death*, to F H, and died leaving his wife *privement ensient* with a

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son; this posthumous son was adjudged to be a son living at the death of F H, and therefore the devise to F H did not take place.

Burdet v. Hopegood, 1 P. Wms. 486.]

If one devise the surplus of his personal estate to the children of A and B, and neither of them have a child at the time of making the will, or the death of the testator, the devise is executory, and shall extend to any children that A and B shall afterwards have; and the children of each shall take *per capita* and not *per stirpes*, (a) they claiming in their own right, and not as representing their parents.

2 Vern. 405, Weld and Bradbury. (a) See *acc.* Northey v. Strange, 1 P. Wms. 343. {8 Ves. J. 604, Barnes v. Patch; 10 Ves. J. 166, 176, Lady Lincoln v. Pelham.}

[A testator bequeathed the surplus of his personal estate equally to his son James and to his son Peter's children, to his daughter Traverse and to his daughter Webb's children, and his daughter Man. At the making of the will the testator's son Peter was dead, leaving several children; the testator's daughter Webb was living, but her husband was in low circumstances, and had been twice a bankrupt, and therefore the testator by his will made some provision for her separate use. The question was, How these children and grandchildren should take, whether *per stirpes* or *per capita*? Lord King at first seemed inclinable that the grandchildren should take *per stirpes* only; yet at length he decreed, that the testator's son James, and the children of the testator's deceased son Peter, and his daughter Traverse, and the children of his daughter Webb, and his daughter Man (being in all fourteen in number) should each of them take *per capita*, as if all the grandchildren had been named by their respective names; and that the grandchildren could not take according to the statute, or in allusion thereto, forasmuch as the testator's daughter Webb was living, and so her children could not represent her; and to determine that the grandchildren should take *per stirpes* would be to go too much out of the will, and contrary to the words, when the meaning of the testator might be according to the words, and that meaning a reasonable and sensible one.

Blackler v. Webb, 2 P. Wms. 383.

{A devised a reversionary estate to S T and A L, as tenants in common in fee, and in case both or either of them should happen to die in the lifetime of T H (who had an estate for life in the premises,) then the share or shares of her or them so dying to go "unto all and every such child and children, grandchild and grandchildren, of the said S T and A L respectively, as should be living at the time of her or their decease, and to the issue of such of them as should be then dead and have left issue, as tenants in common in fee: yet, nevertheless, so as all the descendants of the said S T should together be entitled only to one moiety of the said premises, and all the descendants of the said A L should together be entitled to no more than the other moiety thereof, and that none of such descendants, either of S T or A L, should be entitled to any greater or other share of the said respective moieties of the said respective premises, than his, her, or their father or mother would have been entitled to, if living." The grandchildren of S T and A L, though *in esse* at the date of the will, can only take *per stirpes* and not *per capita*, in substitution of such of their parents respectively as happened to be dead at the determination of T H's life-estate. None of the grandchildren whose parents are then living can take any share.

1 East, 120, Legand v. Haworth. See 2 Ves. J. 357, Routledge v. Dorrill.}

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One Hole bequeathed 500*l.* to the relations of E H, to be divided *equally* between them. Although this bequest is confined to such relations as would take by the statute of distributions; yet Lord King determined, that, as the testator had directed the 500*l.* to be divided *equally* between them, he could not direct an unequal distribution, and accordingly decreed them to take *per capita*.

Thomas v. Hole, Ca. temp. Talb. 251. The word *equally* applied to the next of kin, and relations under the statute of distributions causes a division *per capita*, Phillips v. Garth, 3 Br. Ch. Rep. 64; Butler v. Stratton, Ibid. 367. For though the statute furnishes the rule as to the objects of the bequest, yet it does not determine in what proportions those objects shall take; that must depend upon the directions of the testator. Green v. Howard, 1 Br. Ch. Rep. 31; Rayner v. Mowbray, 3 Br. Ch. Rep. 234.]

{A testator bequeathed a legacy to M D or *her issue*. She died in his lifetime, leaving one child and two grandchildren. They all took *per capita* as joint-tenants. *Issue* comprehends all the descendants.

3 Ves. J. 257, Davenport v. Hanbury; Ibid. 421, Freeman v. Parsley. Vide Ibid. 383, Horsepool v. Watson; 7 Ves. J. 522, Sibley v. Perry, in which the general meaning of *issue* was restrained by the intention.}

If A devise 1500*l.* in trust for the children of B, and B have only one child, and several grandchildren, the child only shall take, and the grandchildren shall not come in for shares; but if B had not a child living, the grandchildren might have taken by the name of children.

2 Vern. 106; {3 John. Rep. 292, Jackson v. Blansham. Grandchildren may take under the description of children if there can be no other construction; but never except either, 1st, from necessity, where the will would remain inoperative unless the sense is extended; or, 2d, where the testator has clearly shown from other words that he does not use the word *children* in the proper sense, but means it in a more extensive signification; as if he has used *issue* and *children* indifferently, showing that he meant to use *children* in the same sense as *issue*. 6 Rep. 16, Wylde's case; 1 Ves. 196, Wyth v. Blackman; Ambl. 555, Wythe v. Thurlston, stated from the register's book; 3 Ves. J. 257, 258; Ambl. 681, Gale v. Bennett; 4 Ves. J. 437, Royle v. Hamilton; Ibid. 692, Reeves v. Brymer; 10 Ves. J. 195, Radcliffe v. Buckley.}

If a legacy of 500*l.* is given to the eldest son of A to be begotten, to place him out apprentice, and A has a son born after the testator's death, the legacy shall be paid him though not born in the testator's life, and though it was given to him for a particular purpose.

2 Vern. 431, Nevil and Nevil, decreed.

If money is devised to younger children, where there are divers daughters, and a son, who by birth is a younger child, but is heir at law to a considerable estate of inheritance, he shall not be considered as a younger child, so as to take by the devise.(a)

3 Chan. Rep. 1, Bretton v. Bretton. {And a younger child who becomes the eldest may be excluded. 10 Ves. J. 166, Lady Lincoln v. Pelham; Ibid. 177, Bowles v. Bowles.} [(a) So, on the contrary, an eldest daughter, where there has been a son, or where the estate by a settlement goes all to a remainder-man, has, in equity, been deemed a younger child. Beale v. Beale, 1 P. Wms. 244. And even an *eldest son unprovided for* has been considered as a younger child. Duke v. Doidge, 2 Ves. 203, note. For the court will indulge this latitude of construction in cases of portions, for the sake of providing for all branches of the family. Chadwick v. Doleman, 2 Vern. 525; Heneage v. Hunlocke, 2 Atk. 456; Lord Teynham v. Webb, 2 Ves. 198. But the same construction is not applicable in other cases. Lord Teynham v. Webb, *ubi supra*, Hall v. Hewer, Ambl. 203.]

A man by will devised all his goods in such a house to G for life, and after his decease to the heir of J S, and the point was, whether he that was heir of J S should take these goods as devisee, and the said goods to go to

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his executors, although such heir die in the lifetime of G, or whether he who was heir to J S at the time of G's death should have them; and though it was urged that those goods were only the furniture of the capital house, yet my Lord Chancellor was of opinion, that they absolutely vest in him that was heir of J S at the time of the death of J S, and decreed accordingly.

Vern. 35, *Danvers v. Earl of Clarendon*.

The Duke of Bolton, by will, devised in these words, viz. *I give and bequeath unto such of my servants as shall be living with me at the time of my death, one year's wages; per* Lord Keeper, stewards of courts, and such as are not obliged to spend their whole time with their master, but may also serve any other master, are not servants within the intention of the will; but I will not narrow it to such servants only as lived in the testator's house, or had diet from him.

2 Vern. 546. {Under such a bequest, a coachman employed by a job-master and supplied by him with carriage and horses, according to the usual course of that business, is not entitled, though he lived with the testator in that capacity. He was the servant of the job-master, who might change the coachman at his pleasure. 12 Ves. J. 114, *Chilcot v. Bromley*.}

[A testatrix gave and bequeathed unto the *two* servants that should live with her at the time of her death 100*l.* new S. S. stock, to be equally divided between them. In fact, the testatrix had but two at the time of making the will; and afterwards took another, who lived with her at the time of her death. Adjudged, that this third servant was entitled to an equal share with the other two.

Sleech v. Thorington, 2 Ves. 560.

So, where the testator gave to the three children of his sister 50*l.* each; the sister had *four* children, and they were all let in.

Tomkins v. Tomkins, (cited) 2 Ves. 564.

A testatrix gave the residue of 3 *per cent.* annuities in trust to pay the same unto and between the *two daughters* of T S, in equal shares and proportions during their lives, and if *either* of them should die, then to pay the whole to the survivor during life; and in case *both* should depart this life, then the whole was to fall into the residue. The master of the Rolls, Sir L. Kenyon, yielding to the authority of the cases, but not the reasoning of them, felt himself compelled to declare, that all the daughters should take.

Stebbing v. Walker, 2 Br. Ch. Rep. 85.]

A gave legacies of 15*l.* apiece to each of his relations of his father and mother's side, and gave the surplus of his personal estate to B, and made C his executor; the executor paid 15*l.* to the testator's cousin-german, and 15*l.* apiece to her four children; and the court allowed the payment to the children, and would not restrain the devise to the relations within the statute of distributions.

2 Vern. 381, *Jones and Beale*, see *Ambl.* 640.

But notwithstanding this case, it seems the established doctrine of the Court of Chancery, to make the statute of distributions the rule and measure of such general devise; as where A devised all his real and personal estate for the use of his relations, without specifying any in particular, or using any other words; it was agreed to be the rule of the court in the construction of such devises to relations, that those, who by the statute of distributions would be entitled to the personal estate in case he died intestate, should, upon such general devises, be let into the same proportions only;

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and my Lord Chancellor said, he thought it the best measure for setting bounds to such general words, and that it had been often ruled accordingly.

Preced. Chan. 401, Roach v. Hammond. [So, Carr v. Bedford, 2 Br. Ch. Rep. 77; Anon. 1 P. Wms. 327; Thomas v. Hole, Ca. temp. Talb. 251; Harding v. Glyn, 1 Atk. 469; Attorney-General v. Buckland, (cited,) Ambl. 71; Edge v. Salisbury, Ambl. 70; Withhorne v. Harris, 2 Ves. 527; Crossly v. Clare, Ambl. 397; Isaac v. Defriez, Ibid. 595; Widmore v. Woodroffe, Ibid. 636; Green v. Howard, 1 Br. Ch. Rep. 31; Hands v. Hands, (cited,) 3 Br. Ch. Rep. 69; Phillips v. Garth, Ibid. 64; Rayner v. Mowbray, Ibid. 234; 5 Ves. J. 529, Devisme v. Mellish; 8 Ves. J. 38, Jones v. Colbeck; 9 Ves. J. 324, Cruwys v. Colman.} And the rule will be the same, though the word "*poor*" be prefixed to "*relations*." Brunaden v. Woolredge, Ambl. 507; Isaac v. Defriez, Ibid. 595; Widmore v. Woodroffe, Ibid. 636. But if the bequest be to the testator's descendants, or to the descendants of A, the necessity of referring to the statute of distributions does not arise, for such descendants are capable of being ascertained. Crossley v. Clare, Ambl. 397; Butler v. Stratton, 3 Br. Ch. Rep. 367. And we have seen above, that where the court does resort to the statute of distributions for the purpose of limiting the objects of the bequest to relations, it does not consider itself bound to adopt the proportions prescribed by the statute; but distributed *per capita*, and in such shares as any particular expressions of the bequest may call for. Carr v. Bedford, 2 Ch. Rep. 77; Griffith v. Jones, Ibid. 179; Thomas v. Hale, Ca. temp. Talb. 251; Green v. Howard, 1 Br. Ch. Rep. 31.]

If one devise the surplus of his personal estate to the children of A and B, and neither of them have a child at the time of making the will, or the death of the testator, the devise is executory, and shall extend to any children that A and B shall afterwards have; and the children of each shall take *per capita*, and not *per stirpes*, (a) they claiming in their own right, and not as representing their parents.

2 Vern. 705, Weld v. Bradbury. (a) See *acc.* Northey v. Strange, 1 P. Wms. 343.

||The court, in general, is anxious to include all children, especially if the testator be their father; but if the bequest is expressly confined to children living at the date of the will, it cannot be extended.

Testator bequeathed to the *children* of his sisters, Esther, Martha, and Tamar; "but if any of them shall die in my lifetime, leaving issue, such issue shall be entitled to the same legacy the parent would have been entitled to, if living at my decease." Martha had children, but they all died before testator made his will, leaving issue: held, that such issue were not entitled, for their parents were never entitled.

Christopherson v. Naylor, 1 Mer. 320. See Matchwick v. Cock, 3 Ves. 609; Freemantle v. Taylor, 15 Ves. 363.

So, under a bequest to the *six* children of John and Mary, a *seventh* child cannot take, though one of the six die, and afterwards the will is republished.

Sherer v. Bishop, Br. C. C. 55.

So, under a bequest to the *seventh* child, a child who was in fact the eighth, but before whose birth the seventh child had died, was held not entitled.

West v. Lord Primate of Ireland, 3 Br. C. C. 148; 2 Cox, 258, S. C.

But a bequest to all the children Joseph Ringrose hath by his wife, will include children born *after* the date of the will and before the death of testator.

Ringrose v. Branham, 2 Cox, 384.

¶ When a legacy is given to a class of individuals, all who answer the description at the time the deed shall take effect will be entitled; and though

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the expression be in the plural, yet if there be but one, he shall take the whole.

Swinton v. Legaré, 2 M'Cord Ch. R. 440.g

2. When Children living at the Death of Testator shall take.

If there be a bequest to children begotten, or to be begotten, and it vests and is divisible, (though subject to be divested by death under age,) (a) at the death of testator, children born subsequently are not entitled: and it matters not that part of the fund cannot be actually divided, being charged with and appropriated for the payment of annuities. (b)

Roberts v. Higman, 1 Br. C. C. 532, in note; Viner v. Francis, 2 Br. C. C. 658; 2 Cox, 190, S. C. Sprackling v. Rainer, 1 Dick, 344; Heath v. Heath, 2 Atk. 122. (a) Davidson v. Dallas, 14 Ves. 576. See Scott v. Harwood, 5 Madd. 332. (b) Hick v. Chapman, 1 Ves. jun. 405; 2 Myers v. Myers, 2 M'Cord's Ch. R. 256; Butter v. Ommancy, 4 Russ. 70; Buttler v. Lowe, 10 Sim. 137.g

Of course, if testator manifests an intention, though not directly expressed, that *all* the children shall take, they will all be included.

Shepherd v. Ingram, Amb. 488, S. C.; 1 Ves. sen. 485, *nom.* Gibson v. Rogers.

If a legacy of 500*l.* is given to the eldest son of A, to be begotten, to place him out apprentice, and A has a son born after the testator's death, the legacy shall be paid him though not born in the testator's life, and though it was given to him for a particular purpose, for which he was unfit.

2 Vern. 431, Nevil and Nevil, decreed. See 1 Roper, 552.

β A legacy to the children of A is to be divided among those born at the death of the testator.

Simms v. Garrot, 1 Dev. & Bat. Eq. 393.

When property is given to the children of A, and no time is fixed for a division, it is divisible by the will at the testator's death, although the executors must, by law, hold for two years for the benefit of creditors; and only children born at the testator's death, or *en ventre sa mère*, are entitled.

Vanhook v. Rogers' Executors, 3 Murph. 178; Knight v. Wall, 2 Dev. & Bat. 125.g

3. As to a Child *en Ventre sa Mère*.

A posthumous child may take under the description of children living at testator's death, or at the death of any other person, or of children born in testator's lifetime.(c)

Doe v. Clark, 2 H. Bl. 399; Rawlins v. Rawlins, 2 Cox, 425; β Jenkins v. Freyer, 4 Paige, 47. A child *en ventre sa mère*, will take a share of a fund bequeathed to children, under the general description of children. Petway v. Powell, 2 Dev. & Bat. Eq. 312.g (c) Trover v. Butts, 1 Sim. & Stu. 181. β A devise to an unborn illegitimate child, where the mother is described, is valid. Pratt's Lessee v. Flamer et al., 5 Har. & Johns. 10.g

4. When Children living at the Time the Fund becomes divisible are alone entitled.

If a fund be given to the children of A, born, or to be born, the shares to be payable on their respectively attaining twenty-one, or on the youngest attaining that age,(d) no child who is not in existence when the first share is payable is entitled. Children of a second marriage may take with those of a former marriage.(e)

Gilmore v. Severn, 1 Br. C. C. 582; Prescott v. Long, 2 Ves. jun. 690; Hoste v. Pratt, 3 Ves. 730; Whitbread v. Lord St. John, 10 Ves. 152; Gilbert v. Boorman, 11 Ves. 238; β Cole v. Crayon, 1 Hill's Ch. 322; Pyne v. Franklin, 5 Sim. 458; Storrs v. Benbow, 2 My. & Keen, 41; Burke v. Wilder, 1 M'Cord's Ch. 551; Execu-

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tors of *Sinkler v. Legatees of Sinkler*, 2 Desaus. 127; *Morse v. Morse*, 2 Sim. 485.
(d) *Hughes v. Hughes*, 3 Br. C. C. 352. (e) *Barrington v. Tristram*, 6 Ves. 345.

But children born after the first share is payable shall take, if the testator manifest that such is his intention. Thus, where testator, after bequeathing a residue to the children of A and B, his daughters, payable at twenty-one, declared that, if any child married and died before their mothers, leaving issue, they should stand in the places of their parents; and in case his daughters died without issue, or having had such, they should die without issue in the lifetimes of his daughters, the residue should go over. Held, that *all* the children of daughters were entitled, including those who came *in esse* after the eldest attained twenty-one.

Mills v. Norris, 5 Ves. 335. *See* *Simms v. Garrot*, 1 Dev. & Bat. Eq. 393; *Reston v. Clayton's Executors*, 2 Murph. 188.

So, if a fund is given to a class, payable upon the death of a person named; generally, all the class who come *in esse* before the death of the tenant for life are entitled, but not those born after.

Ellison v. Airey, 1 Ves. sen. 111; *Attorney-General v. Grispin*, 1 Br. C. C. 386; *Devisme v. Mello*, 1 Br. C. C. 537; *Walker v. Shore*, 15 Ves. 122; *Tebbs v. Carpenter*, 1 Madd. 290; *4 Lit. Kty. R.* 357.

Again, if a legacy be given to B for life, and then to the eldest child of C, and if he have none, then to D; should C have no child at the death of B, but one is afterwards born, it will be excluded, and D will be entitled to the legacy.

Godfrey v. Davis, 6 Ves. 43, 48.

But, of course, children born after the period of distribution may take, if it is clear that such was the testator's intention.

Hutcheson v. Jones, 2 Madd. 124.

5. Younger Children.

Provisions made by parents, or persons *loco parentum* for younger children, are divisible amongst those who are younger children at the period when the fund is distributable; thus, a second son becoming an eldest son before that period is excluded.

Chadwick v. Doleman, 2 Vern. 528; *Teynham v. Webb*, 2 Ves. sen. 198; *Broadmead v. Wood*, 1 Br. C. C. 77; *Lady Lincoln v. Pelham*, 10 Ves. 166; *Bowles v. Bowles*, 10 Ves. 177; *Matthews v. Paul*, 3 Swanst. 328. *See* *Windham v. Graham*, 1 Russ. 331. In this case, upon the words of the settlement, a second son became an eldest son after the vesting, but before the division of fund was *not* excluded. *See also* *Leake v. Leake*, 10 Ves. 477.

An eldest daughter may take as a younger child.

Beale v. Beale, 1 P. Wms. 244; *Butler v. Duncombe*, 1 P. Wms. 449; *Heneage v. Hunlocke*, 2 Atk. 456; *Pierson v. Garnet*, 2 Br. C. C. 38.

An only child, a son, may take under a bequest to the youngest child.

Emery v. England, 3 Ves. 232.

If money is devised to younger children, where there are divers daughters, and a son, who by birth is a younger child, but is heir at law to a considerable estate of inheritance, he shall not be considered as a younger child, so as to take by the devise.

3 Chan. Rep. 1, *Bretton v. Bretton*.

||So, where testator bequeathed to the *children* of his *late* brothers and sister, and at the date of the will and death of testator there were children of the brothers, but of the sister there were *no* children, but

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only grandchildren; Sir W. Grant decided, the grandchildren took nothing.

Radcliffe v. Buckley, 10 Ves. 195.

6. The term "*Children*" may include Grandchildren and other Issue, if it appear that such was the Testator's Intention.

Thus, where the testator used the words *children* and *issue* indiscriminately, and showed that he did not intend to restrict the latter by the former.

Wythe v. Blackman, 1 Ves. sen. 196, cited 3 Ves. 258; Gale v. Bennet, Ambl. 681; Royle v. Hamilton, 4 Ves. 437. β The term "*children*" in a devise does not embrace grandchildren, unless there is something indicating that the testator intended to include them. Phillips v. Beall, 9 Dana, 1; Ruff v. Rutherford, 1 Bail. Eq. 7. § See *ante*, *Legacies and Devises*, (L) 3. β A bequest to the testator's children, when he has several children of his own, and also step-children, does not embrace the step-children; and parol evidence is inadmissible to prove that the testator intended to include them. Foulke et al. v. Kemp's Lessee, 5 Har. & Johns. 135. §

But the word "*issue*" may be confined to mean children, or children and grandchildren only.

Earl of Oxford v. Churchill, 3 Ves. & B. 59.

Grandchildren will not include great-grandchildren, unless such be the intention of the testator.

Hussey v. Berkeley, 2 Eden, 196; β Hollowell v. Phipps, 2 Whart. 376; Erving's Heirs v. Handley's Executors, 4 Lit. 349; Marsh v. Hague, 1 Edw. 174; Hone v. Van Schaick, 3 Edw. 474. §

β Grandchildren may take by the name of children in two cases; first, when the word is used co-extensively with issue, and, secondly, when there are no children literally to answer the description.

Dickinson v. Lee, 4 Watts, 82.

Devise "to the children and grandchildren of my brother A, excepting B, (who was a grandchild of A,) and her children." Held that great-grandchildren take equally with children and grandchildren.

Pemberton v. Parke, 5 Binn. 601. §

So, great-nieces cannot take together with nieces under a bequest to them.

Shelley v. Bryer, Jacob, 207. ||

If A devise 1500*l.* in trust for the children of B, and B have only one child, and several grandchildren, the child only shall take, and the grandchildren shall not come in for shares; but if B had not a child living, the grandchildren might have taken by the name of children.

2 Vern. 106, Crook v. Brooking; || Reeves v. Brymer, 4 Ves. 692; Radcliffe v. Buckley, 10 Ves. 195. ||

|| 7. When "*natural*" Children shall take, see *ante*, "*Legacies and Devises*," (L) 3, *in finem*; and 1 Roper on Legacies, 70 et seq.

HEIRS.—Under a bequest to Edward's "*heirs*," in case of his death in testator's lifetime, (a)—or, under a residuary bequest to the testator's next of kin or heir at law; (b) the next of kin living at testator's death are entitled.

(a) Vaux v. Henderson, 1 Jac. & W. 388. (b) Lowndes v. Stone, 4 Ves. 649. β Monnsey v. Blamire, 4 Russ. 384. See Croom v. Henning, 4 Hawks, 393; Simms v. Garrot, 1 Dev. & Bat. Eq. 393. §

But "*heirs*," from the language of the will, is frequently held to mean children. Thus, under a bequest, "I give to my sister L's *heirs* 4000*l.* ;

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I give to my sister B's *children* 1000*l.*;" L had two daughters only, who were held entitled to the legacy.

Loveday v. Hopkins, Amb. 273. β A legacy to *the heirs* of a living person is to be construed as to *his children*, if it appear upon the will that he is living. Bullock v. Bullock, 2 Dev. Eq. R. 307.*g*

So, if there be a bequest to A, for life, with remainder to his heir or heirs of his body, as he shall appoint; (a) or, to the heirs or heirs male of his body, as tenants in common; (b) or, to the heirs or heirs male of his body, their executors, administrators, and assigns, (c) the word "*heirs*" will be considered the same as if the testator had used the word *children*.

(a) Target v. Gaunt, 1 P. W. 432; and see 5 Maul. & S. 100. (b) Jacobs v. Amyatt, 4 Br. C. C. 542; and see 5 Maul. & S. 95; β Bullock v. Bullock, 2 Dev. Eq. R. 307.*g* (c) Donne v. Merresfield, cited Forest, 56; Hogeson v. Bussey, 2 Atk. 89: β The word *heirs* in a will, where the testator recognises the existence of the ancestor, means *heirs apparent*. Jourdan v. Green, 1 Dev. Eq. R. 270. In a bequest of personalty, "to be equally divided between my son P, my daughters D, C, and E, and the heirs of my daughter P," held that the latter take but one-fifth part among them. Ricks v. Williams, 1 Dev. Eq. 3.*g*

β Testator devised as follows: "It is my will, and I do allow that all the remaining part of my estate, both real and personal, be equally divided among the heirs of my brother J F, the heirs of my sister N S, the heirs of my sister S W, deceased, and nephew L W. Held that the word *heirs* was used in the sense of children, and as a designation of persons, and that the division must be *per capita*."

Stowe v. Ward, 3 Hawks, 604; Ward v. Stowe, 2 Dev. Eq. 509; Whitehurst v. Pritchard's Executors, 1 Murph. 303.

Testator having several children, to the elder of whom he had made considerable advancements, made his will, by which he devised and bequeathed real and personal estates to his wife and younger children, and confirmed the advancements made to the elder, directed the residue of his estate, real and personal, to be sold, and the proceeds "to be divided among his heirs according to the statute distributing intestates' estates." Held that the word *heirs*, as here used, means heirs *quoad* the property, and not "children," "next of kin," nor "heirs at law."

Croom v. Herring, 4 Hawks, 393.

In a bequest to A B and the heirs of C D, the former takes a moiety.

Jourdan v. Green, 1 Dev. Eq. 270.*g*

So, where an express estate for life was not given to the parent, as upon a bequest to B and his heirs male, equally to be divided between them, share and share alike; B had four children, and he was held entitled to a life interest, with remainder to his children, being sons.

Law v. Davis, cited 1 Ves. jun. 145. See Wilson v. Vansittart, Amb. 362.

Again, upon a bequest "to Lady Scott and to her heirs, (say "children,") Lady S. had children; and it was held, that she was entitled for life with the remainder to her children.

Crawford v. Trotter, 4 Madd. 361.

But personal estate may go to the *heir*, properly and technically such, if that be the testator's intention. As, where testator bequeathed to his daughter all his real and personal estates for her life, and to be enjoyed after her death by his "next heir."

Gwynne v. Muddock, 14 Ves. 488.¶

A man by will devised all his goods in such a house to G for life, and
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after his decease, to the heir of J S ; and the point was, whether he that was heir of J S should take these goods as devisee, and the said goods to go to his executors, although such heir die in the lifetime of G ; or whether he, who was heir to J S at the time of G's death, should have them : and though it was urged that those goods were only the furniture of the capital house, yet my Lord Chancellor was of opinion, that they absolutely vest in him that was heir of J S at the time of the death of J S, and decreed accordingly.

Vern. 35, *Danvers v. Earl of Clarendon*.

||**ISSUE.**—As to the construction of this word, see *ante*, “LEGACIES AND DEVISES,” (L) 3.||

SERVANTS.—The Duke of Bolton, by will, devised in these words, viz. *Item, I give and bequeath unto each of my servants as shall be living with me at the time of my death, one year's wages.* Per Lord Keeper: Stewards of courts, and such as are not obliged to spend their whole time with their master, but may also serve any other master, are not servants within the intention of the will ; but I will not narrow it to such servants only as lived in the testator's house, or had diet from him.

2 Vern. 546, *Townshend v. Windham*.

||So, a coachman provided for the testator by a job-master, together with a carriage and horses, is not a servant of testator.

Chilcot v. Bromley, 12 Ves. 114, and see *Laugher v. Pointer*, 5 Barn. & C. 547.

Parol evidence is admissible to show that a servant was in the service of testator at the time of his death, though he had left the house for a short period.

Herbert v. Reid, 16 Ves. 486.||

A gave legacies of 15*l.* apiece to each of his relations of his father and mother's side, and gave the surplus of his personal estate to B, and made C his executor ; the executor paid 15*l.* to the testator's cousin-german, and 15*l.* apiece to her four children ; and the court allowed the payment to the children, and would not restrain the devise to the relations within the statute of distributions.

2 Vern. 381, *Jones & Beale*. See *Ambl.* 640.

But, notwithstanding this case, it seems the established doctrine of the Court of Chancery to make the statute of distributions the rule and measure of such general devise ; as where A devised all his real and personal estate for the use of his RELATIONS, without specifying any in particular, or using any other words ; it was agreed to be the rule of the court, in the construction of such devises to relations, that those who by the statute of distributions would be entitled to the personal estate in case he died intestate, should, upon such general devises, be let into the same proportions only ; and my Lord Chancellor said, he thought it the best measure for setting bounds to such general words, and that it had been often ruled accordingly.

Preced. Chan. 401, *Roach v. Hammond*.

{And where a testatrix bequeathed property to her sister B for life, and declared that it was her absolute desire that she should bequeath it to *those of her own family*, provided they behaved well to her, the master of the Rolls, Sir Wm. Grant, decided that the words *of her own family* were equivalent to *her own relations* : and B having made no disposition of the pro-

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perty, he declared it to be a trust for her family, and that her next of kin were entitled.

9 Ves. J. 319, *Cruwys v. Colman*. But the word *family* may, according to the context, have different significations in different wills. It may be restrained to mean only the children. *Ibid.* 323, 324. As where the testator bequeathed the remainder of his estate to be equally divided between his brother L's and his sister E's families, the children were held entitled *per capita* exclusive of the parents. 8 Ves. J. 604, *Barnes v. Patch*. And on the other hand, in *Macleroth v. Bacon*, 5 Ves. J. 159, where a power was given by will to appoint for the benefit of a married woman and *her family*, Lord Alvanley thought, on the construction of that particular will, that an appointment in favour of her husband was good, though he would not in general be included in the term.

Under a residuary bequest to the testator's "next of kin in equal degree," his brothers are entitled in exclusion of the children of deceased brothers. The latter are entitled under the statute of distributions by representation, not as in equal degree.

12 Ves. J. 433, *Wimbles v. Pitcher*. See 4 Ves. J. 649, *Lowndes v. Stone*;

β A bequest to each of the testator's servants of a year's wages, over and above what may be due to them at the time of the testator's decease, applies to such servants only as are usually hired by the year.

Booth v. Dean, 1 My. & Keen, 560.g

||RELATIONS.—Under a bequest to relations, or to *near*(a) relations, the next of kin, according to the statute of distributions, in existence at the death of testator, are alone entitled, unless from the nature of the bequest, or the testator having authorized a power of selection, a different construction is allowed.

Thomas v. Hole, *Forrest*, 251; *Green v. Howard*, 1 Br. C. C. 31; *Devisme v. Melish*, 5 Ves. 329; *Pope v. Whitcombe*, 3 Mer. 689. (a) *Whithorne v. Harris*, 2 Ves. sen. 527; and see 19 Ves. 403. β When the bequest is to "poor relations," the word *poor* will be rejected. *McNeillage v. Galbraith*, 8 S. & R. 45. See 11 S. & R. 103.g

The courts will not allow this construction of *relations* to be altered by parol evidence of what was the understanding of the testator respecting the word; as, that he intended *second* cousins as well as first.

Green v. Howard, 1 Br. C. C. 31.

Nor by the circumstance of testator, after bequeathing to relations, *excepting* a person who was *not* entitled as one of the statutable next of kin.

Rayner v. Mowbray, 3 Br. C. C. 234.

But though next of kin alone take as relations, yet if the bequest is "equally to be divided," the direction is observed, and all (as brothers and children of a deceased brother) take *per capita*.

Thomas v. Holé, *Forrest*, 251.

Again, if the bequest is to "poor" or "necessitous" relations, the court selects those of the next of kin who are in want of assistance.

Anon. 1 P. Wms. 327; *Brunsdon v. Woolredge*, 1 Dick. 380; *S. C. Amb.* 507; *Widmore v. Woodroffe*, *Amb.* 636.

But in some cases, from the nature of the bequest, as where the bequest is to provide a perpetual fund for charity, *all* relations are entitled, though not next of kin according to the statute.

As where the bequest was, "for the purpose of putting out our poor relations apprentices:"(b) and again, "for ever to divide among my poor

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kinsmen and kinswomen, and among their offspring and issue, 20l. a year."(c)

(b) *White v. White*, 7 Ves. 423. (c) *Attorney-General v. Price*, 17 Ves. 371.

So, if the testator gives a power of selection to any person, he may appoint to a relation who is *not* one of the statutable next of kin.

Mahon v. Savage, 1 Sch. & L. 111; and see 16 Ves. 43; *Spring v. Biles*, 1 T. R. 435, note; *Bennett v. Honeywood*, Amb. 708.

If, however, such a power is not exercised, the fund is divided among the next of kin at the death of the donee of the power.

Harding v. Glyn, 1 Atk. 469, cited 5 Ves. 501: See *Cruwys v. Colmar*, 9 Ves. 325; *Cole v. Wade*, 16 Ves. 27.

If the bequest be to the *nearest* relation, the nearest next of kin are entitled, whether they be one or more.

Marsh v. Marsh, 1 Br. C. C. 293; *Smith v. Campbell*, 19 Ves. 400; *Coop.* 275, S. C. See tit. *Legacies and Devises*, (L) 3.

A widow or relation by marriage is, generally speaking, not entitled under a bequest to relations, for she is not one of the next of kin.

Davies v. Baily, 1 Ves. sen. 84; *Worseley v. Johnson*, 3 Atk. 758; *Maitland v. Adair*, 3 Ves. 231. See 14 Ves. 382.

Upon a bequest to "such of his relations, sisters, nephews, and nieces, as his wife should appoint," it was held that the power could not be exercised in favour of *great* nephews and nieces.

Falkner v. Butler, Amb. 514; and see 1 Jacob, 208.

NEXT OF KIN.—Upon a bequest to the "next" or "nearest of kin," these words are construed literally and without reference to the statute; so that brothers and sisters take, to the exclusion of nephews and nieces.

Brandon v. Brandon, 3 Swanst. 312; *Bird v. Wood*, 2 Sim. & Stu. 400; *Wimbles v. Pitcher*, 12 Ves. 433; *Anon.* 1 Madd. 36.

The words "next of kin" *prima facie* exclude the widow; but a bequest, "to be divided as if I had died intestate," may admit her claim.

Garriok v. Lord Camden, 14 Ves. 382.

LEGAL PERSONAL REPRESENTATIVES.—A bequest to these persons is given to the executors or administrators of the person named, unless a contrary intention is shown, and they take beneficially and as *personæ designatæ*: but the courts anxiously lay hold of any circumstance to displace the legal title, and to infer an intention in favour of the next of kin, or the children, grandchildren, &c.

Evans v. Charles, Anst. 128; *Price v. Strange*, 6 Madd. 159; *Bridge v. Abbot*, 3 Br. C. C. 224; *Jennings v. Gallimore*, 3 Ves. 146; *Long v. Blackall*, 3 Ves. 486. See 19 Ves. 404; *Roper*, ch. 2, sec. 7.

EXECUTORS AND ADMINISTRATORS.—A bequest to A for life, remainder as she should appoint, remainder to her executors and administrators for their own use and benefit; the whole interest does not vest in A, but the executors and administrators take as purchasers in their own rights, subject to the appointment.

Saunders v. Franks, 2 Madd. 147; *Wilson v. Mount*, 2 Sim. & Stu. 493.

DESCENDANTS. See title "LEGACIES AND DEVISES," (L) 3.

FAMILY.—See *Ibid.*

FIRST AND SECOND COUSINS.—Under a bequest to first and second cousins of the name of M, first cousins of that name once removed, living at the

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testator's death, were held entitled with 'a first cousin of the same name ; there appeared to be no second cousin.

Mayott v. Mayott, 2 Br. C. C. 125.

§ Under a bequest of a residuary fund to the testator's first and second cousins, and children of his kinsman G C, whose children were first cousins of the testator twice removed, all persons related to the testator in the degree of second cousin are entitled.

Charge v. Goodyer, 3 Russ. 140. g

GOVERNMENT.—A legacy to government in exoneration of the national debt, or otherwise, for the benefit of the public, is to be disposed of under the king's appointment, by sign manual.

Newland v. Attorney-General, 3 Mer. 684.

Omission of name may be supplied from context of the will.—Testator bequeathed to his *seven* children, A, B, C, D, E, and F, (naming only *six*,) the name of the seventh was supplied.

Humphreys v. Humphreys, 2 Cox, 186. § Testator bequeathed "to the two sons and daughters of A B 50*l.* each." At the date of the will and death of the testator, A B had one son and four daughters. Held that each of these five children was entitled to a legacy of 50*l.* Harrison v. Harrison, 1 Russ. & My. 72; S. C. Tam. 273. g

So, upon a bequest "to my sister's three children of 50*l.* apiece," where the sister had four children, each of the four was held entitled.

Tomkins v. Tomkins, 19 Ves. 126, note.

Again, upon a bequest to the three children of D, and D had four children, the legacy was decreed to the four. Sir W. Grant, M. R., said, the meaning was "*all* children."

Garvey v. Hibbert, 19 Ves. 125.

If a legatee is described as ——— Price, son of ——— Price, (a)—or, as Mrs. G, (b) this is sufficient; parol evidence is admissible to supply the Christian name.

(a) Price v. Page, 4 Ves. 680. (b) Abbot v. Massie, 3 Ves. 148.

But a *blank* of both names cannot be supplied—that would be a bequest by parol.

Baylis v. Attorney-General, 2 Atk. 239; Hunt v. Hort, 3 Br. C. C. 311.

If bequests are made to Anne Collins of S, and Anne Collins of B, and then a bequest is made to the said Anne Collins, the court will endeavour to discover from the whole will for which Anne Collins the last bequest is intended; if this is impossible, such bequest will be void, for parol evidence cannot in this case be received, it being a patent ambiguity.

Fox v. Collins, 2 Eden, 107. j

§ It is not requisite that a legatee be named in a will; if he be otherwise clearly described, it is sufficient; for example, a bequest to "The American Board of Commissioners for Foreign Missions, and their associates," in trust for pious purposes, was held void for uncertainty, but the persons who, at the time of executing the will, constituted the board, and their associates, if they could be ascertained, were the persons intended as trustees.

Bartlett et al. v. King, Executor, 12 Mass. 537. See Trustees of Phillip's Academy v. King, Executor, 12 Mass. 546.

A slave cannot take by devise.

Cunningham's Heirs v. Cunningham's Executors, Conf. R. 353; S. C. Tayl. 209.

Testator directed all his property to be sold, and vested the proceeds in

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his executors as trustees, directing them to divide the same in two equal parts; one part he orders to be placed at interest, and directs the interest to be paid annually to his daughter Elizabeth during her life, and if she should die without leaving a child or children living, then to pay the interest, annually, to the support and maintenance of his nephew Thomas Bullock and Rebecca his wife and their children; the other moiety, or half part, he directs his executors, in their discretion, to pay to the support and maintenance of his nephew Thomas Bullock and his family, that is to say, John B. Bullock and all the children born to the said Thomas. After the testator's death the executors accounted before the orphans' court, and acknowledged a balance of eight thousand four hundred and sixty-eight dollars and twenty cents in their hands. Afterwards testator's daughter Elizabeth died without issue, and after her death Rebecca Bullock was divorced from her husband Thomas Bullock by an act of the legislature, after which the executors refused payment to her. She filed a bill against the executors for support out of the interest of the first moiety, demurrer by the executors. Held, that from her being distinctly named in the first bequest as one of the objects of the testator's bounty, and the difference in the language used in the bequest of that moiety and of the other, the testator intended that Rebecca the wife of Thomas Bullock should have a personal and individual interest in this bequest, and not simply an interest *as* the wife of Thomas Bullock, or a member of his family.

Bullock v. Zilley, Sax. Ch. R. 489.

Devise "to the Roman catholic priest that shall succeed me," &c. Held, that such priest must be regularly admitted by the bishop to the discharge of his duties, and must have the care of the congregation in order to entitle himself.

Bowers' Executors v. Fromm, Add. 362.

A bequest by the testator to his "beloved wife," not mentioning her name, applies exclusively to the individual who answers the description at the date of the will, and is not to be extended to a wife taken afterwards.

Garrat v. Niblock, 1 Russ. & My. 629.

Testator was betrothed to a lady, and, by a codicil to his will, after mentioning her name and alluding to his intended marriage with her, he gave 3000*l.* to his wife. Before the marriage he died. Held that the lady was entitled to the legacy.

Schloss v. Stiebel, 6 Sim. 1.

A bequest to "A B, and his family, to wit, his wife and children," includes only the wife then living, and their issue.

Drayton v. Grimké, 1 Hill's Ch. 227.*g*

3. *What shall be a sufficient Description of the Thing given, and what shall be said to be bequeathed.*

||See Roper, c. iv. § 1, last edit.||

Godolphin says, that in order to find out the testator's meaning, with respect to the things he intended to give away, it is necessary chiefly to regard the (a) time when the will is made; for it is a presumption of law that the testator's mind was not altered, unless it otherwise appear by sufficient evidence; therefore, says he, if a father bequeath to his son (who is a student) all his books, and afterwards buy other books, the books so bought pass not.

Godolph. 272. (a) But in another place he says, that this rule must be understood

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as the testator makes use of words in the present tense or future tense; and that if it be doubtful whether they refer to the time past or the time to come, they shall be understood to relate unto the time that is to come; and that, therefore, if a man devise his corn indefinitely, it shall be understood all such as he hath at the time of his death. Godolph. 274. [The rule must certainly depend upon the particular expression of the bequest, as, where the testator gives a specific thing as being then in his possession, and which, in its nature, is not fluctuating, and he gives it by a particular appellation. Thus, if he bequeaths the leases which he now has, or all the horses now in his stable, or the arrears of an annuity now due, in such cases, subsequent leases, or after-purchased horses, or arrears afterwards accrued due will not pass. 1 P. Wms. 597; Attorney-General v. Bury, 1 Eq. Ca. Abr. 201; Baugh v. Read, 1 Ves. jun. 260.] ||See Howe v. The Earl of Dartmouth, 7 Ves. 147.||

But it seems clear, both by our law and the civil law, that a devise of all a man's personal estate passes whatever he died possessed of, and not that only which he had at the time of making his will; for the personal estate being transient and fleeting, and, from the necessity of dealing and traffic, liable to daily alterations, if the contrary resolution should prevail, it would put men under the difficulty of making a new will every day, and create the greatest perplexity imaginable.

Swinb. 418; Salk. 237, pl. 16. {See 5 Ves. J. 811, Wilde v. Holtzmeier,} and vide tit. *Legacies and Devises*, letter (B).

Also, it hath been determined in Chancery, that if a man devises to his wife all his personal estate at a place called W, all his personal estate, as coaches, horses, &c. there at the time of his death shall pass, though not there at the time of making the will, the personal estate being fluctuating and varying until the time of the testator's death.

2 Vern. 688, Sayer v. Sayer.

{And a bequest of the residue of the testator's fortune in India passes only property which was in India at the time of his death, and not that which was remitted to England after the making of the will, or was on its passage at his death; though the will began with the words "my temporal estate I dispose of in the following manner," and, on that construction of the will, the property remitted or on its passage was not disposed of.

8 Ves. J. 617, Sadler v. Turner.}

If a man devise his house, and all his goods and furniture therein, to his wife for life, and after her decease, to his son R and his heirs, except his pictures, which he gives to his sons A and B, and he has pictures in boxes as well as those hung up in the house, and likewise pictures at his death, which he had not at the time of making his will; and it is proved in the cause that he had skill in pictures, and frequently bought pictures and sold them again; the exception of the pictures shall extend as well to the pictures hung up as furniture as to those in boxes, and as well to those in the house at the time of the will, as to those bought in after the will made.

2 Vern. 538, Gayre and Gayre.

||So, under a bequest of my library of books *now* in the custody of C, after-bought books pass; *now* merely describing the situation and not the extent of the bequest.

All Souls' College v. Coddington, 1 P. Wms. 597.

And there was a similar decision upon a bequest of "all his pictures, drawings, and prints to C, to be kept, and none of them to be sold, they being a good collection."

Dean of Christ-church v. Barrow, Amb. 641.||

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But where a man devised to his niece all his goods, chattels, household stuff, furniture, and other things which then were or should be in his house at the time of his death; and some time after died, leaving about 265*l.* in ready money in the house; it was decreed, that this ready money did not pass, for by the words *other things*, shall be intended things of like nature and species of those before mentioned.

Abr. Eq. 201, Trafford and Berrige. [See *acc.* Cook v. Oakley, 1 P. Wms. 302; Timewell v. Perkins, 2 Atk. 103; Cornforth v. Boon, 2 Ves. 279; Cavendish v. Cavendish, 1 Br. Ch. Rep. 467.] {See 3 Ves. J. 212, Stuart v. Earl of Bute, 11 Ves. J. 657, S. C.}

||Goods.—“Goods” is *nomen generalissimum*, and may pass *all* the personal estate of testator.

1 Atk. 180, 182; 3 Atk. 62, Moore v. Moore, 1 Br. C. C. 128; Swinb. pt. 7, § 10; Anon. 1 P. Wms. 267.

But the operation of this word is frequently restricted. If there be a reference to a house or a county, then bonds and choses in action will not pass by this word, for such things have no locality. As a bequest of “all my goods and chattels in Suffolk.” But money passes and bank-notes. It would seem, too, that promissory notes payable to bearer, exchequer bills, and bills of exchange endorsed in blank, would pass. Leaseholds also pass.^(a)

Moore v. Moore, 1 Br. C. C. 127; Green v. Symonds, 1 Br. C. C. 129, note. See Wookey v. Pole, 4 Barn. & A. 1. ^(a) Portman v. Wills, Cro. Eliz. 387.

The term “goods” is also restricted by a specification of chattels of a particular denomination either preceding or following it.

See Trafford v. Berrige, and other cases in margin, *supra*, and Woolcombe v. Woolcombe, 3 P. Wms. 112. §A residuary bequest which contains an enumeration of certain articles of personal property, and adds, “all my estate not before devised, including my gig and saddle-horses,” is not a general residuary bequest, and must be construed to include only property of the same kind as the articles enumerated. Minor’s Executors v. Dabney, 3 Rand. 191.^g

Upon a bequest of furniture, plate, linen, china, books, and other *goods*, money will not pass, because not *ejusdem generis* with the preceding articles. But if there be an exception of money, as, “other goods except money,” the disposition must be taken to comprehend all that testator has not excluded, which is money only.

Hotham v. Sutton, 15 Ves. 319.

And after a specification of particular articles, the term “goods” is especially to be restricted to those *ejusdem generis*, and not to be extended to money if a money legacy is also given to the legatee.

Crichton v. Symes, 3 Atk. 61; Roberts v. Kuffin, 2 Atk. 113; Anon. Pre. Ch. 8. See 11 Ves. 666; 1 Russell, 149; §Minor’s Executrix v. Dabney, 3 Rand. 191; Lamphier v. Despard, 1 Con. & Law. 200, but see Arnold v. Arnold, 2 My. & Keen, 365.^g

So, “EFFECTS,” “PROPERTY,” “CHATTELS,” “THINGS,” if accompanied by words savouring of the locality, will not pass choses in action; and their generality will also be restricted by a specification to articles *ejusdem generis*.

Popham v. Aylesbury, Amb. 68; Fleming v. Brook, 1 Sch. & Lef. 318; Stuart v. Bute, 3 Ves. 212; 11 Ves. 657; Hotham v. Sutton, 15 Ves. 319; Rawlins v. Jennings, 13 Ves. 39; Michell v. Michell, 5 Mad. 71; Henderson v. Farbridge, 1 Russell, 479. §See Kendall v. Kendall, 4 Russ. 360.^g

§A term for nine hundred and eighty-five years passes by a will under the expression “personal estate.”

Brewster v. Hill, Adams, 232.

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A bequest of "property" will pass real estate, unless it appear from the whole will that the testator meant to use the word in a confined sense

Rossetter v. Simmons, 6 S. & R. 452.

A bequest of "movable goods" will include bonds, unless there is something in the context of the whole will to restrain or qualify the construction.

Jackson v. Robinson, 1 Yeates, 101. See 2 Dall. 142; Delamater's estate, 1 Whart. 362.

Testator devised to his wife the residue of his personal estate "and the benefits of all my real estate, till my sons come of age;" held that grain in the ground at the time of testator's death passed to the widow.

M'Cullough's Appeal, 4 Yeates, 23.

Testator bequeathed to his sister 100*l.* of good and lawful money of Great Britain, and a legacy of 20*l.* to his nephew, and the rest of his money to be equally divided between his brother and niece. At his death the property consisted of 600*l.* 3 *per cent.* consols, and 119*l.* in sovereigns. Held that the stock did not pass by the word *money*.

Gasen v. Dotterill, 1 My. & Keen, 56.

Testator gave to A "all his moneys in hand," and to B, "all moneys out on securities." Held that the testator's balance at his banker's will pass to A as "money in hand."

Madden v. Madden, 2 Leigh, 377. See Stuckey v. Stuckey, 1 Hill's Ch. 309.

A bequest of "my wines and property in England" will pass the testator's property in England of every description, including money in the funds and at his banker's, debts, and arrears of a pension due to him, and such legacy is not confined to property *ejusdem generis* with wines.

Arnold v. Arnold, 2 My. & Keen, 365.*g*

By "all goods and chattels in my house," those things only pass which shall be in the testator's house at his decease, unless the same be removed for some necessary purpose.

Chapman v. Hart, 1 Ves. sen. 273; Moore v. Moore, 1 Br. C. C. 128; Heseltine v. Heseltine, 3 Madd. 277.

HOUSEHOLD GOODS include all movables in the house contributing to the convenient occupation or ornament of the same. But consumable articles, as victuals, wine, malt and hops, &c., do not pass; nor personal articles, as apparel, jewels, &c.; nor do guns and pistols used in shooting game; nor books.*(a)*

Slanning v. Style, 3 P. Wms. 334. See also Porter v. Tournay, 3 Ves. 313; *β* Carnagy v. Executors of Martin, 2 Munf. 234.*g* *(a)* Bridgman v. Dove, 3 Atk. 201.

{A testator gave all the residue of his personal estate to his wife, *except such parts as should be in and about his house*, which parts he gave to his son, and directed the household furniture to go as heir-looms, and gave all arrears of rent which should be due to him at his death to his son. A bond to secure an old arrear of rent, and cash, both found in an iron chest in the house, in which the steward kept the cash arising from the rents, did not go to the son, but to the wife.

4 Ves. J. 166, Jones v. Lord Sefton.}

Plate passes, if in common use, or suitable to the situation and quality of the testator. So pictures hung up, linen, and china.*(b)*

Kelly v. Powlet, Amb. 605, cited in Porter v. Tournay, 3 Ves. 313. *(b)* Boon v. Cornforth, 2 Ves. sen. 279, 430; Kelly v. Powlet, Amb. 605.

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But household goods, in the possession of testator *in the way of trade*, do not pass.

Pratt v. Jackson, 1 Bro. P. C. 222; Le Farrant v. Spencer, 1 Ves. sen. 97.

"Household FURNITURE," and "household STUFF," receive the same construction as "household goods."

Under a bequest of all household goods, and all books, and all stores and implements, and other goods and chattels whatsoever, which should be in and about the dwelling-house and out-houses at B, RACE-HORSES were held to pass.

Gower v. Gower, Amb. 612; 2 Eden, 301; and see 3 Ves. 313.

By the words "household furniture, and other household *effects* of or belonging to the testator's dwelling-house and premises at his decease," all property in the house or on the premises intended for use or consumption therein, or for ornament, was held to pass, including pistols, turning apparatus, pictures, &c., but not a poney or cow.

Cole v. Fitzgerald, 1 Sim. & Sta. 189; *β* Fitzgerald v. Field, 1 Russ. 427; Cermorne v. Antrobus, 5 Russ. 312.*g*

PLANTATION.—A devise of a plantation in the West Indies will pass the cattle, stock, and implements thereon.

Lushington v. Sewell, 1 Sim. 479.

β Testator devised to A B a slave and her increase, held that a child born before the will was written passed.

Robinson v. Robinson, 2 Bibb, 76; Puller v. Puller, 3 Rand. 83.*g*

LIVE AND DEAD STOCK.—If these words are preceded by a disposition (though ineffectual) of all in-door property, they will be confined to out-of-door stock, as horses, corn, hay, &c., but used alone they would have a wider meaning.

Porter v. Tournay, 3 Ves. 311; Roper, ch. 4, s. 1.

STOCK OF CATTLE means not only carriage-horses but farming cattle.

Randall v. Russel, 3 Mer. 190.

STOCK UPON A FARM, carries as well all movable property on a farm as crops of corn. And if a malt-house were included in the lease, and all the stock upon the premises were given, a stock of malt would pass.

West v. Moore, 8 East, 339; Brooksbank v. Wentworth, 3 Atk. 64, ed. by Sanders.

β A bequest of "all my share of personal stock that I have in iron works," does not pass the increase of profits acquired after the testator's death.

Dorsey v. Dorsey, 4 Har. & M'H. 231.*g*

UTENSILS, includes every thing which is necessary for household purposes, or for the trade with reference to which it is used.

Dyer 59, pl. 15, Latimer's case; Fitzgerald v. Field, 1 Russell, 427.

"All my money in the Bank of England," passes stock in the funds, if the testator never had any cash in the bank.

Gallini v. Noble, 3 Mer. 691.

Funded property may pass, though the fund is mis-stated, provided there was not any stock of the description given belonging to the testator at the date of his will; (a) and though stock be standing in the name of trustees, it may pass under a bequest of stock "standing in my name," the testator not having any stock standing in his name at the date of this will, or at his death; (b) but a *bonus* will not pass with a *specified* quantity of stock. (c)

(a) Door v. Geary, 1 Ves. sen. 256; Penticost v. Ley, 2 Jac. & W. 207. (b) Hew-

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son v. Reed, 5 Madd. 451. (c) Norris v. Harrison, 2 Madd. 268; but see Paris v. Paris, 10 Ves. 185.

SECURITIES FOR MONEY pass stock in the funds, mortgages, &c.; but it is doubtful as to bank stock, the owner of that being a partner in the company.

Dicks v. Lambert, 4 Ves. 725; Bescoby v. Pack, 1 Sim. & Stu. 500; β Madden v. Madden, 2 Leigh, 377.*g*

MEDALS will include current coin, if kept with them.

Bridgman v. Dove, 3 Atk. 202.

DEBTS.—Under a bequest of “all debts,” all moneys, however secured, which are due to the testator, pass.

Smallman v. Gooldeen, 1 Cox, 329; Stonehouse v. Mitchell, 11 Ves. 352; Essington v. Vashon, 3 Mer. 424. β The legacy of a debt includes that of the interest due. Hepp v. Lafonta's Executors, 2 Mart. N. S. 446.*g*

But a sum of money to which testatrix is entitled under an intestacy, where no administration has been taken out to intestate, does not pass under a bequest of all sums of money due to testatrix at the time of her death.

Collins v. Doyle, 1 Russell, 135.

USURIOUS DEBT.—Testator gave a share of the residue to the son of T, but the debt due from T to testator was to be deducted from the share. This debt was void on account of usury; held, nevertheless, it should be deducted.

Stanton v. Knight, 1 Sim. 492.

If the bequest be of “all debts, whether by bond, mortgage, or open account,” *all* debts, however secured, may pass.

Stonehouse v. Mitchell, 11 Ves. 352; and see Chalmers v. Storil, 2 Ves. & B. 222, and 1 Roper, 254, 3d edit.

Bequest of 200*l.* secured by a mortgage does not pass the interest due; nor does a bequest of the *arrears* of a debt pass the principal.(a)

Roberts v. Kuffin, 2 Atk. 112. (a) Hamilton v. Lloyd, 2 Ves. jun. 416.

By “*arrears of rent and interest*,” arrears of an annuity pass;(b) but a bond to secure arrears of rent will not pass.(c)

(b) Hale v. Gilbert, 2 Ves. sen. 430. (c) Jones v. Lord Sefton, 4 Ves. 166.

β When the interest or produce of a legacy is given to or in trust for a legatee, or for the separate use of such legatee, without limitation as to continuance, the principal will be considered as bequeathed.

Garrett v. Rex, 6 Watts, 14. See Oldman v. Slater, 3 Sim. 84.*g*

By bequest of a “*balance*” in the hands of A, a sum directed by testator to be invested by A, but which was not actually invested before his death, passed.

Hill v. Mason, 2 Jac. & W. 248.

LINEN, alone, comprises all kinds of linen; but if accompanied by the word “*clothes*,” it is restricted to body linen.

Hunt v. Hort, 3 Br. C. C. 311.

HOUSE.—Bequest of a house does not include pictures or other ornaments, or furniture therein.

Beck v. Rebow, 1 P. Wms. 95. See Buckland v. Butterfield, 4 B. Moo. 440; S. C. 2 Brod. & B. 54.

GROUND-RENTS, a bequest of, carries a reversionary term as well as the rent.

Kay v. Laxon, 1 Br. C. C. 76.

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CABINET OF CURIOSITIES, a bequest of, consisting of coins, gems, &c., and other valuable things, does not pass ornaments of the person, though the same were usually shown therewith, but were occasionally worn.

Cavendish v. Cavendish, 1 Cox, 77; 1 Br. C. C. 467, S. C. || A Bequest of a cabinet, with whatever it contains "except money," will not pass a promissory note payable to the testatrix, of a date anterior to the will, and which at her death was found in the cabinet. Read v. Stewart, 4 Russell, 69.g

If J S bequeaths all his household goods and furniture which should be in his house at R at his death to his wife, and afterwards going beyond sea, his steward gets the head landlord of the house to accept of a surrender of the lease of the house, and removes the goods to another house, and writes an account of this to J S, who approves of it, the goods will not pass by the will to the wife: otherwise, if they had been removed by fraud to defeat the legacy, or by any tortuous act without the privity of the testator.

2 Vern. 747; Gilb. Eq. Rep. 172, decreed between the Earl and Countess of Shaftesbury. || Heseltine v. Heseltine, 3 Madd. 277. ||

So, if a man bequeaths to his son the furniture of his house at D, and two years afterwards orders goods which he had bought in London to be carried to his house in D, and agrees with carriers for that purpose, but dies before the goods are removed from London, these goods shall not pass by the will as part of the furniture of the house at D.

2 Vern. 739, decreed between the Duke of Beaufort and Lord Dundonald. [Lord Hardwicke, alluding to this case, says, "there was very little opposition, being between a mother and a son, and I lay no stress upon it." 3 Atk. 202.] || See Grandison v. Pitt, 2 Vern. 740, in note, by Raithby. ||

If a man who has debts due to him by bond, and who is likewise possessed of a term for years, bequeaths one moiety of his personal estate to his wife, and afterwards several legacies to other persons, and the residue to J S, the wife shall have one complete moiety, if the other is sufficient to pay the debts, and she shall have a moiety of the lease, though it was objected that a lease was not usually reckoned personal estate.

Chan. Ca. 16, Lee and Hale.

If a man possessed of a lease for years bequeaths several legacies of plate and other goods to several persons, and after devises all the residue of his goods to his wife, his debts and legacies being paid, and makes her sole executrix; by this will, the lease passes to her as legatee; for though by a grant of *omnia bona* a lease passes not, yet, by the civil law, *bona* including all chattels, and this being a legacy, the judges of the common law in this case ought to be guided by that law.

Portman v. Willis, Cro. Eliz. 387. But see Godolph. 392, 7.

If a man bequeaths 1200*l.* to J S, and by general words gives all his goods, chattels, and household stuff in and about his house to the said J S, money in the house will not pass, he having a particular legacy devised to him.

2 Chan. Rep. 190.

If a nobleman possessed of a collar of SS, and of a garter of gold, and a buckle annexed to his bonnet, and many other buttons of gold and precious stones annexed to his robes, and of many other chains, bracelets, and rings of gold and precious stones, bequeath all his jewels to his wife, and die, the garter and collar of SS pass not, because they are not properly jewels, but ensigns of honour and state; and the buckle in his bonnet and buttons pass

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not, because annexed to his robes; but all the other chains, rings, bracelets, and jewels pass.

Owen, 124; Earl of Northumberland's case; S. C. cited in Style, 289.

J S by will devises thus:—*Item*, my will and pleasure is, that the furniture and pictures in my houses at A, B, and C shall always remain there, and not in the power of my executors to dispose of, but shall go with my said houses to such of my grandchildren as shall be in the possession thereof; and then appoints that the plate gilt with gold, belonging to his chapel at A, together with the ornaments thereof, should remain to the perpetual use of the said chapel, and makes D executor, to whom he gives all his personal estate, except what is before bequeathed, of what nature or kind soever, for his own proper use; and the question was, if the plate the testator constantly used, and removed with him when he went from one house to another, should go to the executor by the last clause, or belong to the houses under the word *furniture*? And my Lord Keeper was of opinion, that furniture in a large sense takes in plate, but not here, because he distinguishes the chapel plate from the furniture; and the plate of ordinary use that was carried with him could no more be said the furniture of one house than of the others, and he meant only the particular furniture of each house; so the plate went to his executors, and was liable to plaintiffs who were creditors.

Abr. Eq. 200; Mich. 1705; Franklin and Earl of Burlington, 2 Vern. 502, S. C. ill reported; Pre. Ch. 251, S. C.

{ Under a bequest of the use of a house, "with all the furniture and stock of carriages and horses, and other live and dead stock," during life, plate passes, but wine and books do not.

3 Ves. J. 311, Porter v. Tournay.—Note: the case does not determine what "live and dead stock" may mean standing alone; the preceding words showing that out-of-door stock was meant. See 11 Ves. J. 666. }

If a man devises his silver tea-kettle and lamp, with the appurtenances, nothing shall pass but the kettle and lamp, and the box wherein the lamp was placed, and not the silver tea-pot, milk-pot, tongs, strainer, or canisters.

Abr. Eq. 201; Mosely, 47, S. C., S. P. Hunt and Berkley.

If a man devises 40*l.* to be paid to J S, by him to be disposed of in such manner as the testator should by a private note acquaint him with, and dies without such appointment, this is a good bequest to the party.

2 Chan. Ca. 198, Martin and Clerk.

|| If a fund is given to a class of persons, in terms which show that the testator intended the class to take the *whole*, but the specific shares allotted to such persons do not, in fact, exhaust the whole, the part so undisposed of shall be divided amongst the class in proportion to their specified shares.

Berkley v. Palling, 1 Russell, 496; and see Courtney v. Ferrers, 1 Simons, 137. ||

§ A direction by the testator to the executor to support and maintain a person during his life, must be considered, as to the remedy, a legacy.

Farwell v. Jacobs' Admin., 4 Mass. 634.

A bequest of a female slave and her increase, must be construed to apply only to future offspring, if the expression be not enlarged by the context of the will, or other admissible evidence.

Puller's Executors v. Puller, 3 Rand. 83. See Haynesworth v. Cox, Harp. Eq. 117; Gayle v. Cunningham, Harp. Eq. 124; Pringle v. M'Pherson, 2 Desaus. 524.

(B 2) Of Legacies for Life, with Remainder over.

A TESTATOR bequeathed a negro woman to his wife for life, and bequeathed her, after his wife's death, to his daughter B, adding "after the said negro is appraised by two freeholders, and B shall pay unto each of her four sisters above mentioned, one-fifth part of said appraisement." Held, that after the death of the widow, the four sisters were entitled each to one-fifth of the value of the increase, which the negro woman had borne during the life of the widow, as well as of the value of the negro woman herself.

Wadsworth v. Armfield, 1 Dev. & Bat. Eq. 323.

A bequest of a slave to A for life, with remainder to the lawful heirs of B, who, it appears from the will was alive, is a bequest to the children of B, and is to be divided among those who shall be *in esse* at the death of the first taker, and is not confined to those born at the death of the testator.

Simms v. Garrot, 1 Dev. & Bat. Eq. 393.

Testator bequeathed to his wife "a negro girl named Hannah, and my horses, &c., and my plantation and all the lands adjoining to it during her lifetime;" held to pass but a life-estate in the negro girl.

Black v. Ray, 1 Dev. & Bat. 334.

Chattels or money may be limited over after a life interest, but not after a gift of the absolute property.

Patterson v. Ellis, 11 Wend. 260.

Devise of slaves for life, and should the devisee die without issue, remainder over; the limitation over is too remote.

Didlake v. Hooper, Gilm. 194. See Davidson v. Davidson, 1 Hawks, 163; Bryson v. Davidson, 1 Murph. 143; Matthews v. Daniel, 1 Murph. 42; Moor v. Henderson, 4 Desaus. 459; Jones v. Price, 3 Desaus. 165; Guery v. Vernon, 1 Nott. & M'Cord, 69; M'Donald v. M'Mullin, 2 Rep. Const. Ct. 91; Keating v. Reynolds, 1 Bay, 80.

A devisee for life is entitled to the crop growing at his death; as is a legatee for life to the increase of cattle, and the interest of money.

Perry v. Terrel, 1 Dev. & Bat. Eq. 441.

When the testator gives a specific bequest of personal property for life, or for a shorter period, the legatee must give to the personal representative of the testator an inventory of the articles bequeathed, stating that they are in his possession under such bequest, and that when his interest therein has expired, they shall be delivered up to such representatives.

De Peyster v. Clendening, 8 Paige, 295; Covenhoven v. Shuler, 2 Paige, 123.

Security will be required from the first taker when there is danger that the articles will be wasted or otherwise lost to the remainder-man.

2 Paige, 123.

Testatrix gave "a legacy of 4000*l.* to A, and in case of his decease, I give the same legacy to his wife, and at her decease to their eldest daughter." Held, that A having survived the testatrix was absolutely entitled to the legacy.

Crigan v. Baines, 7 Sim. 40*g*.

(C) What shall be an Ademption or Extinguishment of a Legacy.

SWINBURNE distinguishes between the ademption and translation of a legacy: the first, he says, is the taking away a legacy which was before bequeathed, which may be done by an express revocation thereof; or it may be done secretly and by implication, as by giving away, or voluntarily alienating the thing devised. Translation of a legacy is the bestowing of

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the same upon another, which is likewise an ademption; and therefore there may be an ademption without a translation, but there can be no translation without an ademption.

Swinb. 522, 526. § See the following cases where the legacies were declared to be adeemed: *Hayes v. Hayes*, 1 Keen, 97; *Davys v. Boucher*, 3 Y. & Coll. 397; *Gilbreath v. Winter's Executors*, 10 Ohio, 64; *Basan v. Brandon*, 8 Sim. 171; *Walton v. Walton*, 7 Johns. Ch. 262; *Pattison v. Pattison*, 1 My. & Keen, 12; *Gardner v. Halton*, 6 Sim. 93; *Colleton v. Garth*, 6 Sim. 19; *Newbold v. Roadknight*, Tam. 492; *S. C. 1 Russ. & My. 677*; *Ashe v. Berry*, 1 Beat. 255. *g*

The ademption of a legacy is no more to be presumed than the revocation of the testament, unless it be proved; and therefore if the testator bequeath all the corn in his barn, and live after the making of his will till the corn is spent, and other corn be put in the place thereof, this spending of the corn is no ademption of the legacy, and therefore the legatee shall have such corn as is found in the barn when the testator dieth, unless the corn found in the barn at the death of the testator be greater in quantity than was the corn at the time of the will made; for so much is due, but not a greater quantity than was the first.

Swinb. 522.

So, if the testator bequeath a ship, and afterwards, by piecemeal, repair and renew the same, so that there remain nothing of the old ship but only the bottom tree, here is no ademption of the legacy, but the legatee may recover the whole ship.

Swinb. 523.

If a man bequeath a house, which afterwards he voluntarily pulls down, or which is blown down by the wind, or is consumed by fire, and afterwards he erect a new house where the old house stood, Swinburne is of opinion, that the legatee in neither of these cases can have the new house; it being a general rule of the civil law, that a house bequeathed being destroyed, if the testator build another in the same place, the legacy is extinguished, unless the meaning of the testator were otherwise.

Swinb. 523, 524.

But if the testator bequeath a house, and afterwards, by piecemeal, repair the same, so that there is no part of the old matter or stuff remaining, the will of the testator is not hereby presumed to be changed; and therefore the legatee may recover the house so repaired, for it is deemed to be the same house still in law.

Swinb. 523.

Also, if the testator, being constrained by necessity, as for the payment of his debts, supplying himself or his family with food and necessaries, &c., alienate the thing bequeathed; this is no ademption of the legacy, and therefore is the executor bound to redeem the same, or to pay the just value to the legatee.

Swinb. 524.

So, if the thing bequeathed be not fully alienated, as if it be pledged or pawned, the legacy is not thereby extinguished; and therefore the executor in this case is bound to redeem the same, and to restore it to the legatee, or to pay the price thereof, if he suffer it to be forfeited.

Swinb. 525; §2 Br. C. C. 113. §

§So, where A bequeathed "500*l.* now in B's hands," having previously drawn bills upon B, which reduced the 500*l.* to 400*l.*, it was held that the

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full sum of 500*l.* which was secured by a note which was in force at testator's death, was payable to the legatee; and that there was not a partial ademption as to the sum for which it was pledged or mortgaged.

Crockat v. Crockat, 2 P. Wms. 164.¶

If a legacy be given to one person, and afterwards in the (a) same will the same thing be given to another, this is not an ademption of the legacy as to the first person, for the utmost constancy shall be presumed in the testator till the contrary appears; and therefore in this case they shall divide the legacy between them.

Swinb. 528. (a) So if by testament he had given it to one person, and by codicil to another, this would be no ademption, unless it appeared the testator's intention that it should be so; as if he had said, *that which I did bequeath to A I give B*, these or the like words wholly take away the legacy. Swinb. 529.

If a man bequeath a legacy in these words, viz. *I give to my niece A 500*l.* which my sister B hath now in her hands of mine, as by bond appears*; and after the money be paid, and ten years after payment thereof the testator die, yet the legacy is good, though the security is altered; for by the words, no more is intended but that the legacy should be as sure as he could make it.

Raym. 335, Pawlett's case.

Again, a man devised in the following manner; viz. *I give and devise to my good and only uncle the sum of 500*l.**; that is to say, that bond and judgment he gave me for 400*l.*, and 100*l.* in money, and made his wife executrix, and desired her to be kind and assisting to his uncle, that he might live as became a gentleman; the uncle some time after sold an estate, and with the money paid off 320*l.*, and took up the bond, and had the judgment vacated, and gave a new bond for the remaining 80*l.*; and some time after the testator died, and the uncle having notice of this will, brought his bill for this legacy of 500*l.* For the executrix it was insisted, that this was a specific legacy of that particular bond and judgment, and they being cancelled and altered before the testator's death, it was an ademption of the legacy as to so much; and besides, they urged that this payment of the 320*l.* amounted to a release, so that he could only be entitled to the residue. On the other side it was insisted, that the diversity is where the money is voluntarily paid in by the person who owes it, and where the testator sues for and recovers it: in the first case, the legacy continues still good, because the money only comes home to the personal estate; but in the other case, the testator suing for it, shows that he intended to make it his own, and therefore would not leave it to the legatee to recover; and the justice of the uncle ought not to prevent the affection of the nephew; and no alteration of his intention appeared. My Lord Keeper was clear of the same opinion, and decreed the 80*l.* bond to be delivered up, and the residue of the legacy to be paid.

Abr. Eq. 302, Orme and Smith; 2 Vern. 681, S. C.

¶ Testator bequeathed by the following words: "I give and bequeath to A B, my executor, all my 250 shares of capital stock, which I hold in the Union Bank of Pennsylvania, together with such interest as may have accrued therein, &c., as also the further sum of seven thousand dollars, &c., all of which I give and bequeath to my said executor in trust to, and for the use of, my two grandsons C D and E D, to be transferred and paid to them when they shall respectively attain the age of twenty-one years," &c.: after making his will the testator sold the stock, and took from the purchaser his

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bond for the amount. Held, that the legacy was adeemed, although there was evidence that the testator declared his intention to be that the bond should go to his grandsons in lieu of stock.

Blackstone v. Blackstone, 3 Watts, 335.g

One by will devised thus:—Item, *I give and bequeath to my granddaughter Mary Ford (the plaintiff) the sum of 40l., being part of a debt due and owing to me for rent from G M, she allowing what charges shall be expended in getting the same.* Item, *I give and bequeath unto my grandsons A and B the rest and residue of what is due and owing to me from the said G M, which is about 40l., to be equally divided between them, they allowing charges as aforesaid.* Afterwards the testator received the whole debt owing for rent from G M; and for the plaintiff it was insisted, that there was a difference between a specific and a pecuniary legacy; that though the disposing of a specific legacy might be an ademption of it, yet this being a pecuniary legacy, the paying of the money to the testator would not be a loss of it. On the other side it was insisted, that there was a difference between a voluntary and compulsory payment; that though the first was no ademption, yet the second was, and that the testator obliged G M to pay in the money. But my Lord Chancellor was of opinion, that there was no foundation for the difference taken in the books between a voluntary and compulsory payment, for the latter might be with an intent to secure the legacy at all events, and decreed the plaintiff the 40l. legacy.

Abr. Eq. 302, *Ford and Fleming*; [2 P. Wms. 469, S. C.; 2 Str. 823, S. C.]

[A testator gave his sister S C 550l. which was then in Mr. E's hands, and died soon after the making of his will. It appeared, that the testator, before the making of his will, had left in Mr. E's hands 550l., for which Mr. E had given a note to the testator, payable to him or order, and the testator had, before the making of the will, drawn some bills on E ordering him to pay several sums of money, which, in all, had reduced the 550l. to 430l. The testator had left assets for the payment of all his legacies, including the whole legacy of 550l. to his sister S C. It was insisted that S C should have no more than 430l. of her legacy of 550l., there being no more than 430l. left in Mr. E's hands. But the master of the Rolls held, that she should have the whole 550l. legacy. These payments out of the 550l. in the hands of Mr. E having been all ordered by the testator before the making of the will, this cannot be said to be an ademption of the legacy, but is an express indication of the testator's intention, that as the note for the full sum of 550l. was still standing out, notwithstanding he had ordered the payment in part of the note, yet he renounced all those payments, and willed that the whole 550l. should be the legacy which he gave to his sister S C. His honour, therefore, decreed the plaintiff S C the whole 550l. note, and interest from the time of filing the bill.

Crockett v. Crockett, 2 P. Wms. 164.

A having a debt due to him from D, bequeathed 500l. part thereof to B the second son of D, and the residue thereof to the younger children of D, to remain in D's hands until the children should be capable of receiving it; the share of any of them dying before such time to go to the survivors or survivor. A calls in and receives the whole debt in his lifetime; and B dies in the lifetime of A. Then A died in the lifetime of the younger children. Lord King said, that it could not be intended the survivor should take, unless B, the legatee, should have survived the testator, so that the right

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to the legacy became vested in him ; but that B dying in the lifetime of the testator, as nothing could ever vest in him, so neither could it survive from him. His lordship admitted, that where a devise is to A for life, remainder to B, and A dies in the testator's lifetime, B shall take presently ; or if a devise be to A and B, and A die in the testator's lifetime, and then the testator die, there, B shall have the whole ; for these cases seem to be within the plain intent of the testator : but that, in the principal case, it was quite a strain to support a legacy given out of a fund which the testator had by his own voluntary act put an end to ; for which reason he declared that these legacies to the younger children were extinct, and should not be made good.

Rider v. Wager, 2 P. Wms. 328.

A bequeathed 1000*l.* capital S. S. stock to B. At the time of making his will he had 1800*l.* of such stock, and afterwards by sale reduced it to 200*l.*, but afterwards increased it to 1600*l.*, and died. Between the making of his will and his death, the act took place which changed three-fourths of the capital S. S. stock into annuities. Lord Talbot held, that this legacy was not adeemed or impaired either by the sale or the act of parliament. Not by the former, for all cases of ademption arise from a supposed alteration of the intention of the testator ; and if the selling out of the stock is an evidence to presume an alteration of such intention, his buying in again is as strong an evidence of his intention that the legatee should have it again. It was not the particular stock he was possessed of that he gave ; but the devise was only describing the nature of the thing he gave, of which he had sufficient to answer such legacy at the time of his death. If the testator after such legacy sells out part, and dies, such sale would afterwards be looked upon as an ademption *pro tanto*. If he devises so much stock, and at the time of such devise has not any such stock, it is a direction to the executor to procure so much for the legatee. It would be very hard in this case to consider the selling as an ademption, because he might sell out for some particular purpose, and as soon as that purpose was answered he might buy in again.—It was not affected by the act of parliament, for it would be extremely hard to say, that this alteration of stock by parliament should work an ademption, when it cannot be presumed the testator's intent was particularly asked, or that he concurred or agreed to such law in any other manner than what every other person is supposed to do. His lordship added, If an obligee were to devise a legacy of 1000*l.* secured by bond from A B, and he should afterwards compel A B by due course of law to pay it him, this would be an ademption of the legacy ; but it was never thought, if A B should pay in the money voluntarily, it would be an ademption, because the obligee is bound to receive it.

Partridge v. Partridge, Ca. temp. Talb. 226 ; Bronsdon v. Winter, Ambl. 57, S. P.

A and B (afterwards Countess of Suffolk, and since deceased) were each indebted to J S in 2000*l.* secured by bond. J S bequeaths these two sums of 2000*l.* and 2000*l.*, and all interest due for the same to her granddaughter C, and devises away the surplus of her estate, with a proviso, "That in case all or any part of these sums should be paid in before the testatrix's death, then she gives to the said C 4000*l.* or so much money as the principal money so paid in should amount unto, as the case should fall out." Afterwards, the testatrix, in her lifetime, released to A the 2000*l.* due upon his bond without having received any part of the money, and died ; and C died intestate ; upon which the said A, who was her brother, administered to her, and demanded the 2000*l.* released to himself upon his bond, and also

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the 2000*l.* due upon B's bond. With respect to the former (the only one material to notice in this part) it was objected, that the release of the bond to A was a revocation, or ademption of the legacy *pro tanto*, it being the voluntary act of the testator. But by Lord Parker, the testatrix intends by this will (amongst other things) to make a provision of 4000*l.* for her granddaughter C, and though she has shown her kindness to her grandson, (one of these bonds being given by him for 2000*l.*,) yet this noways imports an alteration or diminution of her kindness to her granddaughter. I cannot approve of the diversity, that if the testator gives away a debt by his will, and afterwards calls it in, this must be a revocation; *secus*, if it be paid in to the testator unasked for; for suppose the testator called in that debt, fearing it might be lost, and not liking the security; is there any reason that this should deprive the legatee of his legacy? And the case of Orme and Smith proves that the testator's receiving in the debt is no revocation or ademption of the legacy. As to the matter of the release, that surely implies payment and satisfaction of a debt, being tantamount to the testator's receiving it, and giving it back again; and in the present case, it is the same as if the will had said, *if these debts be paid or discharged*.

Earl of Thomond v. Earl of Suffolk, 1 P. Wms. 461.

A testator enumerates mortgages, bonds, and notes due to him; and gives out of the interest an annuity to A for life, and after her death, directs the securities to be vested in trustees for charitable uses. After the making of the will some of the securities are paid off, (whether voluntarily, or not, did not appear,) and new ones taken. Lord Camden held, that this was a money legacy, a bequest of so much money as was equal to the money owing to the testator on the several securities: that where the intention of the testator was to give a money legacy, there could be no reason to support the distinction between a voluntary and a compulsory payment; and that therefore the receipt of the money on the securities could not be construed to be an ademption of it.

Attorney-General v. Parkin, Ambl. 566.

E being entitled to 840*l.* lent upon mortgage in trustees' names, bequeathed to the plaintiff 100*l.* to be paid by the trustees out of the mortgage money, as soon as the same should be received: and gave him 100*l.* more to be paid out of the said mortgage, when the same should be received. After making the will, there being a considerable arrear of interest upon the mortgage, and the principal and interest amounting to 1250*l.*, the testatrix agreed to a composition, and accepted 1000*l.* for the whole that was due; and within a short time afterwards laid out the money which she so received upon other securities. On a bill by the plaintiff to be paid his legacy out of the assets, the question was, Whether the receiving of the mortgage money was an ademption? The master of the Rolls said, that (to be sure) an alienation of a legacy, if there is nothing else in the case, is an ademption, and equity will not set it up again; that the inference he drew from the cases was, that there must be an indication of change of mind to work an ademption. A debt given specifically, and called in, and no account appearing why it was called in, is an ademption; but if any account is given it is otherwise. It is the intention that governs. It was so in the Roman law. Just. Inst. 2, 20, 12. The receiving of the money in the present case is accounted for: the debt was increased from 840*l.* to 1250*l.*; it was in so much danger, that the testatrix took 1000*l.* for it. He did not

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agree, he said, to the distinction taken in some of the cases between voluntary payment and being called in, as laid down *generally*: at the same time he did not go so far as Lord Talbot, in *Ashton and Ashton*, 3 P. Wms. 384, and say, that the calling in a debt by the testator is not an ademption, because it might be from an apprehension of such debt being in danger: but if there is proof that it was called in for any other reason than an intention to adeem, he thought it not an ademption. His honour therefore decreed the legacy and interest to be paid to the plaintiff out of the money which was received in, and laid out on other securities.

Hambling v. Lister, Ambl. 401.

A bequeathed a moiety of two-thirds of the residue of his South Sea stock, India, bank, and Orphan stock, leases, East India and South Sea bonds, mortgages, and other his personal estate to B, who, before he received his legacy, made his will, and devised this moiety to trustees, to sell and pay 200*l.* thereout to C, and the residue of the money to D. Afterwards B and the legatee of the other moiety came to an account with the executor of A, and their shares are set out and received, and the stock and bonds are allotted to B, who sells part of them in his lifetime, without keeping an account of the produce. It was decreed, that this was an ademption of the legacy to D *pro tanto*. But the bare receipt of his share by B, it was said, was no ademption, for it did not show any change of his mind, but was done in concert with the other legatee, to ascertain their moieties, and prevent survivorship.

Birch v. Baker, Mos. 373.

One partner by his will gives to his partners one-ninth of one-twelfth of the profits reserved to him by the terms of the deed of co-partnership. He afterwards, on the expiration of the partnership, enters into fresh articles with the same partners, under which they take a greater interest than they had under the former articles. Lord Hardwicke held, that the renewal of the articles was no ademption.

Backwell v. Child, Ambl. 260.

A testator bequeathed (*inter alia*) as follows: "*Item*, I bequeath to my sister J A the interest arising from her husband W A's bond to me for principal 3500*l.* sterling during her life, independent of her present, or any future husband, amounting to 175*l.* sterling *per annum*. *Item*, I bequeath the principal of the said bond, on the decease of my said sister J A, to her four daughters, (naming them,) to be equally divided among them or the survivors of them. *Item*, I bequeath to Mr. W B my capital stock of 1000*l.* in the India Company's stock." W A, the debtor, became a bankrupt after the making of the will, and in the testator's lifetime, and the testator proved his debt under the commission, and received a dividend thereon. After the testator's death, another dividend was made to the bankrupt's creditors. The testator, at the time of making his will, was possessed of 1000*l.* E. I. stock, and no more; but sold out the whole of it before his death. Lord Thurlowe held, that the bond was given as a specific legacy; that the receiving the dividend upon it under the commission was no ademption of it, and directed that the bond should be delivered up to the legatees, that they might receive the dividend not received by the testator, and whatsoever else might be thereafter payable out of the bankrupt's estate in respect of that debt. But as to the legacy to W B, he held, that that was clearly

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adeemed: that it was a specific legacy, and the testator having sold the stock after making the will, it was as if it had never existed.

Ashburner v. Macguire, 2 Br. Ch. Rep. 108.

{E I bequeathed to C P such money as her executors should after her death receive on a note of 400*l.* given to her by Cross & Co. bankrupts. A short time before her death, the sum remaining due on the note was paid to her, and deposited by her with a banker, with whom she had no other money, where it remained at her death, except 10*l.* which she drew out. Sir Wm. Grant held that the legacy was specific and was adeemed.

9 Ves. J. 360, *Fryer v. Morris*.}

A testatrix bequeathed several sums of money to different persons to be paid within three months after her decease out of a bond-debt due to her; the obligor in the bond, who was one of the legatees, paid the debt with interest and took up the bond in the lifetime of the testatrix; but whether voluntarily, or upon demand, did not appear. The legacies were holden to be adeemed by this payment.

Badrick v. Stevens, 3 Br. Ch. Rep. 431.

Sir E B by his will gave to his two daughters 2000*l.* apiece, to be paid in the manner therein mentioned; that is 500*l.*, part thereof he directed to be charged upon, and raised out of premises comprised in his marriage settlement, on which he declared by his will he had power to charge 1000*l.* The testator had joined with his son in a recovery of these premises, and had thereby (according to the opinion of the court, on a question raised in the cause) extinguished his power to charge. Lord Macclesfield, upon the hearing, for further directions, notwithstanding these sums had been charged on a fund which failed, decreed them to be paid out of the testator's personal estate.

Saville v. Blacket, 1 P. Wms. 777.

A by his will gave the interest of a bill of exchange for the sum of 1500*l.* on the East India Company to his wife for life, and directed, that after her death the bill should be sold, and the money arising thereby divided between his nephews and nieces, with benefit of survivorship. After making his will, the testator received from the E. I. Company the said sum of 1500*l.* due on the said bill, and he lent it upon personal security. Some time after he called in 100*l.* which he lent to J H, who became insolvent. The remaining 1400*l.* remained due at the death of the testator from the person to whom it was lent. It appeared that this bill constituted the bulk of the testator's fortune. The payment of the bill was decreed to be no ademption.

Coleman v. Coleman, 2 Ves. jun. 639.]

If testator bequeath 100*l.* to a man, and in the same testament give him 100*l.* without taking notice of the first 100*l.*, the second disposition is understood to be but a repetition of the former, and all but one legacy, unless it appears that the testator intended him 200*l.* in all.

Swinb. 530, Greenwood v. Greenwood, 1 Br. Ch. Rep. 30, note. {4 Ves. J. 76, *Holford v. Wood*.}

[But if two legacies of equal sums are given to the same person, the one by the will, the other by a codicil, the second bequest is construed *prima facie* a duplication.

Ridges v. Morrison, 1 Br. Ch. Rep. 389. Though this difference between the legacies being in the same will, and being one in the will, the other in a codicil, is men-

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tioned as a strange distinction by Mr. J. Aston, in his learned argument in *Hooley v. Hatton*, 1 Br. Ch. Rep. 390, note; yet he seems afterwards to admit it as settled. But notwithstanding the legacies are in different instruments, yet if they be not given simply, but for a reason expressed, which reason is the same both in the will and codicil, it denotes the intention of giving but one bequest, and such intention must prevail. *Duke of St. Alban's v. Beaucherk*, 2 Atk. 640; 1 Br. Ch. Rep. 392, note. On the other hand, if the wording of the gift in the codicil be varied from that in the will, and mark the legatee as an object of the testator's peculiar favour, this corroborates the *prima facie* presumption of law, that the latter should be an additional legacy. 1 Br. Ch. Rep. 393. And this seems to hold where there is but one instrument. 2 Br. Ch. Rep. 528.

So, if the sums in the will and codicil be unequal, whether the latter be the greater or the smaller of the two, they shall be taken accumulatively.

Masters v. Masters, 1 P. Wms. 423; *Curry v. Pile*, 2 Br. Ch. Rep. 225. Extrinsic evidence of intention may be taken into the account in these cases; for the ambiguity of presumption, whether a legatee shall have two legacies, does not arise simply from the construction of words, but is a presumption *donec probetur in contrarium*. 2 Br. Ch. Rep. 526, 527. {See 5 Ves. J. 369, *Osborne v. The Duke of Leeds*.} Hence an increase of fortune to the testator after the making of the will, and before the date of the codicil, has been considered as a circumstance that he intended additional bounties. 1 P. Wms. 424.

{So where an absolute legacy was given by the will, the same sum given by the codicil upon a contingency was held additional.

3 Ves. J. 735, *Hodges v. Peacock*.}

So, where a testator bequeathed 300*l.* to be paid to the child he should have at his death, and if he should have none, then to his sister; and afterwards, having three children born, he gave by a codicil 200*l.* to each of them, to be paid at their respective ages of 21 years; it was decreed that the latter bequest being without words signifying the same to be for their portions, or any thing either to revoke or affirm the former gift, it should be taken by way of accumulation, and the children should equally divide both legacies.

Pit v. Pidgeon, 1 Ch. Ca. 301.

But where a testator having made a codicil containing several legacies, afterwards made a second precisely to the same effect, with the addition of only one pecuniary legacy, his intention was thought to appear, that there should be but one codicil, and the latter only was decreed to stand.

Coote v. Boyd, 2 Br. Ch. Rep. 521;] {1 Ves. J. 464, *Mogridge v. Thackwell, acc.*}

{Also, where the testator, by a codicil dated on the same day with his will, bequeathed sundry legacies, and among them several for mourning and to servants, and, by another codicil dated nearly two years afterwards, gave legacies for the same purposes and to the same persons except such as were dead or had left his service, and also gave one legacy expressly in addition to that given to the legatee by the will, these circumstances were considered sufficient evidence that the legacies in the second codicil were substituted for those in the first.

3 Ves. J. 462, *Barclay v. Wainwright*. See farther 2 H. Black. 213, *James v. Semmens*; 3 Ves. J. 289, *Allen v. Callow*; 5 Ves. J. 369, *Osborne v. The Duke of Leeds*.

If a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed to have been the motive to the bounty, the legacy fails, according to the rule of {} the civil law, which is adopted by the Court of Chancery, that "a false reason given for the legacy is not of itself sufficient to destroy it; but there must be an

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exception of any fraud practised, from which it may be presumed the person giving the legacy would not, if that fraud had been known to him, have given it." Therefore, where a legacy was given by a woman to a man in the character of her husband, whom she supposed and described in her will to be such, but who at the time of the marriage with her had a wife living, the master of the Rolls, Sir R. P. Arden, held him not entitled to the legacy, on account of his conduct.

4 Ves. J. 802, Kennell v. Abbott. {1} D. 35, 1, 72, 6. *Falsam causam legato non obesse verius est, quia ratio legandi legato non coheret; sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse.*

||If a testator bequeath a DEBT due to him, and he afterwards receives the whole or part of it, this is considered as a total or a partial ademption of the specific legacy, and this rule is wholly independent of what might be the intention of the testator. The only inquiry is, whether the specific things remain at the testator's death.

Birch v. Baker, Mose. 474; Rider v. Wager, 2 P. Wms. 329; Ashburner v. M'Guire, 2 Br. C. C. 108; Badrick v. Stevens, 3 Br. C. C. 431; Stanley v. Potter, 2 Cox, 182; Fryer v. Morris, 9 Ves. 360.

And it is immaterial whether the testator receive the debt upon a voluntary or a compulsory payment; the distinction which was made on this ground being overruled.

James v. Johnson, 4 Ves. 574; Fryer v. Morris, 9 Ves. 360.

§ The testator, a resident in Jamaica, bequeathed to A B 2000*l.*, part of the sum of 7000*l.* in the hands of his agents in England, and received by them from the transport board on his account. The testator afterwards went to Philadelphia, where he died. Seven days before his death he wrote to his agent in Jamaica, desiring him to order his agents in England to invest all his moneys in their hands secured from the transport board, in any stock most beneficial to his estate. The agent wrote accordingly, but some time before his letter arrived in England, the agents there had, of their own accord, invested the whole of the testator's moneys in their hands in the four *per cents*. Held that the legacy was not adeemed.

Basan v. Brandan, 8 Sim. 171.*g*

So, if there be a specific legacy of stock, and it is not found at testator's death, the legacy is adeemed.

Ashburner v. M'Guire, 2 Br. C. C. 108; Humphreys v. Humphreys, 2 Cox, 184.

But this rule does not operate when,

1. The fund is altered by act of law, (a) as a statutory change in the fund.

(a) Partridge v. Partridge, Ca. temp. Talb. 226; Bronsdon v. Winter, Amb. 590.

§ A legacy is not extinguished nor destroyed by the variation of the testator's interest, produced by operation of law. Walton v. Walton, 7 Johns. Ch. R. 262. See Cogdall's Executor v. His widow, 3 Desaus. 368; Colegrave v. Manby, 6 Mad. 72.*g*

2. When altered fraudulently, or without testator's concurrence. (b)

(b) See 2 Vern. 748, ed. Raithby.

3. When there is a mere change of trustees, or a transfer from trustees to testator. (c)

(c) Dingwell v. Askew, 1 Cox, 427. See Amb. 260, 3 Br. C. C. 416.

4. When the stock is lent upon condition of being replaced. (d)

(d) See Roper, ch. v. § 1.

LEGACIES OF POLICIES OF INSURANCE are adeemed if the money be received by testator.

Barker v. Rayner, 5 Madd. 208.

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Of course a specific bequest is not adeemed, or rather is not lost to the legatee, if testator sufficiently expresses a contrary intention.

Earl of Thomond v. The Earl of Suffolk, 1 P. Wms. 462.

Or, if the words of the bequest are sufficient to pass the fund in its altered state.

Pulsford v. Hunter, 3 Br. C. C. 416.

A bequest of goods in a certain house is adeemed by their removal, unless they are removed for their preservation, or by fraud, or without authority.

Shaftesbury v. Shaftesbury, 2 Vern. 747; Green v. Symonds, 1 Br. C. C. 129, note; Heseltine v. Heseltine, 3 Mad. 276; Ward v. Turner, 2 Ves. sen. 431.

If a person having two houses A and B, but only one set of furniture, which he removed from one house to another from time to time, bequeaths his furniture in A, it passes, though it happens to be in B at his death.

Land v. Devaynes, 4 Br. C. C. 537.

A share in a partnership is not adeemed though new articles are entered into after date of will, altering the shares.

Backwell v. Child, Amb. 260.

When the bequest of leasehold premises is adeemed by the renewal of the lease, see *ante*, "LEGACIES AND DEVISES," (L) 2.

Where a father, or a person *loco parentis*, gives a legacy to a child, it must be understood as a portion, although not so described, because it is a provision for the child; and if the father or person afterwards advance a portion for that child the legacy will be adeemed, though there may be slight circumstances of difference between the advancement and the portion, and a difference in the amount.

Ex parte Dubost, 18 Ves. 151; Watson v. Lord Lincoln, Amb. 325; Grave v. Salisbury, 1 Br. C. C. 427.

Thus a legacy of 300*l.* has been held to be wholly adeemed by a portion of 200*l.*

Hartop v. Whitmore, 1 P. Wms. 681.

So a legacy of 7000*l.* by a portion of 6000*l.* (2000*l.* *in presenti* and 4000*l.* on death of testator.)

Clarke v. Burgoine, 1 Dick. 353.

A slight difference in the time of payment of the legacy and portion will not prevent the ademption.

Hartopp v. Hartopp, 17 Ves. 184.

But there is no ademption if the legacy and portion are not *ejusdem generis*; as where the legacy was money, and the advancement was of stock in trade (jewellery.)

Holmes v. Holmes, 1 Br. C. C. 555.

Or, if the portion be contingent.

See Spinks v. Robins, 2 Atk. 493; 2 P. Wms. 553.

Or, if the legacy be given in lieu of a right.

Baugh v. Read, 1 Ves. jun. 257.

Or, if the legacy be uncertain in amount, as a residue or part of a residue.

Farnham v. Phillips, 2 Atk. 215; Freemantle v. Bankes, 5 Ves. 79.

Or, where the portion is only for *life*.

See Alleyn v. Alleyn, 2 Ves. sen. 38.

When a person is considered to be *loco parentis*, so that his advancement

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will adeem his legacy to a child, see cases below. *Primâ facie*, if the father of a child be living, no other person, however nearly related he may be, can be considered to be *loco parentis*.

Ex parte Dubost, 18 Ves. 152; Shudal v. Jekyll, 2 Atk. 516; Powel v. Cleaver, 2 Br. C. C. 499; Roome v. Roome, 3 Atk. 183; 6 Ves. 546; Monck v. Monck, 1 Ball & B. 298.

A legacy by a person not a parent, or *loco parentis*, is *primâ facie* not adeemed by a subsequent advancement.

Shudal v. Jekyll, 2 Atk. 516; Powel v. Cleaver, 2 Br. C. C. 499; Wetherby v. Dixon, Coop. C. C. 279.

The father of natural children is not considered in this respect as their parent or *loco parentis*, though he may place himself in that situation.(a)

Grave v. Lord Salisbury, 18 Ves. 152, cited; and S. C. 1 Br. C. C. 425. (a) Trimmer v. Bayne, 7 Ves. 508.¶

If testator bequeath 100*l.* to a man, and in the *same* testament give him 100*l.*, without taking notice of the first 100*l.*, the second disposition is understood to be but a repetition of the former, and all but one legacy, unless it appears that the testator intended him 200*l.* in all.

Swinb. 530; Greenwood v. Greenwood, 1 Br. Ch. Rep. 30, note; ¶Holford v. Wood, 4 Br. 79, 91. But where the legacies differ in amount, the legatee is entitled to both. Curry v. Pile, 2 Br. C. C. 225.¶

¶Where a testator leaves two testamentary instruments, and in each has given a legacy *simpliciter* to the same person, the court considering that he who has given twice, must *primâ facie* (b) be intended to mean two gifts, awards the legatee both legacies; and it is immaterial whether the second legacy be of the same amount, or less, or larger than the first.(c) But if, in such two instruments, the legacies are *not* given *simpliciter*, but the nature of the gift is expressed, and in both instruments the *same* motive is expressed, and the *same* sum is given; the court considers the *two* coincidences as raising a presumption that the testator did not, by the second instrument, mean a second gift, but meant only a repetition of the former gift. The court raises this presumption only where the *double* coincidence occurs, of the *same* motive and the *same* sum in both instruments. It will not raise it if in either instrument there be no motive, or a different motive expressed, although the sums be the same; (d) nor will it raise it, if the *same* motive be expressed in both instruments, and the sums be different.(e)

See Hurst v. Beach, 5 Madd. 351. (b) See Currie v. Pye, 17 Ves. 462, as to the legacy to Dr. Currie. (c) Ridges v. Morrison, 1 Br. C. C. 389; Hooley v. Hatton, *Ibid.*, note; S. C. 2 Russell, 269, note; Masters v. Masters, 1 P. W. 423; Roper, ch. 16, s. 2, and the authorities in the civil law there cited. (d) Ridges v. Morrison, 1 Br. C. C. 388; Currie v. Pye, 17 Ves. 462, as to the annuity to Sarah Pye. (e) Hurst v. Beach, 5 Madd. 351; Mackenzie v. Mackenzie, 2 Russell, 262.

Though the sums be the same in amount, yet if they be not *ejusdem generis*,—as, if one be contingent, and the other vested; (g) (or, if they be not payable at the same time, and equally beneficial,)(h)—the court will not presume that the testator intended to substitute one for the other.

(g) Hodges v. Peacock, 3 Ves. 735; Wray v. Field, 2 Russell, 257. (h) Mackenzie v. Mackenzie, 2 Russell, 262, 272.¶

A devises to his younger son 750*l.*, and afterwards buys him a cornet of horse's commission, and paid 650*l.* for it; and it was proved to be intended this 650*l.* should be discounted out of the legacy, and that he would strike so much out of his will as soon as the accounts came from London to him,

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but he died before they came, without altering his will; and it was held, that this money paid for the commission should go in diminution of the legacy, and be taken in payment and satisfaction for so much.

Prec. Chan. 263, Hoskins and Hoskins.

If A by will devise 200*l.* to his daughter, and afterwards on her marriage gives her more than that sum, this is an extinguishment of the legacy.

2 Vern. 115, Jenkins and Powel, and there the case of Elken Head cited, where payment in the testator's lifetime was adjudged a satisfaction of the like sum devised.

So, where the testator directed that 400*l.* should be laid out in finishing a house which he was building; and lived, after the making of the will, to expend a greater sum in that service; it was decreed against the heir at law, that this was an extinguishment and satisfaction of the 400*l.*, although the house was not completely finished at the testator's death.

Vern. 95, Husbands v. Husbands.

|| Lord Thurlow said, "If a legacy be given for a *particular purpose*, and the testator advances money for the *same purpose*; it is too late to say, it is not a *presumption* that he meant to execute it."

Debeze v. Mann, 2 Br. C. C. 166; S. P. 1 Ball & B. 303.

But the advancement must be intended to answer *all* the purposes of the legacy; a legacy to maintain and educate, and to apply the principal or part in apprenticing the legatee, or for his advancement in the world, is not answered by the testator merely paying an apprentice fee.

Debeze v. Mann, 2 Br. C. C. 165; Robinson v. Whitley, 9 Ves. 577; Roome v. Roome, 3 Atk. 181.

If a second codicil has internal evidence that it was intended to be *substituted* for the first, the legacies given in such second codicil cannot be considered as accumulative, but substitutionary; as, for example, if a testator having made a codicil, containing several legacies, afterwards makes a second precisely to the same effect, with the addition of only one pecuniary legacy.

Duke of St. Alban's v. Beauclerk, 2 Atk. 636; S. C. 2 Russell, 271, note; Coote v. Boyd, 2 Br. C. C. 521; Attorney-General v. Harley, 4 Madd. 263; Gillespie v. Alexander, 2 Sim. & Stu. 145; Hemming v. Gurrey, Ibid. 311.]

(D) Where a Legacy shall be presumed to be a Satisfaction of a Debt or Duty owing from the Testator, &or to him.

1. When the Debt or Duty is owing from the Testator.

THE intention of the testator being the prevailing rule to go by in the construction of wills, it has been from thence established as doctrine, that wherever a person, by his will, gives a legacy as great or greater than the debt he owes to the legatee, that such legacy should be a satisfaction of the debt, on the presumption that a man must be intended just before he is bountiful, and that his intent is to pay a debt, and not to give a legacy.

Abr. Eq. 203; Salk. 155, pl. 5; 2 Salk. 508; 2 Vern. 177, 258, 298. || Gaynon v. Wood, 1 Dick. 331; 1 Ves. sen. 123.] β Strong v. Williams, 12 Mass. 391; Ward v. Coffield, 1 Dev. Eq. R. 108; Perry v. Maxwell, 2 Dev. Eq. R. 488; Williams v. Crary, 5 Cowen, 368; S. C. 8 Cowen, 246; Mulheran's Executors v. Gillespie, 12 Wend. 349; Van Riper v. Van Riper, 1 Green's Ch. R. 1; Partridge v. Partridge, 2 Har. & Johns. 63; Ladson v. Ward, 1 Desaus. 314; Muse v. Sawyer, 2 Taylor, 204; Massey v. Leaming, 4 Dall. 123; Byrne v. Byrne, 3 S & R. 54; Bryant v. Hunter, 3 Wash. C. C. 48.]

As, where a man by marriage settlement provides 400*l.* for daughters,

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and having two daughters, by will gives them 200*l.* apiece for their portions, without taking notice of the settlement; it was held, that the 200*l.* apiece should be a satisfaction of the portion by the settlement.

2 Vern. 111, Bloyes and Bloyes, cited to have been adjudged. {But a legacy cannot be considered a satisfaction of a portion, if it is given expressly in satisfaction of a different interest. 10 Ves. J. 319, Burges v. Mawbey.}

So, where a man had prevailed on his wife to join in selling 7*l.* 10*s.* *per ann.* of her jointure, and after 6*l.* 10*s.* *per ann.* more, and having given two several notes, that his executor should pay her the said two several sums during life, he after makes his will, and thereby gives her 14*l.* *per ann.* during life, out of certain lands; this was held to be a satisfaction of the notes.

2 Vern. 498; Prec. Chan. 240, S. C. Brown v. Dawson.

So, where one settles his estate on trustees, to be sold for payment of his debts, with power of revocation; then he marries a daughter, gives her a portion, and covenants that the husband shall have the estate 1500*l.* cheaper than any other; after he, by will, revokes the settlement, gives the husband 1500*l.*, and dies; this legacy was held to be in satisfaction of the 1500*l.* secured by the settlement.

Prec. Chan. 138, Bromley v. Jeffereys.

[So, where a term was created by a marriage settlement to raise 3000*l.* for daughters' portions, within 12 months after the death of the survivor of husband and wife, and there being one daughter, the father devised the trust estate to make good his wife's jointure, and to raise 3000*l.* for his daughter's portion; it was holden, that the will should be taken as relative to the settlement, and construed for the better securing the 3000*l.* by the settlement, and not as another devise of 3000*l.*

Bruen v. Bruen, 2 Vern. 439.

So, where a testator bequeathed 1000*l.* apiece to each of his five daughters, and after legacies paid, gave the surplus of his lands equally amongst his five daughters, and afterwards gave 1000*l.* portion with one of them in marriage, she was excluded from the 1000*l.* intended by the will.

Elken Head's case, cited in 2 Vern. 257.

J S settled his estate on himself for life, remainder to his first, &c. son in tail-male, with a proviso, that if B his son should die without issue male, and leave a daughter, the trustees should raise out of part of the premises 5000*l.* to be paid to such daughter within a year after her marriage, or at her age of twenty-one, which should first happen. B on his marriage settled the said estate (including the premises charged with the 5000*l.*) on himself for life, remainder to his first, &c. son in tail-male, remainder to trustees for 200 years, in trust to raise 8000*l.* for daughters' portions (if no issue male), payable at eighteen, (a) if then married, or at any time after, when married. B having no issue male, devised all his lands to C in tail-male, chargeable with his legacies, and bequeathed to E his daughter for her portion 8000*l.*; viz. 4000*l.*, part of it to be paid at her age of 18 years, and 4000*l.* residue thereof, within a year after marriage, or in all events at 21; and bequeathed to her 120*l.* *per ann.* until 18, and afterwards 200*l.* *per ann.* for her life. E the daughter brought her bill for the recovery of all those sums of 5000*l.*, 8000*l.*, and 8000*l.*, insisting that none of them being given in satisfaction of the other, and it being the case of an heir at law, and these sums payable at different times, some less beneficial than

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others, therefore all these portions, or at least the 5000*l.* given by the grandfather, and the 8000*l.* given by the father, should be paid her: but Lord Harcourt decreed, that she should have but one 8000*l.*, but that, when of age, she might elect which of the portions she pleased.

Copley v. Copley, 1 P. Wms. 147. (a) The time of payment does not appear in Reg. Lib., though much insisted upon in argument.]

So if A, by marriage articles, agrees to leave his wife 800*l.* and her jewels, &c., but it is declared that, notwithstanding the articles, she should not be debarred of any thing he should give her by will; and A by will makes a disposition of his whole estate among his children, &c., and gives his wife 1000*l.* The wife must waive the articles, or the will, for she cannot have both; for his making a disposition of the whole estate, shows that he intended that every part should be performed.

2 Vern. 555, Herne v. Herne.

So, where a child, entitled by his father's marriage articles to a share of his father's personal estate, had a legacy given to him by the will of his father; it was held, that, if he will have the legacy, he must waive the benefit of the articles.

2 Vern. 556.

So, where a freeman of London made his will, and devised legacies to his children, more than their orphanage parts would amount to, without taking any notice whatsoever of the custom; it was held by the master of the Rolls, that these legacies should be a satisfaction of their orphanage shares, to which they were entitled by the custom in the nature of a debt; and that the legacies should not come out of the testamentary or dead man's part; because it is held in this court, that they shall not take both by the will and the custom too: but where such legacies are less than their orphanage shares, whether they shall be *pro tanto* a satisfaction, he was in great doubt, and sent it to the city to certify, though he seemed rather to think they should in that case take both, especially if none of the devises in the will were thereby disappointed.

Trin. 1729, Nicholls v. Nicholls.

|| The doctrine of the courts appears to be, that, as a benefit given by a will is *primâ facie* a bounty, a free gift, it cannot be held to satisfy a debt or obligation, unless there be evidence of a contrary intention; the proof of which intention must lie upon those who would discharge themselves of the obligation. (a) And it seems such intention must be collected from the will itself. (b)

Cuthbert v. Peacock, Salk. 155, pl. 5; S. C. 2 Vern. 593; Cranmer's case, 2 Salk. 508; Peacock v. Falkener, 1 Br. C. C. 295. (a) 2 Br. C. C. 395; 1 Cox, 191. *Incumbit onus petitori*. (b) 1 Br. C. C. 295; 5 Ves. 79. But, if the words of the will raise a presumption that the legacy was to be a satisfaction, parol evidence may be received to rebut it. See Wallace v. Pomfret, 11 Ves. 542.

In a case, however, where testator had, on his marriage, covenanted to pay 1000*l.* to his wife within six months after his death; and by his will gave her a legacy, payable three months after his death;—Sir J. Leach, V. C., held, that the covenant was satisfied by the legacy, and said, “the intention to perform the covenant is to be presumed.”

Wathen v. Smith, 4 Madd. 325.

And it is settled, that a legacy to a wife shall *satisfy* a provision made on marriage, if the wife's taking *both* her marriage provision and the gift would

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disappoint, or frustrate, or be inconsistent with an express provision in the testator's will; at least, the wife would be put to her election.

Reynolds v. Torin, 1 Russell, 129; Dickson v. Robinson, Jacob, 503.

A debt due by a parent to a child, not as a portion, shall be considered, with respect to satisfaction, as a debt to a stranger.

Tolson v. Collins, 4 Ves. 483. See Plume v. Plume, 7 Ves. 258.

A legacy by a creditor to his debtor is *primâ facie* not a satisfaction of the debt; but parol evidence is admissible to show the intention of testator.

Eden v. Smith, 5 Ves. 345; Wilmot v. Woodhouse, 4 Br. C. C. 226. ¶ A general bequest of a sum of money to a creditor, equal to, or exceeding the debt due, though it stand in an unliquidated account, is a satisfaction, if it appears, either on the face of the will or by evidence *âiunde*, to be so intended. Williams v. Crary, 8 Cowen, 246. ¶

[J S by deed-poll assigned all his securities to the value of 7000*l.* to a natural daughter, but afterwards treats them as his own, not having delivered the deed to her. About six months before he died, he executed and delivered to her a bond for 10,000*l.* payable in three months after his decease. He afterwards made his will, and devised to her his real estate, provided she married W J, but in case of her refusal, he gave it to W J. He likewise bequeathed her all his personal estate, and made her executrix. She refused to marry W J. It was decreed, that the daughter was not entitled to the benefit of the deed of assignment and the bond, but must make her election.

Johnson v. Smith, 1 Ves. 314.

The testator, James Reed the elder, had six children, James, Sarah, Mary, William, Thomas, and Charlotte, who were entitled under the will of their grandfather, upon their attaining their respective ages of 23 years, to two sums of 5000*l.* each, which had been paid into the bank under an order of the Court of Chancery, and laid out in the purchase of 11,315*l.* 8*s.* 4*d.* 3 *per cent.* bank annuities, which being divided into six parts, came to 1885*l.* 18*s.* and a fraction of a penny each. Such of the children as had attained their ages of 23 before the testator made his will, viz., James, Sarah, (now Sarah Jones,) and Mary, (late Fydell deceased,) had applied for their shares, which had been transferred to them; and James Reed, the eldest son, transferred his sixth, the 4th September, 1783, to the testator, his father; Sarah, the eldest daughter, on the 8th February, 1784, executed a power to the house of Escot, Reed, and Co., for transferring her sixth of the said stock; but the same was a general power to accept, receive dividends, and transfer, not naming to whom. The daughter Mary and her husband R. Fydell, by their marriage articles, dated 24th March, 1784, covenanted, that her sixth should become the property of her father; and in April following it was transferred into his name. William the next son, 4th August, 1784, transferred his sixth into the name of his father. On the 30th of July, 1784, the testator (being then possessed of 32,771*l.* 16*s.* 2*d.* bank 3 *per cents.*) made his will, and (*inter al.*) gave to trustees three sums of 8114*l.* 1*s.* 11*d.* in the same stock, part of the capital therein, in trust for his son Thomas, and his daughters Sarah and Charlotte, and their respective children and grandchildren. The question was, Whether the 1885*l.* 18*s.* which continued to stand in the name of Sarah (now Mrs. Jones) was her property, or the property of her father? As to which a great deal of evidence was read, particularly that of James her brother, who swore, that the power of attorney was given for the purpose of a transfer to the father,

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which had not been made by mistake, but he had received the interest till his father's death, and carried it to his account. On the contrary, evidence was read to show, that at the time Mrs. Jones executed the power of attorney, she was very ill, and scarcely knew what she did, and that she received no consideration for it. Under all these circumstances it was insisted, that Mr. and Mrs. Jones must elect between the sum of 1885*l.* 18*s.* and the legacy. But Lord Chancellor said, he thought the evidence was not satisfactory to drive Mr. and Mrs. Jones to an election. He thought it not sufficient to enable him to pronounce, that the testator did not mean she should have both.

Baugh v. Reed, 3 Br. Ch. Rep. 199.

R. S. Hyde having issue by a former wife one son, upon marrying a second wife, settled lands on himself and his wife for their lives, remainder to trustees to sell the same to his son, by the former marriage for 5000*l.* for a provision for the children by the second marriage. Afterwards, having three children, and his wife being enseint, he, by will, gave 1000*l.* to each of the three children of the second marriage by name, and 1000*l.* to the child, of which the wife was enseint, and charged his lands with these portions. After his death, the son paid the 1000*l.* portions, and accepted the purchase, and the wife dying, after her decease, the plaintiff, the only surviving child of the marriage, filed a bill to have the purchase completed, and to be paid the 5000*l.* over and above his portion under the will. Lord Northington thought the testator meant to give each child an election, and that by accepting the legacies, they had made their election to take under the will, and therefore dismissed the bill without costs.

Hyde v. Hyde, 1 Br. Ch. Rep. 309, note.

Sir E. Seymour and Mr. Webb, the paternal and maternal grandfathers of the plaintiff, upon the marriage of the plaintiff's father, entered into articles of agreement, dated March 2, 1716, whereby Sir E. S. agreed to settle the estates at B. on the plaintiff's father, chargeable with the following portions for younger children, namely, 4000*l.* each for one or two, or 12,000*l.* equally to be divided between three or more children, payable at 21 or marriage, which should first happen after the death of the father. Besides this, he agreed to advance 1600*l.* to be laid out in lands, as an additional jointure for plaintiff's mother. Sir E. S. died in 1740, whereupon plaintiff's father, the last Duke of Somerset, took under the marriage articles; and he also died in 1757, leaving the plaintiff, his eldest son, and the defendants, his widow and younger children. But plaintiff's father by his will made fresh provision for every branch of his family, and bequeathed to his three younger sons 5000*l.* each, and to his daughters the third part of his W estate, or 8000*l.* in lieu thereof, with cross bequests between his sons and daughters, in case of any of them dying under age, and charging the whole upon his estates at large, which he devised to the plaintiff, his eldest son, with remainders over to his younger sons, successively in tail-male. The plaintiff filed his bill, praying among other things that his younger brothers and sister's husband might elect to take under the articles or will. And the Lord Chancellor directed them to make their election.

Duke of Somerset v. Duchess of Somerset, 1 Br. Ch. Rep. 309, note.

J W by his will (he having at the time of making it four sons and ten daughters) devised considerable real estates to each of his sons, and to every one of his daughters (except F, the eldest, to whom he had given a full

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portion on her marriage, and his daughter D, on whose portion the question arose, and his daughter D, who had disobliged him by turning Roman Catholic) he gave the sum of 500*l.* if they married with their mother's consent; otherwise but 300*l.* apiece. He then gave his wife the residue of his personal estate in trust for the performance of his will. He then gave his daughter D 300*l.* if she should be living at her age of 23 years, and unmarried, or married by and with her said mother's full consent first had and obtained in writing; but if married when it was thereby appointed to be paid her, and that without her mother's full consent as aforesaid, then and in such case he gave her 200*l.* only, and that to be paid at her age of 23 years; and he appointed S W, his wife, sole executrix. It appeared, that at the time of making the will S W was under her father's displeasure, and then in London with a milliner, but upon one T Y's paying his addresses to her, the father and mother were informed of it by a Mr. F by letter; that they thereupon offered to give 200*l.* as a portion, and no more; that Y for some time refused to marry her without a larger portion, but they were afterwards married without the consent of father or mother. Afterwards, upon Y's applying to the father for D's portion, the father offered him 200*l.*, and the mother at that time said, that if she survived her husband, and had it in her power, she would add another 100*l.* Y would not then accept the 200*l.*, but afterwards wrote a letter to the father for it, who thereupon paid it to F for the use of Y, and took a receipt for it from F. The testator lived two years afterwards, without revoking or altering his will. Y became a bankrupt, and his assignee brought a bill against S W the executrix, and Y and his wife, for the legacy of 300*l.* By Lord Chancellor Parker.—If a father gives a daughter a portion by his will, and afterwards gives to the same daughter a portion in marriage, this by the laws of all other nations as well as of Great Britain, is a revocation of the portion given by the will; for it will not be intended, unless proved, that the father designed two portions to one child. And as to his having lived so long after giving the portion to his child on her marriage, without ever revoking that part of his will, there could be no need for the father to revoke that legacy which he before had done by giving the portion in his lifetime, since that would be but revoking the same will twice. And this demand is the harder, inasmuch as it is made by the assignee of the commissioners of bankruptcy against the husband, so that the wife, whose portion this is said to be, would be never the better for it.

Hartop v. Whitmore, 1 P. Wms. 681.

J S had four daughters, A, B, C, and D, and by his will devised to A 1000*l.*, and by the same will devised to them 1500*l.* apiece for their portions, which several sums of 1500*l.* were to be raised out of a real estate devised by his will for that purpose. A married in the testator's lifetime, and he gave her 4000*l.* portion. By Lord Keeper Wright.—This 4000*l.* portion must be taken to be a satisfaction of the 1500*l.* given A by the will for her portion, and a revocation of the will *pro tanto*: but as to the 1000*l.*, that being a general legacy, A must have that, notwithstanding the 4000*l.* given her for her portion.

Ward v. Lant, Pr. Ch. 182.]

But though the cases on this head have prevailed thus far on the circumstances attending them, and the (a) intention of the testator, yet, as a legacy is a mere gratuity, it is to receive the most favourable construction; and

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therefore, if it be less than the sum due, (b) payable on a (c) contingency or future day, on these and the like circumstances it will be construed an additional bounty, and not a satisfaction.

(a) That in all these cases the intention of the party ought to be the rule. Salk. 508. [(b) *Graham v. Graham*, 1 Ves. sen. 263.] (c) Though the contingency does actually happen, and the legacy thereby becomes due, yet it shall not go in satisfaction of the debt, because a debt which is certain shall not be merged or lost by an uncertain and contingent recompense; for whatever is to be a satisfaction of a debt ought to be so in its creation, and at the very time it is given, which such contingent provision is not. Prec. Chan. 295.

As, if A give a bond to B, her servant, to pay her 20*l.* *per ann.* quarterly, for her life, free from taxes; and by will, without taking notice of the bond, gives 20*l.* *per ann.* for her life, payable half-yearly, but not said free of taxes; B shall have both the annuities, for that by the will not being so advantageous as the first, cannot be presumed a satisfaction.

2 Vern. 478; *Atkinson v. Webb*, Prec. Chan. 236, S. C., and the reasons there given; because the second annuity being payable half-yearly, and charged on land, by which it will be liable to taxes, cannot be so advantageous.

So, where A on his marriage covenanted to purchase and settle a jointure of 20*l.* *per ann.* on his intended wife, and if he died before such purchase or settlement made, she should have 300*l.* out of his estate for her own use: the marriage was had, and the husband died before any such settlement was made; but by his will he devised to his wife 330*l.* for her life, with power to dispose of 30*l.*, part thereof, at her death; it was held, first, that she had a right to 300*l.* and interest, and that the executor could not now be at liberty to settle 20*l.* *per ann.* as the testator might have done. Second, that she should have the 330*l.* as an additional bounty and provision for the wife.

2 Vern. 505, *Perry v. Perry*.

[In the marriage settlement of J B the father, there was a provision of 8000*l.* for younger children, with a proviso that if the father should in his lifetime, or at the time of his death, give to any of his daughters or younger sons so entitled to portions or provisions under that trust, money or lands, for or in advancement in marriage, or otherwise, the value thereof should be deducted from the portion, unless he should by writing declare the contrary. J B the father, by his will, gave a sum of 4000*l.* in the funds to his wife for life, and after her decease to his second son, J B jun., and also gave him the residue of his personal estate, and made him executor of his will.—It appeared from the master's report, that the residue was considerably greater than the 8000*l.* charged upon the estate by the settlement. Lord Thurlowe decreed, that it was a satisfaction of the portion.

Rickman v. Morgan, 1 Br. Ch. Rep. 63; 2 Br. Ch. Rep. 394, S. C. {See 10 Ves. jun. 477, *Leake v. Leake*.}

{A grandfather devised lands to trustees for a term of years, in trust to raise portions for his grandchildren; provided, among other events, that if the children should be by *their father in his lifetime* advanced and preferred with portions as good or greater, the term should cease. The father died intestate. The personal property distributed among the children on his intestacy was no satisfaction of the legacies left by the grandfather.

9 Ves. jun. 413; *Twisden v. Twisden*. But a provision by *will* would be an advancement in his lifetime. Id. *ibid.* 10 Ves. jun. 477, *Leake v. Leake*; vide *Lee v. D'Aranda*, 1 Ves. 1; 3 Atk. 419, and *Blandy v. Widmore*, 1 P. Wms. 324, and Mr. Cox's note; in which cases a covenant to leave his wife a certain sum was held to be

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performed, where the covenantor died intestate, and the distributive share of his wife exceeded the sum.}

Felix Devese, in 1768, covenanted by marriage articles, that in case B, his then intended wife, should survive him, and there should be no issue of the marriage, that his heirs, executors, or administrators, should, within nine months after his death, pay her 800*l.* to be for her own proper use and benefit, and at her own disposal; but in case there should be any child or children born of the said marriage, that the interest thereof should be paid to her for her life, and after her decease that the principal should be paid or divided to and among such child or children, &c. F D in 1781 made his will; and thereby, (*inter al.*) after bequeathing several specific articles to his wife B, directed, that all the debts due to the business which he then carried on should be collected as soon as possible; that the stock in trade and household goods should be valued, and the money that should be in the public funds, and the produce of all being collected, he desired that it should be divided into equal shares; the one to be the property of his dear beloved wife B, for her to be disposed of as she pleased; the other to be devolved to his dear beloved brother P D, (since deceased,) appointing him his heir-general. The testator died some time after without issue. A bill being filed by the widow of P D against the testator's widow, and other necessary parties, the question was, Whether the disposition under the will should be held as a performance or satisfaction of the covenant in the marriage articles? The master of the Rolls held, that it was not a satisfaction, there being no express evidence, or even a strong presumption, that the testator intended it as such, and it having been repeatedly ruled that an aliquot part of a residue shall not be deemed a satisfaction.

Devese v. Pontet, Nov. 15, 1785, Finch's ed. of Pr. Ch. 240, note.

A, previously to his marriage, covenanted to secure to his wife an annuity of 1000*l.* a year, issuing out of lands, for her jointure and in bar of dower. He afterwards by his will devised to his wife certain parts of his real and personal estate, of considerable value. It was holden, that she was entitled both to the estates devised, and to her annuity, and that the one was not to be intended to be a satisfaction for the other.

Broughton v. Errington, 7 Br. P. C. 12.

In a settlement, a term was created for raising 10,000*l.* for daughters' portions, with a proviso, that if the father by deed or will should give or leave the sum of 10,000*l.* to his said daughters, it should be a satisfaction. The father leaves lands to the daughters of the value of 10,000*l.* Adjudged to be no satisfaction.

Chaplin v. Chaplin, 3 P. Wms. 245.

A being indebted to his maid-servant, who lived with him for a considerable time, gave her a bond for 100*l.* as for wages, and afterwards by will gives her 500*l.* which was mentioned in the will to be for her long and faithful services. The master of the Rolls observed, that the bond was for service, and the 500*l.* legacy also for service, so that it is a greater reward and satisfaction for the same thing; and so decreed. But he held clearly, that such a legacy is not a satisfaction for service done to the testator after the making of the will.(a) But this decree was afterwards reversed by Lord King; for that the testator had by the express words of his will directed, that all his debts and legacies should be paid; and as this bond was then a debt, and the 500*l.* a legacy, it was as strong as if he had

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directed that both the bond and legacy should be paid: that when the testator gave a bond for the arrears of wages, it was the same thing as paying them; and as, if he had actually paid them, and had afterwards given the legacy of 500*l.*, the executor could not have fetched back the 500*l.*, and made the defendant refund, so neither should the bond in this case be satisfied by the legacy. His lordship added, that the executor did not himself take this 500*l.* legacy to be a satisfaction of the bond, as appeared by his having voluntarily paid the 100*l.* He therefore decreed the servant both her debt and legacy.

Chancey's case, 1 P. Wms. 408, S. C. by the name of Chancy v. Wootton, Sel. Cas. Ch. 44. (a) So, Cranmer's case, 2 Salk.; Fowler v. Fowler, 3 P. Wms. 355; Thomas v. Bennet, 2 P. Wms. 343.

A on his marriage gave a bond to his wife's trustee in the penalty of 4000*l.*, conditioned, that if he at any time within four months should settle and assure freehold lands of 100*l.* *per annum* on his wife for her life, or if his heirs, executors, or administrators should, within the space of four months after his death, pay unto his said wife 2000*l.*, then the bond should be void. The husband, soon after the marriage, made his will, devising thereby freehold and copyhold lands of 88*l.* *per annum* to his loving wife and her heirs, having surrendered all his copyhold to the use of his will, and died within four months after the marriage. The wife claimed to retain these lands of 88*l.* *per annum*, and as her husband had not settled the 100*l.* *per annum* for her life, she also insisted that she was at liberty to elect the 2000*l.* out of his assets. The master of the Rolls decreed, that this 88*l.* *per annum* should not be taken in part of the 100*l.* *per annum*; but only as a benevolence: and this decree was, on an appeal, affirmed by Lord Chancellor King.

Eastwood v. Vinke, 2 P. Wms. 613.

A had two daughters, M and N. A legacy of 100*l.* was left to M by J S, and another of 50*l.* by W R, and both legacies were in the father's hands as executor of J S and W R. Afterwards A by will, by virtue of a power, charges his lands with 2000*l.*, and also left M and N 250*l.* apiece. Adjudged, that this was not a satisfaction of the legacies.

Meredith v. Wynn, Pr. Ch. 314.

R S borrowed of his wife 100*l.* which she had saved out of the money allowed her for housekeeping, and by his will gave her a pecuniary legacy of 30*l.*, and also 40*l.* a year during the life of her mother, and all his household goods for her life, and gave the residue of his estate to her three sisters. In a cross bill brought by the widow for the 100*l.* and the legacies, the executors insisted, that the legacies and annuity should be looked upon as a satisfaction of the debt. But Lord Talbot held, that the 30*l.* could not be a satisfaction, because a less sum; and as to the specific things devised, and the annuity of 40*l.* a year, these sorts of devises were never held to be in satisfaction of a debt, unless so expressed in the will; and his lordship decreed accordingly.

Stanway v. Styles, 2 Eq. Ca. Abr. tit. *Devises*, pl. 21.

A father gives legacies to his children, and makes his wife executrix: she not having paid the legacies, by her will gives the children legacies likewise: one of which was the same sum, and the other a greater. It was decreed, the children should not have both, and the latter was a satisfaction of the former.

Barkham v. Dorwine, Vin. Abr. tit. *Devise*, (T. c.), pl. 37.

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Husband, on his marriage, settled 100*l.* *per annum* pin-money in trust for his wife, for her separate use, which became in arrear; and then the husband by will gave the wife a legacy of 500*l.*; after which there was a further arrear of the pin-money; and then the husband died. This legacy being a greater sum than the debt, was decreed, even in the case of a wife, to be a satisfaction of the arrears of the pin-money due before the making of the will, though not of those incurred after the date of the will.

Fowler v. Fowler, 3 P. Wms. 353.

W L, to reward the services of A, who had lived with him a great number of years, gave her a bond in 1728 for payment of 300*l.* and interest, on a day fixed; and in 1731 paid her 100*l.*, part of the 300*l.*, and all interest. In 1736 he made his will, and thereby (*inter al.*) gave to B all his messuages, lands, &c., in C, to hold to him, his executors, &c., for two hundred years, upon trust out of the rents, &c., by mortgage or sale, to levy, raise, and pay to A within two years after his death 200*l.*, and subject to this term he devised the same premises to the plaintiff and his heirs: he also gave other lands to the same trustees for 300 years, upon trust, to pay 200*l.* to A within one year after his death. In other parts of his will he gave her plate, linen, &c., and other personal legacies. The executor of W L paid off some part of the bond to A in her lifetime. A bill was filed against the defendant, her representative, praying, that the legacies bequeathed by the will of W L to A might be decreed a satisfaction of the bond; and that the defendant might be directed to refund such sums as he had received in part payment of the said bond from the executor of W L. But the master of the Rolls held these to be contingent legacies, and if the legatee had died before the days of payment, they would have sunk into the land, for the benefit of the plaintiff: and as the rule of ademption had never been carried so far as to take in a contingent legacy, he decreed for the defendant, that the legacies of 200*l.* and 200*l.* were not a satisfaction of the bond.

Nicholls v. Judson, 2 Atk. 300.

An annuity of 10*l.* *per annum*, charged on a particular estate, was granted by deed to A by her husband's father for 99 years, on condition that she maintained her son: another annuity of 6*l.* *per annum* was given her by bond by the same person, during her widowhood; and he gave her a third annuity of 10*l.* *per annum* by his will charged generally. The annuity given by the will cannot be considered as a satisfaction for both the other annuities, not being equal to them; nor as a satisfaction for the annuity of 10*l.* *per annum*, because out of different funds; the one being out of a particular estate, the other charged on the general fund of real and personal; but it is a satisfaction of the annuity of 6*l.* *per annum*, for that is nothing more than a debt upon the testator's estate.

Graham v. Graham, 1 Ves. 262.

A husband entered into a bond on his marriage to leave to the wife, in case she should survive him, 300*l.*, (which was her fortune,) payable in a month after his decease. By will he gave to his wife 500*l.*, payable within six months after his decease: he gave her also a house in fee, and several other specific legacies. Lord Thurlowe held this to be no satisfaction by reason of the different times of payment of the bond and legacy.

Haynes v. Mico, 1 Br. Ch. Rep.

G R by his marriage articles covenanted to pay to his wife, in case she should survive him, 200*l.* free of all deductions in the name of a jointure,

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and the sum of 50*l.* to provide herself with a house, yearly during her life, to commence at Whitsunday or Martinmas, which should first happen after his decease. Afterwards, by his will he directed his debts to be paid, and gave his wife for life the capital messuage at P in C, with the household goods, plate, linen, and china therein; and devised an estate to his eldest son when he should attain 21. Then reciting articles into which he had entered to associate captains of India ships, he gave certain directions relative thereto; and then gave all the residue to trustees upon trust to invest the same in stock, and to permit his wife and her assigns to receive 100*l.* *per annum* during her life. He then gave annuities to his children, sisters, and uncles; and declared, that the several annuities, as well to his wife and children as to his sister and uncles, should be payable half-yearly, and commence from the day of his death. The master of the Rolls, Sir R. P. Arden, thought the provisions in the will were not intended as a satisfaction of the covenant; for if the testator had had the articles in contemplation, it was absurd to suppose he should give a real estate in satisfaction for half, and an annuity payable and commencing at different times for the other half; provisions so extremely different, without expressing it to be a satisfaction.

Richardson v. Elphinstone, 2 Ves. jun. 463.

Harry Merryweather and Ann his wife seised in fee simple (in the right of Ann of a moiety of lands in H and N in the county of S) by indenture, Oct. 4th, 1740, covenanted with trustees to levy a fine to inure to the use of H M for life, remainder to A for life, remainder to Rachael Coles (sister to A) for life, remainder to trustees for a term of 1000 years, remainder to the right heirs of the survivor of H M and R C. The trusts of the term were to raise 1000*l.* to be paid to such of the relations, &c. of A, and at such times and in such proportions as the survivor of H M and R C should by deed or will appoint, and in default of appointment to the next heir or coheirs of R C. The fine was levied: H M and A both died in the lifetime of R C, who thereby became entitled to the inheritance of the moiety comprised in the indenture, subject to the term of 1000 years. She was at the same time, and at the time of the execution of the indenture, seised in fee of the other moiety. She died in 1769, having made her will bearing date the 26th November, 1756, by which she gave annuities to the father of the plaintiff Mills, and to the mother of the defendant Veale; and after their decease, sums of 100*l.* to be divided between the children of the annuitants, charged on lands not comprised in the settlement, and an annuity to the mother of the plaintiff Litman; and after her decease, a sum of 100*l.* to be divided between the children of the plaintiff, Litman, charged upon H estate, (one moiety of which was comprised in the indenture;) and, having given other legacies charged on H, devised the premises to a trustee for the term of 100 years to raise the same: and she gave all her messuages, &c., whatsoever, in H and N, (charged with the payment of the annuities and legacies,) to defendant Morris for life, with remainder to trustees to preserve, &c.; remainder to his first and other sons in tail-general; remainder to his daughters in tail-general; remainder to defendant Veale, with like remainders; remainder to J. Litman, son of plaintiff Litman, in fee. And out of her personal estate the testatrix gave several legacies, and gave the residue to J. Morris. She made no other appointment of the 1000*l.* The plaintiffs Cattle, Mills, and Elizabeth Litman wife of William Litman, (father and mother of plaintiff Litman, both since deceased,) were her heirs at law, and filed their bill, insisting that they were entitled to have the 1000*l.*

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raised. The defendant set up three defences: 1st, That R C having become entitled to the inheritance in fee of the moiety comprised in the term, the term sunk into the inheritance. 2d, That the will operated as an appointment, and the devisees of the estate, being relations of Ann, were capable of taking as appointees. 3d, That the legacies and other charges were satisfactions *pro tanto*; and therefore, (if they were wrong upon the other point,) only the residue of the 1000*l.* should be raised. But Lord Chancellor ordered the whole of the 1000*l.* to be raised for the plaintiffs, and, upon appeal to the House of Lords, this decree was affirmed.(a)

Cantle v. Morris, 1 Br. Ch. Rep. 132, note. (a) June 12, 1782.]

By a marriage settlement, in case of failure of issue male, the remainder of the estate was limited to daughters, until they should raise 3000*l.* for portions: there was issue of the marriage a son and two daughters: the father devised 700*l.* apiece to the daughters, and died: the son afterwards made his will, and devised to the daughters to the amount of 7000*l.*, without any mention of its being in lieu or satisfaction of any thing due to them, and gave his land to his heirs male, and died without issue. It was held clearly, that the father's legacy could be no satisfaction, not being adequate in value; besides, the father had a son then living, and it was altogether contingent and uncertain whether 3000*l.* would ever arise and become payable or not, and therefore it was but reasonable that the father should make some certain provision for his daughters: but as to the son's legacy of 7000*l.* it was by two lords commissioners, against Rawlinson, decreed a satisfaction; but upon an appeal to the Lords the decree was reversed, for the daughters being heirs at law, and disinherited, there was no ground for the court to make a strained construction to their prejudice, in favour of a voluntary devisee.

2 Vern. 258, Duffield and Smith; ||Journ. Ho. Lords, vol. 15, p. 158, 20 Dec. 1692.]]

H owed to his niece A 100*l.* by bond, and having two other nieces, B and C, makes his will, and bequeaths 300*l.* to his niece A, and to his other two nieces 200*l.* apiece; after that he borrowed another 100*l.* of his niece A, and died, being indebted to her in 200*l.* To prove that the 300*l.* should go in satisfaction of the debt, is was insisted on as a rule in equity, that where a testator, being indebted, gives his debtee a legacy greater than his debt, it shall go in satisfaction; for a man shall be intended to be just before he is kind: otherwise, where a legacy is less, for that is neither to be just nor kind, and shall not be taken to go in satisfaction of any part. But *per* Cowper, Lord Chancellor, it might be as good equity to construe him to be both just and kind, if he intended to be both; if any part of this 300*l.* be applied to the payment of the debt, as for so much it is not a gift: whereas a legacy must be taken to be a gift or gratuity: and there being assets, and some (b) proofs of the testator's greater kindness to A than his other nieces, his lordship decreed her the whole 300*l.*, over and above her debt.

Salk. 155, pl. 5, Cuthbert v. Peacock; 2 Vern. 593, S. C. (b) But whether any parol evidence ought to be admitted in those cases, see tit. *Evidence*. See also Shudal v. Jekyll, 2 Atk. 517, *et infra*. {See also 11 Ves. J. 542, Wallace v. Pomfret; in which parol evidence was admitted, and prevailed against the presumption of satisfaction, though that presumption was fortified by an inference from the will itself.}

If a legacy of 100*l.* is given to A by J S, and another of 50*l.* by J D, and of both wills A's father is made executor, who having by a marriage settlement power to charge his land with 2000*l.* for portions, devises 1000*l.* equally between his daughters; by devising it to them equally, according

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to the marriage settlement, he shows that he intended them an equal benefit, and therefore the 1000*l.* shall not be in satisfaction of the legacies given A.

Preced. Chan. 514.

A indebted to B in 50*l.* left him a legacy of 500*l.* and made him executor, and *after the making of his will* borrowed 150*l.* more of him; and the master of the Rolls held, that the legacy should be a satisfaction of both debts: but Harcourt, Lord Chancellor, reversed his decree, and held, that a court of equity ought not to hinder a man from disposing of his own as he pleases; and when he says he gives a legacy, it cannot contradict him, and say he pays a debt: and it was also held in those cases, if a legacy be less, it shall not be a satisfaction. So, if the thing given be of a different nature, as land, it shall not go in satisfaction of money. So, if the legacy be upon condition; for by the breach he may be a loser, whereas the will intended it for his benefit.

2 Salk. 508, pl. 4, Cranmer's case; [Thomas v. Bennet, 2 P. Wms. 343.]

{A legacy is not deemed a satisfaction of a demand which was unliquidated when the legacy was given; nor where it was given before the time when the demand accrued, or the debt was contracted; unless it is said expressly in the will that it shall be a satisfaction.

1 P. Wms. 299, Rawlins v. Powell; 1 Esp. Rep. 187, Le Sage v. Causemaker. Vide 7 Ves. J. 258, Plume v. Plume.

A debt due on a negotiable bill of exchange is not satisfied by a legacy.

3 Ves. J. 561, Carr v. Eastbrooke.}

A by will gave six several annuities for lives, three of 10*l.* each, and three of 5*l.* each, to be paid out of his personal estate, and gave all the rest of his real and personal estate to E his wife, whom he made sole executrix: the annuitants were his sisters and their children; and about two years after the wife makes her will, and gives two annuities of 5*l.* each to two of the 5*l.* a year annuitants in her husband's will, but gives them to them and their heirs, in case they happen to overlive such a one, who by her husband's will had 10*l.* *per ann.* for life; she likewise gives another annuity of 10*l.* *per ann.* to one and her heirs, and another of 5*l.* to another and her heirs, who had each of them the like annuities for life by the husband's will; but in the disposition of these annuities she takes no manner of notice of her husband's will, or that they had any annuities thereby given them; and the only question was, Whether the four annuities given to the persons in fee, by the wife's will, should be taken to be only in satisfaction of the like annuities for life, given to the same persons by the husband's will?—and it was argued that they should, because the husband's annuities being payable only out of his personal estate, and the wife being his executrix, she was in the nature of a debtor for them; and wherever a person, by his will, gives a legacy as great or greater than the debt he owes to the legatee, it has always been taken to be a satisfaction of the debt. But *per* Lord Chancellor, this doctrine has already been carried too far, and he would never carry it further; for though it is true, a man ought to be just before he is bountiful, and therefore shall be presumed to pay a debt rather than give a legacy to the same person, when it is the same sum, or more, than he owes him, yet why may he not be both just and bountiful when there are assets to answer both, as in the present case; and there can be no pretence to say that the two first annuities of 5*l.* can be a satisfaction of the

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like annuities given by the husband, because they are given upon the contingency of overliving such a one, which has not yet happened, and possibly never may; and then shall the annuities for life, which are certain, be extinguished by giving the same persons annuities in fee on a contingency which may never happen? And if that were so, as to these annuities, there is no reason to imagine the wife had a different intention as to the others, or that she intended two of them should go in satisfaction of the like annuities given by her husband, and the other two not: and the cases where a legacy has been held a satisfaction of a debt, are where the debt was owing by the same person who gave the legacy; but if such legacy be given on a contingency, or to take place at a future day, it is no satisfaction of the debt; and therefore in the principal case it was decreed, that the annuities given by the wife were distinct additional annuities, and not an enlargement only of the husband's annuities from an interest for life to an interest in fee, and that the annuitants should take both.

Trin. 1729, *Crompton v. Sale*; 2 P. Wms. 552, S. C. ¶ See also *Mathews v. Mathews*, 2 Ves. sen. 635, where it was held a *contingent* legacy could not satisfy a certain debt. See, too, *Nichols v. Judson*, 2 Atk. 300.¶

{ There is no distinction, as to the presumed satisfaction of a *debt* by a legacy, between the cases of parent and child and of strangers. Therefore circumstances of difference, as that the legacy given by the parent is contingent, are laid hold of to prevent the legacy from being a satisfaction of a debt due to the child.

4 Ves. J. 483, *Tolson v. Collins*.

But it is otherwise with regard to the satisfaction of *portions* by legacies. A legacy given by a parent is presumed a satisfaction of a prior provision by settlement, unless clearly not so intended; and slight circumstances of difference (as that the legacy to a daughter is not payable unless she marries, and the portion was payable absolutely at twenty-one) will not rebut the presumption; even though they are such as would be sufficient to repel it between strangers.

3 Ves. J. 516, *Hinchcliffe v. Hinchcliffe*; Ibid. 530, *Sparkes v. Cator*; Ibid. 466, 7 Ves. J. 515, *Trimmer v. Bayne*.}

[J S, on his marriage, made a settlement of some exchequer annuities for 99 years, to the amount of 300*l.* *per ann.* in trust for himself for life, remainder to his wife for life, remainder to his children, in such manner as he should appoint, and if no children, to his executors, administrators, and assigns. By this marriage there was only one child B. J S being likewise seised of a considerable real and personal estate, afterwards devised all his real and personal estate to his wife and her heirs, charged with the payment of 10,000*l.* as a portion for his daughter, payable at the age of 18 years; and in case his wife should marry again, that then the estate should stand charged with a further sum of 5000*l.* for his daughter. One point in the cause was, whether the 10,000*l.* bequeathed by the father to B should be taken to be in satisfaction of the annuities under the settlement, and so the annuities be considered as part of the father's personal estate which he had a right to dispose of by his will? And Lord Hardwicke was of opinion, that it could not be taken to be in satisfaction, but that B was entitled to both as a double portion: for though the annuities and the legacy are both of the same nature, both personal estates; yet the legacy of 10,000*l.* is subject to a contingency, and not payable, unless B survived the age of

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18 years: besides, B might have lived till the annuities were run out, as several of the years were already gone; and as the legacy might never have become payable, it would be hard to say, that a mere contingency should take away a portion absolutely vested, especially in the case of an only child. If indeed the father had disposed of these annuities to any other person, it might have been a question, his lordship added, whether the 10,000*l.* should not be taken to be in satisfaction, and whether, upon those circumstances, B ought to be allowed to insist upon both demands.

Bellasis v. Uthwait, 1 Atk. 426.

A freeman of London, having a wife and six children, by his will gives his wife her widow's chamber, and the third of his estate, which she was entitled to by the custom of London; and to his six children one other third which they were entitled to by the custom; and as to the third which he had a power to dispose of, he directed a debt of 100*l.* to be paid out of it, and the residue to be equally divided between his wife and children. After making his will he married one of his daughters to the plaintiff, and gave her 1000*l.*, which in the marriage articles was called her portion or provision. On the death of the testator, a bill was brought by the husband and wife, for their seventh part of their testamentary third. For the defendants, the other children, it was insisted, that the portion was a satisfaction for the whole, and that as the plaintiffs did not offer to bring the 1000*l.* into hotchpot, to make all the children equal, they ought not to claim this 1000*l.* (which was more than their testamentary third, the whole estate being only 10,500*l.*) and the share of the testamentary part too, by which they would have 290*l.* more than the other children; that the will intended an equality among all the children, and as they refused to bring in this 1000*l.*, they claimed under the will as far as it makes for them, and against the will, when it makes against them, which equity would not permit. But Lord Hardwicke said, that though it be true, that where a father, after making his will, advances his child with a portion as great or greater than the legacy given by the will, such provision has been always holden an ademption; yet, there was no case where the devise has been of $\frac{1}{3}$ a residue, (that is, uncertain, and at the time of the testator's death may be more or less,) in which a subsequent portion given has been held to be an ademption; that this was not a devise of one-third, but of a residue after payment of a debt charged on that third; that here was likewise something to which this portion might be properly applied as a satisfaction, viz., the orphanage part; and the testator calls this a portion or provision in the marriage articles, which seems as if he then considered this as an advancement in his lifetime in bar of the custom: that there was no declaration in the will, that he intended all equal; but what he has said of equality is of the residue, which is a part of the estate remaining after what was given away in the testator's lifetime. His lordship decreed accordingly.

Farnham v. Phillips, 2 Atk. 215. $\frac{1}{3}$ That a residuary bequest is not adeemed by a subsequent portion, see also 1 Ves. 519, *Barret v. Beckford*; *Ambl.* 325, *Watson v. Earl of Lincoln*; 4 Bro. C. C. 493, *Smith v. Strong*; 5 Ves. J. 79, *Freemantle v. Bankes*;

J S by a codicil, without any date, gives 1000*l.* apiece to M and S, (the daughters of Mrs. R, a widow, with whom he lived for several years till the time of his death,) and if either of them should die before their legacies were paid, then he gave the whole to the survivor, and directed that each of the said legacies should remain in the hands of his executors, till the

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legatees attained the age of 21. He afterwards enters into two bonds, one to M and the other to S, reciting, that for divers good causes and considerations he is desirous of making a provision for and towards their maintenance. Each of the bonds was in the penalty of 4000*l.* for securing 2000*l.* apiece to them, provided they should marry in his lifetime, with his consent, or in case they should survive him. It was insisted, that the bonds were to be considered as given in satisfaction of the legacies under the will: but Lord Hardwicke held, that they were not; for that he did not remember in any case between strangers, where a man first gives a legacy by will, and afterwards a different sum to the same person by bond, that the one has been held to be in satisfaction of the other; that in this case it weighed with him very strongly, that the money given by the bond was upon a contingency, and therefore wholly uncertain whether one shilling of the principal sum would become due or not; and that in the construction upon double portions, it had always been of weight, that they were both certain.

Spinks v. Robins, 3 Atk. 491.

A bill was brought against the executors of Sir Joseph Jekyll for a legacy of 1000*l.*; Sir J's will was dated the 4th of May, 1738: soon afterwards Mr. S, the plaintiff's late husband, made his addresses to her, and applied in July following to Sir J, who was her uncle, for his approbation; who, being satisfied with the match, said, he would give him 500*l.*, but as it was not convenient to let him have the money, he would draw a note payable to him on 25th of March, 1739, and lodge it in Mr. Hill's hands, to be delivered to Mr. S after the marriage was had, (which he did accordingly:) and also said, that he would leave something to his niece by will, but that he would not be put under any obligation of doing it. Upon the 19th of August, 1738, Sir J died without revoking his will, and the very next day the plaintiff and Mr. S were married. The question was, Whether the legacy under the will was satisfied by the 500*l.* given in the testator's lifetime? Lord Hardwicke decreed, that it was not: that there was nothing done by Sir J J afterwards in his lifetime that induced a presumption of satisfaction; and farther, that even if a father had given his daughter a portion in his lifetime, and accompanied it with such declarations as used by the testator in this case, a portion so given would not have been an ademption of the legacy; *a fortiori* in this case, it could not, where the testator was only a remote collateral relation, the plaintiff's great-uncle, and did not even stand *in loco parentis*, for the plaintiff's father was living.

Shudal v. Jekyll, 2 Atk. 516.

The plaintiff's wife was entitled to the residue of her grandmother's estate, under her will, and likewise was left executrix, *et durante minori etate*, her father was administrator. At the time of her marriage with the plaintiff, he was, by agreement, to have 800*l.* from the father, which in the settlement was mentioned to be for a portion, and in consideration of natural love and affection. It was insisted for the plaintiff, that he is entitled to an account of the grandmother's estate from the representative of the wife's father, and that the 800*l.* paid by her father, upon her marriage, was not in satisfaction of this residue, especially as it is expressed to be given for natural love and affection: and as the father, at the time of the marriage, was worth at least 8000*l.* and had only this daughter and one son, the counsel argued, it was not probable he meant it as a satisfaction: that constructive satisfactions must be drawn from circumstances; that there is no case to be produced,

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where a father is indebted to a child on account of a demand under the will of a collateral relation, and that before the demand is liquidated, his giving a sum as a portion to this child has been held a satisfaction: and for this purpose were cited *Chidley v. Lee*, Pr. Ch. 228, and *Barnham v. Phillips*, (*supra*.) before Lord Hardwicke, in 1741. The counsel for the defendant rested chiefly upon the parol declarations of the plaintiff and his wife, soon after the marriage, that the 800*l.* was intended both as a portion and a satisfaction likewise as to the residue of the grandmother's estate; and the depositions of six or seven witnesses were read, which were very full to this point. To encounter this, on the plaintiff's side, was read the evidence of the father's declarations before, and after the marriage; that he said his mother had left 500*l.* at least to his daughter; and that he would give John Wood (the plaintiff) 1000*l.* and make a man of him; and not above six weeks before his death, said to the plaintiff, "Thou knowest I owe thee a great deal of money, and thou shalt not be wronged of a farthing." Lord Hardwicke refused to decree an account of the grandmother's personal estate, she having been dead twenty years, and there being no grounds to think that the residue under her will was more than the fortune given to the plaintiff's wife in marriage, it being admitted that 500*l.* was the utmost amount of it.

Wood v. Briant, 2 Atk. 521. In the case of *Chidley v. Lee*, the facts were these, viz., Mr. L. was father to the plaintiff's wife, and had in his hands a legacy of 150*l.* which had been given him by a collateral ancestor. On her marriage with the plaintiff, the defendant, her father, gave her 1000*l.* portion, and after settled a church lease on the plaintiffs, and maintained them 14 or 15 years at his own house, and no notice was ever taken of the legacy, nor, for ought appeared, did the husband know any thing of it; yet, after some difference between them, and a bill brought, the legacy was decreed with interest and costs; and the master of the Rolls said, he could not discharge it, though he disliked the suit. Lord Hardwicke, in speaking of this case, says, the ground Sir John Trevor went upon was, that the husband knew nothing of the legacy to the wife from the collateral ancestor, and therefore held it was not satisfied by the portion, though it was a much larger sum than the legacy: but his lordship added, he thought this an extremely hard case, and he believed he should have been inclined to determine it otherwise. 2 Atk. 523.

On a bill by the plaintiff, as administrator to his wife, one of the daughters of W. Bradford, which daughter was entitled to a fifth part of a legacy of 520*l.*, left to her and her four sisters by the will of T. Tindall their grandfather; the case was as follows, viz.: Tindall made the wife of Bradford executrix. Bradford, as her husband, possessed himself of the personal estate of Tindall; mixed the effects with his own; applied them to his own business; and continued so till his death. Upon a treaty for the marriage of the plaintiff in 1740, with one of his daughters, Bradford agreed to give 400*l.* as a marriage portion, as it was sworn by the plaintiff's father, one of the parties to the agreement. On the wedding-day, Bradford went up and fetched the 400*l.* which was put by for the husband's use; one witness swearing, that Bradford said, "there is the money, but that is not all;" another, that he said, "there is what I give my daughter, but that is not all;" and both added, "or words to that effect." It appeared, that the daughter was privy to the right she had to this fifth part. It did not appear (but rather the contrary) that her husband knew of it at that time; but he knew of it a year after the marriage, yet never made any demand of it in the life of his wife, who died in 1742, nor in the life of Bradford, who died in 1746. The court, principally upon the ground of the long acqui-

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escence by the plaintiff, decreed the 400*l.* to be an implied satisfaction of the 104*l.*, the fifth part of the legacy of 520*l.*

Seed v. Bradford, 1 Ves. 501.

A devised his real and personal estate to B his son, charged with 500*l.* to B's daughter, payable at 21 or marriage. B married this daughter to C her first husband, after the testator's death, and gave her 1500*l.* as a portion, but no mention was made of the 500*l.* legacy, nor was any release or discharge taken for it. Twenty-one years afterwards the daughter and her second husband brought their bill against the father for the 500*l.* legacy. But the bill was dismissed, it being to be presumed that the 1500*l.* portion was intended in satisfaction of the legacy, especially after such a length of time.

Mackdowell v. Halfpenny, 2 Vern. 484.

E G by his will gives a legacy of 2000*l.* to trustees, in trust to pay the interest thereof to his wife for life, and after her death the benefit of the principal to his son; but if he dies before 21, then he gives it over to his daughters, and makes J S and two more persons executors. The son attained 21, and became entitled to the 2000*l.* The directions in the will were, that the executors should carry on the testator's trade of a brewer; and in compliance with this, they suffered the 2000*l.* as well as the rest of the testator's estate to continue in the trade. The son, after he had attained his age of 21, still carried on the trade on the foot of the same stock which was left by his father. The son afterwards makes his will without any reference at all to his father's, and gives a legacy of 10,000*l.* upon different trusts from what his father had done of the 2000*l.*; for after the interest of the 10,000*l.* to his mother for life, he gives the principal to his sister S's children, and charges it upon all his real and personal estate, and to be paid to trustees *in a month after his death*. Upon the death of the son, the plaintiff, as devisee of the mother, insisted both on the interest of the 2000*l.* and the interest of the 10,000*l.* Lord Hardwicke held him entitled to both; that in the case of portions, it is true, the court always leans against encumbering estates twice over; and will overlook little circumstances of time; as to the payment of two sums to children, if it appears to be a double portion and a double provision for younger children; but that this has never been the rule in regard to debts, where the funds for payment are appointed by different persons: that the interest of the 2000*l.* was part of the provision and livelihood of the mother, and a debt upon the estate of the father in the hands of the son: that the mother might have lived till within a day of the time which was to be the commencement of the payment of the interest of the 10,000*l.* to her, and yet not have been entitled to it, and therefore it could be no satisfaction; for there is no case to make a legacy a satisfaction of a debt, when the legacy is not due at the time of the testator's death, but is made contingent, and to take place at a future day.

Clerk v. Sewell, 3 Atk. 96.

J B being by the will of J P, to whom he was executor, to pay 300*l.* to his aunt M P, devises the residue of his estate to his mother and his aunt M P for life. It was adjudged, that this devise of the moiety of the residue for life was not a satisfaction of the annuity; for it is a general rule of satisfactions, that the thing given in satisfaction should be exactly of the same nature, and equally certain; but that here it was neither: the first being a clear annuity of 300*l.*, the last being the moiety of the residue of the per-

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sonal estate, whether more or less: that when a legacy has been presumed a satisfaction, it has been for a debt by the same testator.

Barret v. Beckford, 1 Ves. 519.

A son was entitled under the marriage articles of his mother to have 1500*l.* laid out in land to his sole benefit after the death of his father and mother. The mother died; the father by a second marriage had a daughter, and having made a provision for her by a settlement, he, by his will, devised other parts of his estate to his daughter and her heirs, and the residue in trust for his son for life, and then to the daughter, with particular limitations and declarations of that trust; and all his personal estate, except such as was given to the daughter, he gave to the same trustees to pay all just debts and legacies, and then to his son for life, with a bequest over to the daughter and her family. It was insisted, that this devise to the son was a satisfaction for the 1500*l.* But Lord Chancellor said, there was no authority that such a bequest as this of the residue of real and personal estate, after payment of just debts, to testator's eldest son and heir for life only, should be construed a satisfaction for the 1500*l.* he was entitled to under his mother's marriage articles. If the son died in the lifetime of the father, leaving several children, there was no provision for them. So, if he survived, as he did, and had issue afterwards: the 1500*l.* therefore must be considered as a debt by specialty on the testator's estate, to be retained by the defendant his son.

Alleyn v. Alleyn, 2 Ves. 37.

Mr. Pelham, having four daughters, by his will appointed a sum of 10,000*l.*, over which he had a power under his marriage settlement among his daughters, excepting Lady Lincoln, (whom he had advanced;) he then directed his Nottinghamshire estate to be sold after the death of the Duke of Newcastle, and the money to be divided among all his daughters, excepting Lady Lincoln; and also gave his personal estate among his daughters, excepting Lady Lincoln, and the residue of his real estate to all the daughters without any exception. By a codicil he charged his estate at Esher with 5000*l.* to each of his younger daughters who should not be entitled to the house and park at Esher. His daughter Grace afterwards married Mr. Watson; and Mr. Pelham gave her 20,000*l.*, by applying part of the 10,000*l.* and other means, for her fortune: and the question was, Whether the legacy given by the will was satisfied by the portion? Lord Hardwicke held, that the 20,000*l.* advanced to Grace in Mr. Pelham's lifetime, which by her marriage settlement was recited to be in full of her portion or fortune, was a satisfaction of what she could claim under the will or settlement of her father by way of portion; but as to the devise of the one-third of the personal estate, and the fourth of the residue of the real estate, his lordship thought it was no satisfaction.

Watson v. Earl of Lincoln, *Ambl.* 325; 1 Br. Ch. Rep. 66, note, S. C.

T C entered into a bond to trustees, reciting, that he was desirous of providing for one of the defendants, T C his natural son, then about four years old, and conditioned that his executors should, six months after his decease, pay the sum of 5000*l.* to the trustees for the use of the said T C, the interest to be applied for his maintenance and education till 21, and the principal then to be paid him; but if he should die, living the father, or under 21, then not to be paid.—T C afterwards made his will, whereby he gave the defendants, the trustees, all his estates in trust to pay legacies, and

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to lay out 15,000*l.* upon securities, and to apply 200*l.* *per ann.* to the education of his natural son T C, till 25, and then to pay to him the 15,000*l.*; but if he should marry between 22 and 25, and should die, to pay the whole to his issue: and if he should die unmarried before 25, the whole over. Lord Thurlow decreed, that the bond was not satisfied by the legacy; and his lordship's decree was affirmed by the Lords Commissioners Loughborough, Ashurst, and Hotham.

Jeacock v. Falkener, 1 Br. Ch. Rep. 295.

The Earl of Salisbury left a legacy of 10,000*l.* to James Cecil Grave, suggested, but not proved to be his natural son. The bill was filed to establish the will, and for an account of the personal estate; but the defendant's answer stating that the testator had in his lifetime advanced money to J. C. Grave, which it was insisted ought to be taken in satisfaction *pro tanto* of his legacy, the Lord Chancellor referred it to the master to inquire into the circumstances of such advancements, and to report them to the court. The master found, that the testator had granted to J. C. Grave a lease for 99 years of a farm called T, at the rent of 40*l.* a year, which farm he found had before been let at 142*l.*, and was reported to be worth to be let at 180*l.* *per ann.* He calculated the difference between the reserved rent and the real value, at 20 years' purchase, to be 2800*l.*; and also found that the testator had paid the former tenant of the premises 1200*l.* for a standing crop, dead stock, and farming utensils, and also 400*l.* for repairs; making together the sum of 4400*l.* The question was, Whether this sum of 4400*l.* should be considered as a satisfaction for so much of the legacy of 10,000*l.*? Lord Thurlow was of opinion it was not to be so considered, and ordered the legacy to be paid.

Grave v. Earl of Salisbury, 1 Br. Ch. Rep. 425.

Holmes the father, who was a jeweller, by his will gave his son 500*l.*, and 2000*l.* to four unmarried daughters; then gave his son the utensils of his trade, (which were of trifling value;) and gave the residue of his personal estate to his wife for life; and after her death, he gave further legacies to his daughters; to some 500*l.*, and to others 1000*l.*, and if any surplus, to be divided between all his children who should be then living, (there being then seven in all.) He afterwards took his son into partnership with him, and by the deed of partnership, the stock was to be 3000*l.* to be brought in equally; and they were to be equally entitled to the whole. The father brought in the whole capital, and it was understood by the whole family that he meant to give the son the half of the stock. The children, who were of age, by their answer admitted this; and there was parol evidence of declarations of the testator at different times, that he meant to bring his son into partnership, and to give him half the stock, and even the whole; and that he told one witness, that he had brought his son in, and had given him 1500*l.* The question was, Whether this advancement was a satisfaction of the legacy of 500*l.*? and it was held not to be a satisfaction, not being *ejusdem generis*; and that it must have been the testator's intention, that the son should have both.

Holmes v. Holmes, 1 Br. Ch. Rep. 555.

A testator bequeathed to his putative daughter in the following terms, viz., "I bequeath the mortgage bond 1365*l.* due to me from Mrs. M. to Miss Kitty Meredith, now in my house, in order to fit her out for India, or to dispose of her in marriage." Miss Meredith, during the testator's life,

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married More the bankrupt, and the testator gave More a bond for 1000*l.* as a marriage portion. He also gave them after marriage 600*l.* to buy furniture, &c. The bond was afterwards paid; 400*l.* of it being retained by More out of money received on account of the testator, and the remaining 600*l.* upon suit by the assignees. More, the bankrupt's father, being examined as a witness, said, that the testator, before the marriage, told him, in a conversation on the subject, that "he could only give her 1000*l.* on her marriage, but there would be more hereafter, as his life was a bad one;" by which he understood she would have a further fortune at the testator's death. Lord Thurlow held, that the sum of 1000*l.* advanced upon the marriage was not an ademption of the legacy; nor was there any evidence or presumption that the gift of 600*l.* after the marriage was an execution of the testamentary gift.

Debeze v. Mann, 2 Br. Ch. Rep. 165, 519; {9 Ves. J. 577, *Robinson v. Whitley*, *acc.*}

A testator bequeathed to a young lady, to whom he was not related, the sum of 6000*l.*, payable in three months after his decease. After the making of the will, the lady married a clergyman, which marriage was had with the approbation of the testator, who gave 5250*l.*, 5000*l.* of which was stated in the settlement to be her marriage portion. After the marriage, the testator laid out 800*l.* in the purchase of a chaplainship of Chelsea hospital for the husband. It was insisted that these sums, making together 6050*l.*, were instead and lieu of the legacy of 6000*l.* But Lord Thurlow held, that where a stranger gives a legacy by will, and afterwards gives a sum, without any evidence that it is intended for the same purpose, it is not taken as a satisfaction; that to make it so, it must appear, at the time of the gift, to be meant as an ademption of the legacy; and nothing of that kind appearing here, he decreed the legacy not to be adeemed.

Powell v. Cleaver, 2 Br. Ch. Rep. 499.

H and F, the daughters of J S, were entitled under his marriage settlement to 2000*l.* charged upon his estate. J S, by codicil to his will, gave the sum of 20,000*l.* to be equally divided between H and F, to be paid down, or sufficient security given for the payment thereof within thirty days of either of them being married, provided the person to whom she should be married should settle on her a jointure of 500*l.* *per ann.*, otherwise she should be entitled but to 5000*l.*, &c. This was adjudged to be a cumulative provision, and not a satisfaction of the 2000*l.* provided for the daughters by the settlement.

Hanbury v. Hanbury, 2 Br. Ch. Rep. 352.

A testator, being possessed of 32,771*l.* 16*s.* 2*d.* bank 3 *per cents.*, devised to trustees three sums of 8114*l.* 1*s.* 11*d.* in the said stock, part of the said capital therein, in trust for his son T and his daughters S and C, and their respective children and grandchildren. After the making of the will, (the testator being then possessed of 34,657*l.* 14*s.* 2*d.* bank 3 *per cents.*.) C intermarried with the plaintiff, and by their marriage settlement, the plaintiff, in consideration of 5000*l.* in bank 3 *per cent.* consolidated annuities, which were to be accepted by him as the portion of C his wife, and in satisfaction of his contingent right to a legacy given her by her grandfather's will, covenanted, within one month after she should attain her age of 23 years, to release her share of the said legacy to her father. Lord Thurlow held, that this portion

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could not be considered either an ademption or satisfaction of the legacy given to C by her father's will.

Baugh v. Reed, 3 Br. Ch. Rep. 192.

Before marriage, a sum of money, partly belonging to the husband, partly to the wife, was settled to the use of the husband for life, remainder to the wife for life, remainder to the children to be equally divided between them. There were several children, and the money amounted to only 2400*l.* among them. The father afterwards made his will, and gave each of the children 2000*l.*, and the residue of his estate among them. Lord Bathurst decreed, that what they took by the will should be in lieu of their portions under the settlement.

Ackworth v. Ackworth, 1 Br. Ch. Rep. 307, note.

J W, the plaintiff's father, by his marriage settlement, conveyed his estate to trustees to the use of himself for life, remainder to trustees to preserve, &c., remainder to his wife for life, remainder to trustees for a term to raise 10,000*l.* for younger children, remainder to his eldest son in tail, remainder over, &c. In the settlement was a power reserved to him to raise money, but subject to the wife's life-estate, and the provision for the children; and also a proviso, that in case he should in his lifetime give to any of his younger children any sums of money towards his or their portions and advancement, and declare the same by writing to be in part of his or their portions, they should go *pro tanto* in satisfaction thereof. By his will, reciting that he had made no provision for his wife by settlement or otherwise, he declared it to be his will that the trustees should pay her 600*l.* *per ann.* for life in bar of dower; and if he should have but one younger child only, they should raise 5000*l.* for such one child, if more, 2000*l.* each, which he charged on his personal estate, and in default thereof, upon the settled estate. He died leaving the plaintiff his eldest son, and two of the defendants, his younger children. It was decreed that this provision by the will was in part satisfaction of the portion by the settlement, and that upon payment of 5000*l.* each, the surviving trustee in the settlement should assign the term.

Warren v. Warren, 1 Br. Ch. Rep. 305.

Testator by will, 7th March, 1774, devised to his eldest son, Isaac Cookson, certain freehold and copyhold estates, and continued as follows: "As to all my other lands, goods, and chattels, of what nature or sort soever, I give to my dear wife Elizabeth, appointing her executrix of this my last will, with the tuition and education of all and every such younger children, and to provide for them, with regard to their fortunes, as they may deserve and merit." To the will he added a paper of the same date, called *Instructions to my wife with regard to my younger children*; wherein, after directing fortunes for his younger sons, he says, "My daughters Hannah (the plaintiff) and Sarah to have 5000*l.* each; all the surplusses over and above your own expenses to be laid out in mortgages or purchases for the purposes before mentioned." By an additional codicil on the same paper, and of the same date, he says, "I do further add to what I have said on the other side, that what savings or increase I may make, or my dear wife may make of my effects, she may give and dispose of the same, either in her lifetime or by will, to such of her children as she sees proper." The testator died in December,

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1783, without revoking the said will and codicil, which were proved by the defendant, the widow, in the ecclesiastical court.

After the date of the will, viz. about September, 1776, a treaty of marriage being on foot between the plaintiff Richard Ellison and the co-plaintiff his wife, Mr. Bush, brother-in-law to Mr. Ellison, was desired by Mr. Ellison senior, the father of the plaintiff, to go to Mr. Cookson, the co-plaintiff's father, to acquaint him with the provision intended by Mr. Ellison senior for his son, and to learn from Mr. Cookson what he meant to give his daughter; when Mr. Cookson informed Mr. Bush, (as he swore in evidence,) that he meant to give his daughter Hannah (the co-plaintiff) 5000*l.* upon her marriage, and intended to give her *a further sum, equal or nearly equal thereto upon his death*: but refused to settle or specify the sums. In the course of the treaty between Mr. Bush and Mr. Cookson, several letters passed; and in one of them from Mr. Bush to Mr. Cookson, dated 5th of October, 1776, Mr. Bush says, "Mr. Ellison (the father) says—as he hopes the provision you told me and Mr. Richard Ellison you intended making for Miss Cookson at your decease, *WILL BE equal, or nearly so, to what you propose giving upon the marriage*, he shall rest perfectly satisfied with your word for fulfilling that engagement." In answer to this letter the testator wrote to Mr. Bush, and in the letter said, "You must mistake Mr. Ellison in regard to any such declaration as you mention; the mistake may arise between what may be possible and probable: I told him my present plan, which would be executed by my wife, if the longer liver."

In February, 1777, the plaintiffs intermarried; and, on the 14th of that month, the plaintiff Richard received from Mr. Cookson the sum of 5000*l.*, and gave a receipt for the same as for his wife's portion. The master of the Rolls, Sir L. Kenyon, thought there was not sufficient to repel the general presumption in such a case as this, that the portion was a performance of the legacy; and Lord Thurlow was afterwards of the same opinion.

Ellison v. Cookson, 2 Br. Ch. Rep. 307; 3 Br. Ch. Rep. 61.

A by her will says, "*Item*, I give to my servant Jane Greese 500*l.*, to be paid her within three months after my decease." In another part she says, "I give 5*l.* apiece to the rest of my servants, but I do not give 5*l.* to the said Jane Greese, because I have done very well for her before." By another clause she gives her lands lying in different parishes, in trust, by mortgage, sale, or otherwise, to pay her debts and legacies; and after her debts and legacies paid, then, &c. The testatrix was at her death indebted to Jane Greese in 260*l.* on bond. Lord Chancellor held, that the legacy was not a satisfaction of the debt; for the words, "*because I have done very well for her before*," show, that what she had given her before she intended as a bounty, and not as a satisfaction; and they likewise intimate, that the testator meant the 500*l.* to be equally a reward for the services of Jane Greese, as the 5*l.* was for those of the other servants; and legacies to servants have never been held to be in satisfaction of debts. The argument, too, that the legacy was not to be paid within three months after the death of the testatrix, was not to be laid entirely out of the case: though, if it had been charged upon real estate only, and not at all chargeable upon the personal estate, his lordship said, he should have thought it of greater weight; for the possibility and contingency of the legatee's dying before the legacy became payable, must be taken into consideration, as the legacy might not have been paid at all, if the legatee had died before the three months. But

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where the legacy is charged upon a mixed fund of personal and real estate, if the personal assets are sufficient, the legacy is payable, though the legatee die before the day of payment: otherwise, if the legacy be out of a real estate only.

Richardson v. Greese, 3 Atk. 65.

Where a testator by will gave to Sarah Gaynon a legacy of 500*l.*, and thereby declared, that in case his personal estate should not be sufficient to pay *all his debts, legacies, and funeral charges*, he thereby subjected all his real estates to the payment thereof; and afterwards by a codicil gave a further legacy of 500*l.* to the said S G, and died indebted to S G in 200*l.* on bond, which debt was contracted after making the will, but before the codicil: the master of the Rolls declared, that the 500*l.* given *by the codicil* was to be considered and deemed a satisfaction of the said 200*l.* owing by the testator to the plaintiff Sarah.

Gaynon v. Wood, July 19, 1759, 1 Cox's P. Wms. 410, note.

Admiral Mathews had upon his marriage a real estate of 300*l.* *per annum* in strict settlement, so as to make his eldest son tenant in tail. Long afterwards, in 1773, he enters into a deed, which was an agreement between the father and son upon the son's marriage, whereby the father agreed to take 800*l.*, part of the fortune of the son's wife, and to make a settlement in this way; that in consideration of the 800*l.* he should in one month afterwards convey to trustees for a term of years, lands, subject to these trusts, to secure 50*l.* *per annum* to the son, and 800*l.* to the younger children of the son, to be paid at such days, times, manners, and proportions, as the son should direct and appoint, and for want of appointment, to be paid to them equally at twenty-one or marriage, with benefit of survivorship upon the death of any before: and if he had no child, the said 800*l.* should not be raised, and the term should attend the inheritance. In 1749, he made a will and devised 700*l.* *per annum* to his son, upon condition that the son, within twelve months after testator's death, should convey the whole family estate, for better securing to the testator's sister-in-law Anne Burgess 100*l.* *per annum* for life, which he had before given her out of the said lands; with another condition, that the son should confirm his will, otherwise the 700*l.* annuity to cease; and then makes a very large provision for the grandchildren at their age of twenty-five or marriage. In 1750, the testator by a deed made his son tenant for life, instead of tenant in tail, as he was before, by levying a fine, and resettling the estate in the strictest settlement, and to no other uses. After his death, the question was, How far the claims of the son, his wife and children, under the agreement in 1773, were barred by any other provisions in the will of the father, and whether that was a satisfaction? The master of the Rolls, Sir Thomas Clarke, said, that the deed in 1733 was a contract between the father and son, so as to make the son and his family purchasers from the father, and created a debt owing from the father to them: that the wife had clearly received no satisfaction for the debt contracted to her; that as to the children, by the articles in 1733 they were entitled to 800*l.*, so as that every child must have had part of it; by the will the testator has given twenty times as much in the whole among them; but then it is so given, that if they do not arrive at the age of twenty-five or marry, they are entitled to nothing: this therefore did not fall within the rules of satisfaction to which the court had adhered: that as to the annuity of 50*l.* for life to the son, independent on the deed in

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1750, what is given by the will is not a satisfaction of that: for the annuity given by the will is *diverso intuitu*. It is the same as if the testator had devised the settled estate to his son for life, &c., subject to the annuity to Anne Burgess; and then if the son had performed that condition, he would be entitled to claim under the deed in 1733: for the rule of satisfaction was never carried so far by construction as to make that answer a double purpose. That it stood thus with respect to this annuity of 50*l.* merely upon the will; but by the deed of 1750 it was put out of the son's power to perform the condition annexed to the devise of the 700*l.* *per annum*, which the son might have done when the will was made, he being then tenant in tail of that estate: the annuity of 700*l.* therefore is, by the deed in 1750, a pure annuity, and free from the condition; and then it is the same as if the condition comprised in the will never had been mentioned; and if it had been pure and free, it would be a satisfaction of the 50*l.* *per annum*. By the deed in 1750, then, it is within the general rule of satisfaction, though by the will it would not have been so.

Mathews v. Mathews, 2 Ves. 635.

C B by her will gave to her brother G B, and the lawful heirs of his body, if he should have any, her whole fortune, (except a few legacies,) but if he should die without heirs, she gave to J S 1000*l.* and to J C 500*l.*, the residue to her brother. The property was personal to the amount of about 5000*l.* The testatrix died, and the brother surviving, and having no child, by his will gave a like legacy of 1000*l.* to the said J S, *to her sole and separate use*, and also 500*l.* to the said J C. It was decreed, that the legacies given by the brother would be a satisfaction for the legacies given by the former will, (supposing those legacies not to be too remote, as it was holden they were.)

Attorney-General v. Hird, 1 Br. Ch. Rep. 170.

By a settlement on the marriage of Godolphin Edwards and Elizabeth More, a term of 600 years was created to raise portions for daughters, by which it was provided, that in case there should be but one daughter, the sum of 5000*l.* should be raised for such only daughter, to be paid at eighteen or day of marriage, with maintenance in the meanwhile. There was a proviso in the settlement, that in case the daughters should be advanced with portions in money or lands, equal in value to the portions thereby provided, in the lifetime of Godolphin Edwards, or he should give or leave them money or lands not equal in value, the trustees should raise only so much as would make the money or value of the lands so given equal to the portions provided. Elizabeth, the appellant, being the only daughter of the marriage, attained eighteen the 4th December, 1746. Godolphin Edwards being possessed of 5300*l.* East India annuities, which he had saved from the income of the estate, 21st November, 1772, transferred them to the appellant Elizabeth, then the widow of Mr. Manlove. A bill had been filed, and the cause came on to be heard before Lord Bathurst, 25th June, 1776, when there was a decree in favour of the appellant for her portion of 5000*l.*, the present question not being then before the court. The respondents afterwards exhibited their bill of review, stating that since the pronouncing of the decree in that cause, they had discovered that Godolphin Edwards had transferred to the plaintiff these India annuities in part of her portion. Upon the cause coming on to be heard, Lord Chancellor declared, that these annuities transferred by Godolphin Edwards to the appel-

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ant Elizabeth were to be considered as having been so transferred in part satisfaction of the portion of 5000*l.* under the marriage settlement, and therefore varied the former decree so far; whereupon an appeal was lodged in parliament, which being heard March 15th, 1780, it was ordered that the same should be dismissed, and the decree therein complained of affirmed.

Pugh v. Duke of Leeds, 1 Br. Ch. Rep. 67, notes.]

|| A debt is due and payable at the death of testator: if, then, a legacy be given which is not payable then, it is not equally beneficial and shall not be deemed a satisfaction, though larger in amount than the debt.

Thus Lord Hardwicke held, that a legacy payable *one month* after death of testator did not satisfy a debt which was payable immediately on his death. So Lord Thurlow decided, that a debt payable one month after testator's death was not satisfied by a legacy payable within six months.

Clarke v. Sewell, 3 Atk. 96. See Nicholls v. Judson, 2 Atk. 300; Haynes v. Mico, 1 Br. C. C. 129. See 2 Ves. sen. 636; M'Clel. & You. 54; Adams v. Lavender, *Ibid.* 41.

For a legacy to satisfy a debt it must be of the *same nature* as the debt. Copyhold land shall not be taken as a satisfaction for freehold; (a) nor money for land; (b) nor the moiety of the residue of personal estate for an annuity; (c) nor a life interest in the whole residue for a sum secured by bond; (d) nor the absolute interest in a share of the residue for a debt. (e)

(a) Eastwood v. Vincke, 2 P. Wms. 613. (b) *Ibid.* and 15 Ves. 515. (c) 1 Ves. sen. 591. (d) Alleyn v. Alleyn, 2 Ves. sen. 37; Forsight v. Grant, 1 Ves. jun. 298. See also Richardson v. Elphinstone, 2 Ves. jun. 463. (e) Devese v. Pontet, 1 Cox, 188.

Nor can a contingent debt, or one which is uncertain, as due on a running account, be satisfied by a legacy. Nor a debt due on a negotiable instrument.

Rawlins v. Powell, 1 P. Wms. 296; Carr v. Eastbrooke, 2 Ves. 561. *But see* *contra*, Williams v. Crary, 8 Cowen, 246.*g*

A direction by testator that debts and legacies should be paid has been relied upon, by Lord King, Chancellor, to show that a legacy should not be deemed a satisfaction of a debt.

Chancy's case, 1 P. Wms. 408; Richardson v. Greese, 3 Atk. 64; Field v. Mostin, Dick. 543.

A father, who as executor owed one of his two daughters 250*l.*, bequeathed 2000*l.* to be equally divided between his daughters; held that the debt was not satisfied, otherwise the daughters would not have been equally benefitted.

Meredith v. Wynn, Prec. Chan. 314.

PORTIONS.—If a father incur a *debt* to his children by engaging by marriage settlement, or otherwise, to pay them portions, and afterwards by his will makes a provision for them, such provision shall *prima facie* be deemed a satisfaction, or part satisfaction of the portion. So, if it be provided in the settlement that any sum settled or given by the parent shall be taken in full or part satisfaction of the portion, a legacy shall be so taken. (*g*)

Hinchcliffe v. Hinchcliffe, 3 Ves. 516; and cases there cited. Sparkes v. Cator, 3 Ves. 530; Pole v. Lord Somers, 6 Ves. 309; Bengough v. Walker, 15 Ves. 507. (*g*) Rickman v. Morgan, 1 Br. C. C. 63, continued 2 Br. C. C. 393; Leake v. Leake, 10 Ves. 477; Onslow v. Michell, 18 Ves. 490; Goolding v. Haverfield, M'Clel. 345. *¶* The rule of considering a legacy as a satisfaction of a portion arises from a presump-

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tion that it was so intended by the testator; but that, like every other presumption, may be repelled or confirmed. *Taylor v. Lanier*, 3 Murph. 98.*g*

It matters not that the legacy and portion are payable at different periods; (a) or that the legacy is given in an uncertain shape as a residue. (b)

(a) 18 Ves. 493; 17 Ves. 191. (b) *Rickman v. Morgan*, 1 Br. C. C. 63; *Bengough v. Walker*, 15 Ves. 507. *β* *Owings' Executors v. Owings*, 1 Har. & Gill. 484.*g*

But a *contingent* legacy cannot be taken as a satisfaction for a certain portion; nor if it (the legacy) be given for a different purpose.

Bellasis v. Uthwatt, 1 Atk. 426; *Hanbury v. Hanbury*, 2 Br. C. C. 352, 375.

β Testator devises to his daughter, the wife of A, two hundred and fifty acres of land; it is no satisfaction of a like quantity due from the testator to A.

Ball v. Ball, 2 Bibb, 67. See *Kelly v. Kelly's Executors*, 6 Rand. 176.

The bequest of a father to the children of his deceased son is not a satisfaction of a debt due by the father to the son.

Ladson v. Ward, 1 Desaus. 314.

2. When the Debt or Duty is owing to the Testator.

A legacy given to the wife of the testator's debtor is not a satisfaction of the debt due to the testator.

Clarke v. Bogardus, 12 Wend. 67.

A legacy given to the testator's debtor, when the debt is less in amount than the legacy, is satisfied *pro tanto*, and when the debt exceeds the legacy, the executor is entitled to retain the legacy in part discharge of the debt.

*Ibid.**g*

(E) Of Legacies vested or lapsed: And herein,

1. Where it shall be a lapsed Legacy by the Legatee's dying in the Lifetime of the Testator; and where in such Case it shall vest in another Person, to whom it is limited over.

It seems by the rule of the civil law, and by the cases on this head, that if a legacy be devised to J S, and he die in the lifetime of the testator, that the legacy is lapsed, there being no such person to take at the time when the will is to take effect.

Abr. Eq. 296, 297. *Weishaupt v. Brehman*, 5 Binn. 118; *Robinson v. Martin*, 2 Yeates, 525; *Dickinson v. Purvis*, 8 S. & R. 71; *Sword v. Adams*, 3 Yeates, 34; *Craighead v. Given*, 10 S. & R. 351; *Swan v. Hanse*, 2 Rawle, 28; *Comfort v. Mather*, 2 Penns. 450; *Jerningham v. Herbert*, 4 Russ. 388; *Marsh v. Wheeler*, 2 Edw. 156; *Frazier v. Frazier*, 2 Leigh, 642; *Barker v. Rayner*, 2 Russ. 122; *Baker v. Hanbury*, 3 Russ. 340; *Williams v. Jones*, 1 Russ. 517; *Birdsall v. Hawlett*, 1 Paige, 32; *Bone v. Cooke*, 13 Price, 332; *S. C. McClell.* 168.*g*

So, where A by will, reciting that B owed him 400*l.*, gave and bequeathed those 400*l.* to him, provided he, out of the 400*l.*, paid several sums in the will mentioned to his wife and children, and the rest and residue he freely and absolutely gave to him, and willed and required the executor to deliver up the security immediately upon his death, and not to claim or meddle with the debt, or any part thereof, but to give such release or discharge as B, his executors or administrators, should require or think fit; and B died in the lifetime of the testator: it was held, that the money directed to be paid the wife and children was well devised; but as to the residue devised

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to the debtor himself, that it was a lapsed legacy, he dying in the lifetime of the testator; (a) although it was admitted, that if the testator had said, *I forgive such a debt, or my executor shall not demand it, or shall release it*, that would have been a good discharge of the debt, though the debtor died in the lifetime of the testator. (b)

2 Vern. 522, Elliot and Davenport; [1 P. Wms. 83, S. C. (a) The Lord Keeper declared, "that the last clause in the will (whereby it was directed that the security should be delivered up to the said William Elliot, his executors, administrators, or assigns, to be cancelled, and that no use should be made thereof) was only in aid of the first clause in the will, by which alone the sum is to be taken as a lapsed legacy." Reg. Lib. A. 1705, fol. 521;] [Toplis v. Baker, 2 Cox, 119, 121. See Corbyn v. French, 4 Ves. 435. (b) Sibthorp v. Moxom, 3 Atk. 580.]

¶ So where testator bequeathed to A for life, and at her death to B, "or to her proper representative," if she should not be living at A's decease, and B died in testator's lifetime, the bequest to B was held lapsed.

Corbyn v. French, 4 Ves. 418, 434.

Again, a legacy bequeathed to A after a life-estate, and in case of his death before it became payable to his executors or administrators, was held to lapse by the death of A in testator's lifetime.

Bone v. Cook, M'Clel. 168; 13 Price, 332.

§ Where a legacy is given when the legatee attains the age of twenty-one years, if the testator directs the interest of the legacy to be applied in the mean time for the benefit of the legatee, there being an absolute gift of the interest, the principal will be deemed to have vested.

Patterson v. Ellis, 11 Wend. 260.g

So where a legacy was directed to be paid to the legatee at the end of one year after testator's decease, or to his heirs, the legacy was held to lapse by the death of legatee in testator's lifetime.

Tidwell v. Ariel, 3 Mad. 403.

§ Testator bequeaths his personal property to his five daughters, naming them, "to them and their disposal." Three of the daughters die in the lifetime of the testator; the shares given to those who die are to be distributed among the next of kin of the testator, as lapsed legacies, and do not survive to the other two daughters.

Sawyer et al. v. Trueblood's Executor, 1 Murph. 190.g

But where testator gave, among other legacies, a legacy to Ann, wife of R W, and to her executors or administrators, and declared, that if any of the legatees should die before the same became due and payable, they should not be deemed lapsed legacies; and Ann died in the lifetime of testator: held, that her husband as administrator was entitled.

Sibley v. Cook, 3 Atk. 572.

So where a legacy was given, in case of death of legatee before testator, "to her legal representatives," the next of kin of legatee, at the death of testator, were held entitled.

Bridge v. Abbot, 3 Br. C. C. 224; S. C. 2 Vern. 378, in note. See Pirie v. Strange, 6 Mad. 159.]

[The testatrix, the grandmother of the plaintiff, devised in the following words: "I likewise forgive my son-in-law Richard Chillingworth a debt of 500*l.* due to me upon bond, and all interest that shall be due for the same at my decease, and desire my executor to deliver up the bond to be

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cancelled," and made her son J P executor. The legatee died in the lifetime of the testatrix. Lord Hardwicke thought the testatrix intended *in all events* the bond should be delivered up to be cancelled: that there was nothing personal in the present case for the direction that it should be delivered up. In *Elliot v. Davenport*, his lordship said, the words are not penned as *forgiveness or remission*; there was no intention to release the recognisance till Sir William Elliot paid 150*l.* thereout; but here is a clear intention to release the debt. There, it was to be delivered up to Sir William Elliot; here, in general, to be cancelled. There, the right of action subsisted, which was the reason of that opinion; here, it would be too nice to make such a distinction, and would narrow too much the bounty intended by the testatrix to her family. His lordship therefore decreed the bond to be delivered up to the plaintiff to be cancelled, but without costs.

Sibthorp v. Moxom, 3 Atk. 580.

In a will was the following clause: "I give to my kinsman N D the sum of 400*l.*, which he owes to me on mortgage of his estate in S, and I further order my executor to *give him up all bonds* owing from him to me, and which shall be found in my custody at the time of my decease, together with all interest due thereon." The mortgage debt was also secured by bond; besides which, N D was indebted to the testator on another bond in 200*l.*; both bonds were in the custody of the testator at the time of his death. After great consideration, the court held this to be a lapsed legacy. The Lord Chief Baron, in delivering the judgment of the court, observed, that none of the circumstances which could be supposed to distinguish the case of *Sibthorp v. Moxom*, from *Elliot v. Davenport*, occurred in the present case. That the principal ground on which *Sibthorp v. Moxom* was decided, was this, viz., that there was nothing in the will to confine the delivery of the bond to the *person* of the son-in-law, and that charge therefore was not ancillary to the former bequest to him, but amounted to a declaration that in all events the bond should be delivered up, and therefore of necessity operated for the benefit of the representative; that in the present case, the word used by the testator was "*give*," and not "*forgive*;" and (what was more material) the bond was directed to be delivered up to N D, (personally,) and there was no direction whatever for delivering up the mortgage; and therefore the court saw no reason for departing in this case from the general rule, viz., that a testamentary disposition must lapse by the death of the legatee in the lifetime of the testator.

Toplis v. Baker, Excheq. 11il. 1789; 1 Cox's P. Wms. 86, note.]

A devised an estate to his wife for life, and after to the plaintiff, his niece, and her heirs, upon condition and to the intent that she pay 400*l.* to such person as his wife by her will in writing, or any other writing, should direct and appoint, and dies; the wife after marries a second husband, and then makes a will in writing, and thereby, reciting the power given her by her former husband's will, appoints the 400*l.* to be paid to her husband, his executors or administrators, and that when he shall have fully received the 400*l.* he shall pay 100*l.* out of it to B, 50*l.* to C, and 50*l.* to D, and makes her husband her executor; and then goes on and says, that she has published this her last will and testament in the presence of three witnesses; and the husband subscribed that he approved of this will: the husband dies before her, and makes her executrix of his will, and residuary legatee; then B and C die both intestate, and afterwards the wife dies, and the defendants

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take out administration to her, with the will annexed, and also administration to B and C; and the question was, Whether this appointment being made by will, and the appointee dying before the appointer, this should be in the nature of a legacy, and so the appointment void, the testatrix surviving the nominee? And my Lord Keeper held, that if it was a thing purely testamentary, it would be plainly a lapsed legacy, but that in this case the 400*l.* was not in its own nature testamentary, but they take as nominees, and it is but the execution of a trust; and decreed the money to be paid.

Abr. Eq. 296, Burnet and Holgrave. [This case of Burnet v. Holgrave is much weakened in point of authority by the case of Oke v. Heath, 1 Ves. 135. In that case a *feme covert* having by marriage articles power by deed or will to appoint 4000*l.* for such persons as should be her kin, and for none other; the 4000*l.* in default of appointment to go according to the statute of distributions; appointed by will to her nephew C, he in consideration thereof paying an annuity to his mother. C died in the lifetime of the testatrix. Lord Hardwicke held, that by the death of the appointee in the lifetime of the testatrix, the appointment was void; for though it arises under a power, it is a testamentary disposition, and subject to all the qualities of a will. The case of Burnet v. Holgrave, his lordship said, is a very particular and extraordinary case, and he doubted if it would be so determined now: it appeared by the register to have been a cause by consent, and not adversary; which takes off greatly from the weight of the opinion there, showing it to have been probably sudden, and without consideration. But taking it as it is, his lordship observed, there are several differences: first, the wife there, by marrying a second husband, had disabled herself from making a will; nor is the power given her to be executed during coverture; therefore it could not be a will, but must be considered as a writing under hand and seal only; and then the determination may be right: but that is nothing to this, which is by a will properly proved as such. But, suppose the court took it as a will, or a writing in nature of a will; the appointment there was not personally to the husband only, but the executors or administrators, and on trust to pay thereout. It is true, that in general the words *executors* or *administrators* are understood as representatives only, but not always; as in cases *pur autre vie*, executors or administrators take, not as representatives of the first taker, but as new special occupants newly named in the will or deed: and if they took further so as to be persons taking the trust, in that light it is different. And the court rather did this in support of the trust, one of the *cestui que trusts*, for whose benefit it clearly was, being then living; nor can the *cestui que trust* be defeated by the death of the trustee in the testator's life. The words are, that the court took it to be an execution of a *trust*; which is not a misprint instead of *power*; and imports the husband, his executors or administrators, to be barely trustees. Another thing in support of that determination is, that all was come back to the wife herself; the husband, to whom and his executors she had appointed, dying in her life, and making her executrix.] ¶ This case of Oke v. Heath has been followed by Duke of Marlborough v. Lord Godolphin, 2 Ves. sen. 61, 73; and see Vanderzee v. Aclom, 4 Ves. 771; Burges v. Mawbey, 10 Ves. 319, 326.]]

So, where E made her will, and devised in these words:—*I give unto my loving kinsman R H the sum of 300*l.*, one 100*l.* part whereof he doth owe me, which I intend to give to my cousin S H, his youngest daughter; but my will and desire is, that he will give the said 300*l.* to his daughter S H at the time of his death, or sooner, if there be occasion, for her better advancement and preferment*; the testatrix, at the time of making her will, was in England, and it happened that R H died in Ireland, eight days before the death of the testatrix; afterwards S H died, at the age of sixteen, and unmarried, and the plaintiff was her administrator; and it was decreed at the Rolls, and affirmed by my Lord Chancellor, that the words *I desire*, or *I will*, amount to an express devise, and that the 100*l.* bond to the testatrix should be assigned to the plaintiff, and the 200*l.* paid him, with interest, from the time of exhibiting the bill; although it was insisted upon, that a benefit was designed R H, and that he was not a bare trustee, for he was

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to have the interest of the 300*l.* for his life, unless his daughter had occasion for it before his death, which she had not.

2 Vern. 466, 467, *Eales v. England*; Prec. Chan. 200, S. C. || See *Moggridge v. Thackwell*, 1 Ves. jun. 465. ||

But if the testator gives his sister 350*l.*, upon condition that she, at or before her death, give to her children 200*l.* thereof, and the sister dies in the lifetime of the testator, the whole legacy is lapsed; although it was insisted, that if the devise had been only of the interest of the 200*l.* to the testator's sister for life, and the principal to the children, that had been a good devise to the children as to the 200*l.*, and it would not have been lost by the mother's dying in the testator's lifetime, and the intention of the testator in this case amounted to as much; but it was adjudged *ut supra*, the court taking it that, being a devise of money, the absolute property vested in the first legatee: *Quere*.

2 Vern. 116, *Birkhead v. Coward*.

But however a legacy may become void or lapsed by the legatee's dying in the lifetime of the testator, yet it is plain, that if in such case there be a limitation over to another, that the limitation over is good, though the first legatee die in the lifetime of the testator; as, where A devised 500*l.* apiece to his two grandchildren by name, and if either of them die, his share to go to the survivor; one of them died in the lifetime of the testator; it was held, that his share should go to the survivor, and was not a lapsed legacy.

Prec. Chan. 470, 471. {See 9 Ves. J. 566, *Smith v. Pybus*.} *Northey v. Burbage*; || and see *Barker v. Giles*, 2 P. Wms. 280; 3 Br. P. C. 104. ||

|| So, where testatrix bequeathed a personal annuity, after the death of her father, to be equally divided between her brother and sisters, Charles, Catherine, and Martha, "to them and their heirs, or the survivor of them;" and Martha died in the lifetime of testatrix; it was held, that her share went over to her brother and sister, under the limitation to the survivor.

Smith v. Pybus, 9 Ves. 566. ||

¶ Testator bequeathed his personal property to his five daughters, naming them, "to them and their disposal;" three of the daughters died in the lifetime of the testator; held that the shares of deceased did not survive to the other two daughters.

Sawyer et al. v. Trueblood's Ex'r, 1 Murph. 190. *g*

[J S (*inter al.*) bequeathed the surplus of his personal estate unto four persons equally to be divided between them, share and share alike. One of the four residuary legatees died in the lifetime of the testator; and the question being, to whom the fourth part bequeathed to the legatee so dying should belong? Lord Chancellor was of opinion, that the testator having bequeathed his *residuum* in fourths, and one of the residuary legatees dying in his lifetime, the devise of that fourth part became void, and was as so much of the testator's estate undisposed of by the will; that it could not go to the surviving residuary legatees, because each of them had but a fourth devised to them in common, and the death of the fourth residuary legatee could not avail them, as it would have done, had they been all joint legatees, for then the share of the legatee dying in the life of the testator would have gone to the survivors. (a) But here the *residuum* being devised in common, it was the same as if a fourth part had been devised to each of the four, which could not be increased by the death of any of them.

Bagwell v. Dry, 1 P. Wms. (a) *Show*. 91; *Salk*. 238; {3 Ves. J. 629, *Morley v. Bird*.}

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One devised the residue of his personal estate to six persons, to each of them a sixth part, and made them executors. One of these executors and residuary legatees died in the lifetime of the testator. Per Lord Chancellor—This is a lapsed legacy as to one-sixth, and undisposed of by the will, the residuary legatees being tenants in common, and not joint-tenants.

Page v. Page, 2 P. Wms. 489; Mosel. 42, S. C.

A testatrix, after several legacies, bequeaths in these words: "All the rest and residue, &c., I give and bequeath to my two nieces M and E, daughters to my nephew W O, and A, his wife, whom I desire to be trustees for their children, to take care of their legacies for them, they being of tender age; and my will is, that my estate be equally divided between my two nieces M and E, whom I nominate and appoint my executrixes accordingly." One of the nieces died in the lifetime of the testatrix. Lord Hardwicke thought that the bequest to the two nieces did not make a joint-tenancy, for the words *equally divided*, though not annexed to the clause which gives the residue, can relate to that only; the consequence was, that it was a lapsed legacy.

Owen v. Owen, 1 Atk. 494.

A testator desired all the rest and residue should be divided between two. By the master of the Rolls—This must be understood to be *equally divided*; and by the death of one in the lifetime of the testator, his moiety shall not survive to the other devisee of the residue.

Peat v. Chapman, 1 Ves. 542.

A testator gave several legacies to A, B, C, D, E, F, and G, and afterwards directed all his real and personal estate to be sold, and after payment thereof of his debts and legacies, he ordered the residue to be paid to the said A, B, C, D, E, F, and G, *in proportion to their several and respective legacies therein to them bequeathed*. Two of the residuary legatees died in the testator's lifetime. Lord Thurlow was clear, that this was a tenancy in common in the residue, and therefore the shares of the two who died in the testator's life had lapsed.

Ackroyd v. Smithson, 1 Br. Ch. Rep. 503.

S M by his will gave the use of his personal estate to his wife for life, if she should so long continue his widow, and after her death to A, B, C, and D, share and share alike. C and D died in the lifetime of the testator. Adjudged, that the shares of C and D had lapsed, the testator having particularly appointed that each of his legatees should have a special share.

Man v. Man, 2 Str. 905.

A testator left a legacy to M, his executors, administrators, or assigns. At the time of making the will, M was dead. This is a lapsed legacy, notwithstanding the words are to M, his executors, administrators, and assigns; nor is parol proof admissible, that the testator knew of the legatee's death, as an argument, that he meant it should be transmissible to his personal representative.

Maybank v. Brooks, 1 Br. Ch. Rep. 84;] {9 Ves. J. 575.}

{A residue was bequeathed to A for life, and after her death legacies were given to B, or to her proper representative in case she should not be living at the death of A, and to four other persons or their representatives or representative. One of the four died in the life of the testator; and another sur-

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vived him, but died in the life of A. The legacy to the former lapsed, but that to the latter vested.

4 Ves. J. 418, *Corbyn v. French*.]

So, if A devise 1500*l.* apiece to the four children of J S, by name, to the sons to be paid at their age of twenty-one years, and to the daughters at eighteen, or days of marriage; and in case one or more of the aforesaid children shall happen to die before his, her, or their respective legacy or legacies shall become due, then such legacy or legacies shall go to the survivors of them; and in case three should die, then the survivor to take the whole; if one of the children dies in the lifetime of the testator, the survivors shall take that share, and it shall not be a lapsed legacy.

2 Vern. 207, *Miller and Warren*, decreed; 2 Vern. 611, *Ledsome and Hickman*, S. P. decreed; *Willing v. Baine*, 3 P. Wms. 113, S. P.

||So where testator, having bequeathed a life-interest in a share of the residue to A, directed, in case she died leaving issue, that the share to which A so deceasing should be entitled, *at or before* the time of her decease, to receive the interest on, should go amongst her (A's) children; A died in lifetime of testator; held, that her children were entitled to the share.

Rheede v. Ower, 3 Br. C. C. 240.]]

So, where a legacy of 50*l.* was given to A at twenty-one, or marriage, and 50*l.* to B at twenty-one, or marriage, and in the close of the will the testator added, *If any legatee dies before his legacy is payable, the same shall go to the brothers and sisters of such legatee*; A dying in the lifetime of the testator, it was adjudged no lapsed legacy, but that it should go to his sister.

2 Vern. 378, *Dorrel and Molesworth*; Vern. 425; 2 Vern. 653, 744, S. P.; *Hornsby v. Hornsby*, Mosel. 319, S. P.

||If there be a bequest to a person, payable at a certain period, which may happen either before or after the death of testator, with a declaration, if legatee die before legacy is payable that it shall go to the "survivors," if there be a class, or to some person or persons described; then if the legatee should die before the assigned period, although in the lifetime of the testator, the legacy does not lapse but goes according to the will. If, however, the period should arrive in the lifetime of the testator, and the legatee should survive *it*, and then die *before* testator, the legacy *does* lapse.

Willing v. Bain, 3 P. Wms. 113; *Humberstone v. Stanton*, 1 Ves. & B. 388; *Walker v. Maize*, 1 Jac. & W. 1; *Williams v. Jones*, 1 Russell, 517; and see *McClel*. 177.]]

So, where a man devised 100*l.* to A and B, the two daughters of his brother G, to be paid within a year after the death of his wife; viz. 50*l.* to A, and 50*l.* to B., if they shall be both alive at the time of payment; but if either of them should die before, then the said 100*l.* to the survivor of the said two daughters: one of the said two daughters died in the lifetime of the testator; and the only question was, Whether the surviving daughter should have the whole 100*l.*, or only the 50*l.*?—and *Rawlinson and Hutchins*, Lords Commissioners, were clearly of opinion that she should have the whole 100*l.*: they said, that by the first clause of the will it is a joint devise to them of the 100*l.*, in which case, if the will had gone no farther, if one had died, it would have survived to the other; then the viz. that comes after is only a severance of it, in case they should both live to

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the time of payment, which they did not; and then the last clause of the will, in case either died before the time of payment, is a new substantive devise of the whole 100*l.* to the survivor; and decreed accordingly.

Abr. Eq. 298, Scoolding and Green.

So, where one made his will, and, after several legacies, gave and devised all the rest, residue, and remainder of his personal estate to three persons, whom he thereby made his executors; one of them died in the lifetime of the testator; and the only question was, Whether the two surviving executors should have the whole; or whether the third part should be distributed, according to the statute, amongst the next of kin? and the master of the Rolls, on time taken to consider of the case, and citing most of the authorities, both out of the civil and common law, was of opinion, and decreed accordingly, that the two surviving should take the whole.

Ab. Eq. 243; Trin. 1730, Hunt & Berkley; Mosel. 47, S. C. [Frewen v. Relfe, 2 Br. C. C. 220.]

[A devise was of 500*l.* apiece to two of the testator's grandchildren by name; and if either of them died, his share to go to the survivor: and if both died, then their shares to go to their mother: one of them died in the lifetime of the testator, yet his share went by the express words of the will to the other grandchild, and was held to be no lapsed legacy.]

Northy v. Burbage, Gilb. Eq. Rep. 137.

A testatrix devised (*inter al.*) as follows: "I give and devise the several legacies and sums following, which I will shall be paid to the several persons hereinafter named; and that if any of those persons should die before the same become due and payable, I will that they, or any of them, shall not be deemed lapsed legacies;" then she particularized the several legatees, and says, "To Anne the wife of Richard Wensley, and to her executors or administrators, I give the sum of 50*l.*" Anne Wensley died in the lifetime of the testatrix, and her husband administered to her. Lord Hardwicke said, I am of opinion this is not a lapsed legacy. If a man devises a real estate to J S and his heirs, and signifies or indicates his intention, that if J S dies before him it should not be a lapsed legacy, yet, unless he had nominated another devisee, the heir at law is not excluded, notwithstanding the testator's declaration. So, in the bequest of a personal legacy to A, though the testator should show an intention that the legacy should not lapse in case A die before him, yet this is not sufficient to exclude the next of kin. But here, in case Anne Wensley dies before the testatrix, she expressly provides against the lapsing, for she says, *If any of these persons die before the same become due or payable, I will that they or any of them shall not be deemed lapsed legacies*; and subsequent to this, bequeaths to Anne and her executors and administrators 50*l.*, so that in case of her death before the testatrix, other persons are named to take, which distinguishes it from the case I put before; and in Dorrel v. Molesworth, the court laid a stress upon the words *was payable*, which are much the same with the present, *become due or payable*. And upon the authority of this case, his lordship decreed the legacy to the husband.

Sibley v. Cook, 3 Atk. 572.

A testatrix conveyed the residue of her personal estate to J W and seven other persons, equally to be divided between them, share and share alike; and she directed, "that in case of the death of any of them (the said residuary legatees) before her, then the share or shares of him, her, or them, so

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dying before her, should go to, be had and received by his or her legal representatives." J W died in the lifetime of the testatrix. His share was prevented from lapsing, and those persons are entitled to it as his legal representatives, who would have been entitled as next of kin to him at the death of the testatrix.

Bridges v. Abbot, 3 Br. Ch. Rep. 224.

A testator ordered the interest of the residue of his personal estate to be paid to his sisters for their lives equally between them, and in case any of them should die leaving issue, he directed his trustees "to pay and transfer the share and proportion of the *residuum* to which his sister so deceasing was entitled, at or before the time of her decease, to receive the interests and dividends thereon, unto and amongst all and every such child or children of such deceased sister, equally between them, share and share alike, at their respective ages of 21 years." One of the sisters died in the lifetime of the testator. Adjudged, that her children were entitled to her share of the residue.

Rheeder v. Ower, 3 Br. Ch. Rep. 240.]

||JOINT-TENANCY.—If there be a bequest to A and B as joint-tenants, and from some cause or other the bequest to A is defeated,—as by his death in testator's lifetime,(a) or by testator making a codicil, and revoking the bequest to him,(b) or by reason of an uncertainty in the description of A,(c) —B takes the whole; for "each was a taker of the whole, but not solely; for the whole was devised to both, and not a moiety to each."

(a) Buffar v. Bradford, 2 Atk. 220; Morley v. Bird, 3 Ves. 628, 631. (b) Humphrey v. Tayleur, Amb. 136. (c) Dowset v. Sweet, Amb. 175.

Of course the share of a tenant in common, who dies before testator, lapses.

Bagwell v. Dry, 1 P. Wms. 700; Owen v. Owen, 1 Atk. 494; Ackroyd v. Smithson, 1 Br. C. C. 503.

But if there be a bequest to persons as a *class*, as to the children of M C, equally to be divided among them, the children who are living at the death of testator are entitled to the whole, although a child or children may have died between the date of will and death of testator.

Viner v. Francis, 2 Cox, 190; S. C. 2 Br. C. C. 658; *sed vide* Martin v. Wilson, 3 Bro. C. C. 325, *cont.* but the former seems the better authority.¶

2. *Where a Legacy shall be said to be vested or lapsed, being to be paid at a future Time, to which the Legatee did not arrive.*

The rule and distinction which hath obtained in these cases, and which is agreeable to the rule (d) of the civil law, is, that if a legacy be devised to one generally, to be paid or payable at the age of twenty-one, or any other age, and the legatee die before that age, yet this is such an interest vested in the legatee that it shall go to his executor or administrator; for it is *debitum in presenti*, though *solvendum in futuro*, the time being annexed to the *payment*, and not to the *legacy* itself; but if a legacy be devised to one at twenty-one, or if or when he shall attain the age of twenty-one, and the legatee die before that age, the legacy is lapsed; and though, says my Lord Cowper, this distinction was at first introduced upon very slender reasons, and probably upon no other but from a constant willingness in the civil law to stretch in favour of a particular legatee against the residuary legatee, who went away with the whole surplus of the personal estate, yet, it being the rule of the ecclesiastical

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tical courts, it is fit that the same rule should be observed in Chancery, as this court has now a concurrent jurisdiction with the ecclesiastical courts in matters of this nature; and therefore there ought to be a conformity in their resolutions, that the subject may have the same measure of justice, in which court soever he sues.

This distinction is laid down in Dyer, 59; Leon. 177; Swinb. 311, 313; Off. Ex. 347; Godb. 182; 2 Vent. 342; Cloberie's case, 2 Chan. Cases, 155; 2 Salk. 415, pl. 2; Carth. 32; Vern. 462; 2 Vern. 673; Prec. Chan. 21; Abr. Eq. 294, 295; Bur. Rep. 227; Atk. Rep. 504; *2* Patterson v. Ellis' Executors, 11 Wend. 259; King v. Crawford, 17 S. & R. 118; Moore v. Smith, 9 Watts, 403; Lamb v. Lamb, 8 Watts, 184; Ziegler v. Grim, 6 Watts, 106; Seibert v. Butz, 9 Watts, 490. *§* (d) See the rule, Cod. lib. 6, tit. 53, sec. 5, and Roper, ch. 10, sec. 2. *§* 3 Ves. J. 543, 544, Mackell v. Winter; 5 Ves. J. 509, Bolger v. Mackell; 6 Ves. J. 239, Hanson v. Graham.}

But if legacies are given to children, and if any die, their legacies to survive, yet after twenty-one, or marriage, there shall be no survivorship, though the words are general.

Pasch. 7 Annæ, Strick v. Hudson, in Canc.

So, if a legacy of 50*l.* is devised to J S when of the age of sixteen years, and interest in the mean time, to be paid quarterly, this is a legacy vested, and shall go to the representative of the legatee, because it carries interest.

2 Vern. 673, Stapelton v. Cheales; Pr. Ch. 318, S. C.; Gilb. Ex. Rep. S. C. *§* In the following cases the legacies given were holden to be vested: Bass v. Russell, Tam. 18; Rope v. Sowerby, Tam. 376; Bull v. Johns, Tam. 513; Birdsall v. Hewlett, 1 Paige, 32; Lyman v. Vanderspiegel, 1 Aik. 275; Tazewell v. Smith, 1 Rand. 313; Collins v. Macpherson, 2 Sim. 87; Poole v. Terry, 4 Sim. 294; Watkins v. Cheek, 2 Sim. & Stu. 199; Thackeray v. Hampson, 2 Sim. & Stu. 214; Cudworth v. Hall, 3 Desaus. 256; Selby v. Morgan, 6 Munf. 156; O'Driscoll v. Koger, 2 Desaus. 295; Home v. Pillans, 2 My. & Keen, 15; Calhoun v. Thompson, 2 Moll. 281; Perry v. Rhodes, 2 Murph. 140; Chesnut v. Strong, 1 Hill's Ch. R. 123. *§*

{So, if it is directed that the interest, in the interval, shall be laid out at the discretion of the executors for the benefit of the legatee, the legacy vests immediately.

6 Ves. J. 239, Hanson v. Graham. But a direction for *maintenance* in the mean time has not the same effect. 3 Bro. C. C. 416; Pulsford v. Hunter, 6 Ves. J. 249.}

So, it will vest immediately if left to two infants when they shall attain twenty-one, and their father is appointed trustee for them during their minority.

7 Ves. J. 421; Branstrom v. Wilkinson.

Z I being possessed of certain stock, after bequeathing to her sister for life 30*l.* yearly out of the interest of it, bequeathed all the remaining interest to J L "for his second daughter that he shall have born, for her education till she shall attain the age of 21 years, and after she shall attain that age," to her, she being christened Z I; and in default of such issue over. She also bequeathed, after the death of her sister, the said 30*l.* a year interest money "to the said J L, till the said second daughter shall attain 21, and after she shall attain to that age," then to her. Both legacies vested in the second daughter, who was christened Z, though she died under 21: the former on the principle that the fund was to be employed during her minority for her benefit for the purpose of education, and was given to her father only as trustee; the latter on the principle that though the intermediate interest was not given for the benefit of the child, yet it was only an exception out of the whole property meant to vest in her: and when an absolute property is given, and a particular interest in the mean time, as until the

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legatee comes of age, and when he comes of age then to him, &c.{¹} the rule is that that shall not operate as a condition precedent, but as a description of the time at which the legatee is to have possession.

9 Ves. J. 225, *Lane v. Goudge*. {¹} 1 Burr. 228; *Goodtitle v. Whitby*, 6 Ves. J. 239, 246; *Hanson v. Graham*, 1 Dall. 175; *Kerlin's Lessee v. Bull*, *acc.* }

But if A devise in these words; viz., *I give 100l. apiece to the two children of J S at the end of ten years after my decease*, and the children die within the ten years, this is a lapsed legacy, and is so in all cases where the time is annexed to the legacy itself, and not to the payment of it; though it was objected, that this differed from the case where a man devises 100l. to J-S at his age of twenty-one; because it is a contingency whether he will attain to that age; but the expiration of the ten years is inevitable.

2 Salk. 415, *Smell and Dee*, pl. 2.

{So, where a testator directed that the income of his estate should be vested in stock, there to remain till the youngest child of his nephew by his present wife attained 18 if a daughter, or 21 if a son, then to be divided among the children in equal portions, the shares did not vest till the youngest child attained the age prescribed; there being no substantive gift. They could only claim under the direction to divide it, and, therefore, the time of division was annexed to the very substance of the gift.

12 Ves. J. 75, *Sansbury v. Read*. }

Again, one being possessed of a very considerable estate, part in Jamaica, and part in England, and being himself resident in Jamaica, made his will, and thereof appointed several executors, some for his estate in Jamaica, and others residing in England, for his estate here, and, amongst other things, devised in these words, viz., *I give and bequeath to J S, now under the custody of R D, the sum of 2000l. at the age of twenty-one years, to be paid by my executors in England*, and devised all the rest and residue of his estate to the plaintiff, and died. J S having attained the age of eighteen, made his will, and thereby devised this legacy, and all his estate, to the defendant. My Lord Chancellor held this a lapsed legacy, and that it was a vain endeavour in the defendant's counsel to construe it a present legacy, and therefore vested by the word *now*, because it was a plain description of the condition of the legatee, viz. *now* under the custody of, &c., for otherwise they must stop at *now*, which would be playing with the words; and though the word *paid* was made use of, yet it was plainly intended a designation of the persons by whom the legacy was to be paid, viz. by his executors in England, which was proper, he having two sets of them.

Abr. Eq. 295, 296, *Onslow v. South*.

[A testator gave all the residue of his personal estate, after debts and legacies paid, to trustees, until W N should attain his age of twenty-four years; from the age of twenty-one until the age of twenty-four to pay him thereout an annuity of 10l. yearly; and thenceforth in trust for him, his executors, administrators, and assigns. W N attained his age of 21, but died before his age of 24 intestate. It was decreed, that the representative of W N was entitled, as the right vested in him immediately upon the testator's death.

Love v. L'Estrange, 3 Br. P. C. 337.

J C bequeathed his personal estate to his wife for her life, and gave several particular legacies after her death, and then declared, that the residue at her decease, and after the legacies paid, should be divided between his relations

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A, B, C, and D.—A and B died in the lifetime of the wife, and after her decease, the administrator of A and B had a decree for their shares; for by Lord Talbot, the time of payment was future, but the right to the legacies vested upon the death of the testator.

Corbett v. Palmer, 2 Eq. Ca. Abr. tit. *Legacies*, (A), pl. 27.

A testatrix bequeathed her personal estate to her daughter, to be sold and disposed of by such parcels, and at such times, and in such manner as she should think fit, and out of the money arising by sale thereof to pay her debts; and the residue thereof she willed should be equally paid and divided to and between E S and T S, her two grandchildren, at such time as they should severally attain their respective ages of twenty-one, or sooner, if her daughter should think fit, and appointed her daughter sole executrix. Lord Hardwicke said, if it had rested upon the words, *at such time as they should severally attain twenty-one*, he should have thought that the legacies did not vest till then, and that it would have been the same thing as if the testator had said, “I give it them at twenty-one.” But what is the meaning of the testatrix’s saying *or sooner, if her daughter should think fit*? Not to hinder the legacies from vesting; but she considered her daughter as the natural guardian of her children, and left it to her discretion to accelerate it, if she thought proper. And as the testatrix, by the whole tenor of her will, left the mother a trustee only for the children, without giving her any power over the capital of the legacies, his lordship was of opinion that the legacy vested in E S and T S at the death of the testatrix.

Steadman v. Palling, 3 Atk. 423.

T A bequeathed the residue of his personal estate to his wife for life; “but if it shall happen that my wife shall depart this life, leaving no child or children at the time of her death, then my will is, that my trustees shall transfer the securities in which my estate shall then be vested to my two brothers, or, if either of them shall depart this life without issue, then to the survivor, and I hereby give the same to J A and H A accordingly.” J A and H A survived the testator, but both died in the lifetime of the wife. Lord Thurlow declared, that the interest vested in them as joint-tenants, and H A having survived J A, it belonged, subject to the wife’s interest for life, to the personal representative of H A.

Barnes v. Allen, 1 Br. Ch. Rep. 181. {Vide 3 Ves. J. 208; 5 Ves. J. 210.}

{J S bequeathed stock to A for life, and after her decease to B and C in equal moieties; and in case of the decease of either in the life of A, the whole to the survivor of them living at her decease. Both of them died during A’s life. It was holden that they took vested interests as tenants in common, subject to be divested only on the contingency expressed; and as that did not take place, the representatives of both were entitled.

5 Ves. J. 207, Harrison v. Foreman; 9 Ves. J. 233, Smither v. Willock, S. P.}

J M by will gave his wife the use of 800*l.* for life, and from and after her decease disposed of the same as follows: that is to say, to L H 100*l.*, to M M 100*l.*, to E and C H 100*l.* each, to M H 5*l.* a year. Then followed other devises, some of real, some of personal estate, among others to a servant 5*l.*, and then the legacy on which the question arose. “*I also give to J M, son of my brother G, the sum of 100*l.**” He then gave the rest and residue to his wife. The nephew J M (the legatee of the 100*l.*) died in the lifetime of the testator’s widow. His legacy was holden to be vested, and transmissible to his personal representative.

Monkhouse v. Holmes, 1 Br. Ch. Rep. 298.

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L made his will, and subject to his debts was a clause, by which he gave the whole of his estate to J M, in order to pay the income to his (the testator's) mother H L for life, and after her decease, he then gave to five persons the sum of 500*l.* each 3 *per cent.* annuities, and to J B and M his sister the sum of 100*l.* 3 *per cent.* annuities. All the rest and residue he gave to his executor, and empowered him to dispose of by will the *residuum* he would be entitled to after the decease of his (the testator's) mother. J B died in the lifetime of the testator's mother. His legacy vested immediately upon the testator's death.

Benyon v. Maddison, 2 Br. Ch. Rep. 75.

A testator bequeathed to his daughters the sum of 3000*l.* 5 *per cent.* navy annuities, and all the dividends and proceeds arising therefrom, to be equally divided between them, and all his estate at S, to be equally divided between them, *when they should arrive at twenty-four years of age*. One of his daughters died before she attained her age of twenty-four years. The master of the Rolls was of opinion, that according to the true rule of construction the word *when* could not be otherwise considered than as denoting the period of payment, and must not be deemed as a condition precedent, upon which the legacy was to vest, but merely postponing the payment of this 3000*l.* with the dividends thereon till twenty-four; and therefore declared, that the personal representative of the deceased daughter was entitled to a moiety of the 3000*l.* 5 *per cent.* navy annuities.

May v. Wood, 3 Br. Ch. Rep. 471.

{ A legacy was left in trust for the testator's mother and sister for life, and, after the death of the survivor, for all and every the child and children of his sister living at her death, share and share alike, each receiving his or her share of the principal thereof at 21; and if but one child should be so surviving, then in trust to pay the whole to such child at 21. Two children of the sister survived her, but died under 21. The legacy vested; there being a gift of the principal, and a postponement only of the payment.

3 Ves. J. 364, *Wadley v. North*.

But where the testatrix gave to A the dividends of 500*l.* stock, until he should arrive at the age of 32, at which time she directed her executors to transfer the principal to him, and A died before 32, the legacy of the principal was held not to be vested; for only the dividends were given, and there was no gift of the principal except in the direction for payment, which attached only on a person of the age of 32.

3 Ves. J. 363, *Batsford v. Kebbel*.

R B bequeathed the *residue* of his estate to trustees, upon trust to pay the dividends equally between his two great nieces (both of whom were then of age) until their respective marriages, and from and immediately after their respective marriages to assign their respective moieties to them respectively. The master of the Rolls, Sir R. P. Arden, held that the nieces had a vested interest in the residue before marriage, notwithstanding the general rule that an uncertain day of payment, or any circumstances that are to precede the payment of a legacy, will render it subject to condition; this case being taken out of that general rule by the circumstance that it was the case of a {} residue, and by the particular wording of the clause, which was in fact an absolute gift of the residue to trustees, in trust for the nieces, to pay the dividends to them until their respective marriages, and then to transfer the principal: for it was not merely a gift of the interest until marriage, and after the marriage a gift of the principal; but it was impossible

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not to see that these words were equivalent to a gift of the principal. His honour therefore construed it to be an absolute gift of the residue qualified only thus, that until their marriages they were not to have the actual possession. And one of the legatees being dead without having been married, he directed one moiety to be paid to her executors; but would not permit the other moiety to be paid to the other legatee, (considering that though it was a vested and disposable interest, it was not tangible till the event mentioned, and the court never accelerated the payment;) but he directed the dividends to be paid to her, with liberty to apply in case of her marriage or her death before marriage.

4 Ves. J. 399, Booth v. Booth. {} 5 Ves. J. 509, Bolger v. Mackell. Vide 4 Ves. J. 692, Reeves v. Brymer; 1 Bay. 369, Boone v. Sinkler.}

A legacy of 30*l.* was given to an infant to bind him an apprentice. The infant died before he attained a proper age to be bound an apprentice. It was decreed that this legacy was vested; and the infant being 17 years old, and having made a will, and named an executor, it was allowed to be a good disposition of the 30*l.*

Barlow v. Grant, 1 Vern. 255.

{So where a legacy of 100*l.* was given for the board and education of an infant until he should be fit to be put out apprentice, and then a farther sum of 100*l.* with him as an apprentice fee; the infant having attained 19, and not having been put out, was held entitled to the legacies.

5 Ves. J. 461, Barton v. Cooke.}

The giving of interest before the payment has been considered as evidence of an intention to vest the legacy. Hence, where a portion was devised to a child with interest, but not to be paid or payable, until the child should attain twenty-one years, or be married; and the child died under twenty-one and unmarried; it was decreed that the portion should go to the administrator of the child.

Collins v. Metcalfe, 1 Vern. 462.

So, in the case of Stapleton v. Cheales, *suprà*, if the testator had there added, that in the meantime, or until the legatee attain the age of twenty-one, he should have interest for the legacy at such a rate, from the time of his (the testator's) decease, this subsequent clause would explain the intent of the testator, so as to make the legacy, which was the principal, an interest vested, which shall go to his executors or administrators, though the legatee die before that age, because, if the principal were not due presently upon the testator's decease, there could no interest accrue to the legatee at the time.

Pr. Ch. 317.

Again, T B being possessed of a considerable personal estate, by his will gave J N 600*l.* to be laid out in the names of his executors, as counsel should advise, in the purchase of some advowson or advowsons, or other spiritual preferment for him, and until the same should be purchased, ordered his executors to place out the 600*l.* at interest in their names, and continue the same until such preferment could be had, and to pay J N such interest for his maintenance; and if there should be a remainder after the payment of the purchase, directed the same to be paid to him; but if he should afterwards lend him any money upon bond or note, it should be deducted out of the 600*l.*, but without interest. T B afterwards by his will directed, that if his brother-in-law, R N, should be living at his decease, he thereby

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charged R N's three sons, viz., the said J N, and T, and R, to pay their father yearly during his life 20s. out of each of their legacies; and then directed that if J T and R N should die before their legacies should become payable, that then the legacies of them or him so dying should not be paid, but fall into the *residuum* of his personal estate, and be applied as the same was directed. J N died about a year after the death of the testator, being at that time about twenty-five years of age. The 600*l.* given him by the will was never paid him, nor was it ever laid out according to the directions of the will. The question was, Whether the 600*l.* given to J N by this will, was transmissible to his administratrix with the will annexed? Lord Hardwicke was of opinion, that it was: for it is payable at the death of the testator, and if J N had, instantly upon the testator's death, found out a purchase for the money to be laid out in, he might have demanded it. There is no suspension of the interest arising from the legacy, till the advowson can be purchased; but, on the contrary, interest is to be paid on the legacy in the mean time, and that to J N himself. And as to the clause respecting the devise over, the words of it may well be answered by construing it to mean no more than that the legacies given to the nephews should sink into the estate in case any of them had happened to have died in the testator's lifetime.

Neale v. Willis, Barnardist. Ch. Rep. 43.

A testator bequeathed to C F, when he shall have attained the age of 25 years, 1000*l.*, which he empowered his four sons, his executors, guardians, and trustees of the will, to lay out on such securities as they should think fit, and the interest or income thereof to be for or toward the education of the infant as they should think fit, as also part of the principal to put him apprentice, and the remainder to be paid him when he should have attained his age of twenty-five, and not before. The question was, Whether the time of twenty-five years was put in, in order to postpone the vesting of the legacy, or only to postpone the payment of it? Lord Hardwicke held, that it was only to postpone the payment. Where a testator gives interest in the mean time, he gives a property in the principal, unless something arises on the face of the will to take off the force of it. And this case is still stronger than that, there being a direction to dispose of part to put him apprentice, to which a court of equity would compel the executors, it being obligatory upon them; and their discretionary power being confined to the securities, the executors might have taken the greater part, almost to the extent of the whole, to place him out; which shows it arises from his property. In the case of the Attorney-General v. Hall, in Lord King's time, where the testator gave a legacy to one for life, and so much as he did not dispose of gave to a charity, it was held, the legatee might dispose of the whole: so, here is a direction very near to the whole of the principal: which can arise only from his having the property.

Fonnereau v. Fonnereau, 3 Atk. 645; 1 Ves. 118, S. C.

J P bequeathed to his godson T, the plaintiff, the sum of 50*l.* to be paid to him at the age of twenty-one years, or day of marriage, which should first happen, the same to be put out at interest in the name of his executors and administrators, the interest arising therefrom from time to time to be applied towards his maintenance and education; and if he should die before 21, or marriage, he gave the legacy to his executors in trust for the poor of S, and appointed the defendant his executor. The defendant proved the will, retained 50*l.* for the payment of the legacy to the plaintiff, and paid

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over the residue (after payment of debts and legacies) to the residuary legatees, and afterwards became bankrupt, and obtained his certificate. By the master of the Rolls, this was a vested legacy, and as such, might have been proved under the commission. The giving interest always vests personal legacies. It was therefore vested, subject to be divested, on the legatee's dying under 21, and although it might not have been provable as a debt, yet the guardian, upon petition, would have been admitted to prove it. The certificate therefore bars it.

Walcott v. Hall, 2 Br. Ch. Rep. 305.

A testator devised in these words: "I devise to my daughter E H the sum of 200*l.* to be paid her at the time of her marriage, or within three months after, provided she marry with the approbation of my two sons W and S H or the survivor of them; and my will is, that my said daughter E shall yearly receive and be paid, until such time as she shall marry, the sum of 12*l.*, free and clear of all taxes and impositions whatsoever." And he willed that his leasehold estate called —, should stand charged with the payment of the 12*l. per ann.*, and likewise with the payment of the 200*l.* when the same should become due, and devised the said leasehold premises, and his whole personal estate to his two sons, and made them executors. E died after 21, but without being married, and her administrator claimed the legacy of 200*l.* But Lord Hardwicke was of opinion, that it was not a vested legacy: for that when the time annexed to the payment is merely eventual, and may or may not come, and the person dies before the contingency happens, he could find no instance where it had been held, that the legacy should in all events be paid: that the rule as to vesting is founded upon another rule, *certum est quod certum reddi potest*, and it is plain the testator did not regard the point of time, but the fact that was to happen, *the marriage*, which makes it a legacy on a condition, and cannot be demanded till the condition is satisfied; that as to what had been insisted, that the testator's giving 12*l. per ann.* to E till the contingency of her marriage, is in the nature of interest for the 200*l.*, and that from thence it appears to be his intention, that the legacy should vest in the mean time; whenever this doctrine has been allowed, the payment of the principal hath been certain, and so not similar to the present case, because, here, this is not meant as interest, for it is an annuity of 12*l. per ann.* charged upon, and issuing out of an estate.

Atkins v. Hiccocks, 1 Atk. 500.

The above authorities, it must be observed, are applicable only where the legacies arise out of a fund *merely personal*: for with respect to interests arising out of land, these rules are totally different; for whether the land be the primary or auxiliary fund, whether the legacy be given with or without interest, the *general* rule is, that charges upon land payable at a *future* day shall not be raised, where the party dies before the time of payment. Therefore where T S by will gave his daughter 1000*l.* to be paid by his executor, at her age of 21, or marriage, which should first happen, willing the same to be raised out of the rents and profits of his lands; and further willed, that in case his son should die before his age of 21 years, or without heirs of his body lawfully begotten, then from and after the death of his son, he gave all his said lands, &c., to the defendant, he making up his daughter's portion 2000*l.*; and the daughter died soon after the testator's death an infant and unmarried; upon which her mother took out letters of administration

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and claimed the 2000*l.*; it was decreed, that she was not entitled to any part of it, for it appears that the intention of the testator was that it should be for a portion, and it is expressly called a portion in the will: it is no personal legacy, but money to be raised out of the rents and profits of lands, and the payment is expressly to be at 21 years, or marriage.

Duke of Chandois v. Talbot, 2 P. Wms. 612; Bateman v. Roach, 9 Mod. 106; Smith v. Smith, 2 Vern. 92.

A having entailed his lands on his son, subject to a mortgage, devised his leasehold and personal estate for the payment of his debts and legacies; directing, that if his personal estate was applied to pay off his mortgage, the same should be kept on foot to make good his daughter's portion, and bequeathed to his daughter 3000*l.* to be paid her at 21, or marriage, if married with consent; if not, then but 1000*l.* The daughter died under age, and unmarried. It was decreed, that this being a portion and charged upon land, should extinguish in the land for the benefit of the heir. Besides, the devise being of 3000*l.* at 21 or marriage, which marriage was to be had by consent, it did not vest in the daughter, but was contingent.

Yates v. Phettiplace, 2 Vern. 416.

A devised his lands to his eldest son B in fee, and added, "But my will and mind nevertheless is, that B shall pay out of the lands so devised to him the sum of 600*l.*, viz., to my daughter M 200*l.* at her age of 21 years, and to my son J 200*l.* at his age of 21, and to my son N 200*l.* at his age of 21; and if my son B shall die before he attain the age of 21 years, then my will is, that my son J shall not have the 200*l.* settled on him, but that it shall be paid to my daughter M and son N, to be added to their portions, and J to have all the estate given to B, paying the 600*l.* as before expressed; and my said children shall be allowed 4*l.* *per ann.* maintenance for every 100*l.* till their several portions are paid." B died before 21; the plaintiff married M and has issue by her. M dies two months before her age of 21. The question was, Whether this was not a subsisting charge upon the land, and an interest so vested in M as to entitle the plaintiff, as her administrator, to the legacies? Lord Chancellor dismissed the bill as to the demand of both the legacies, because there were no words in the will which vested any interest in those legacies before the age of 21 years; and as to the other 100*l.*, that was governed by the other legacies.

Carter v. Bletsoe, Pr. Ch. 267; 2 Vern. 617, S. C.; Gilb. Eq. Rep. 11, S. C.

In the case of Stapleton v. Cheales, *supra*, it is said, if such portion were to arise out of lands or a term for years, though it were limited to the party *generally* to be paid, or payable at such an age, there, for the benefit of the heir, the portion should sink, and not go to the representatives of the party so dying.

Pr. Ch. 318; {3 Ves. J. 135, Pearce v. Loman; Ibid. 543, 544, Mackell v. Winter.}

One has two sons, R and T, and being seised in fee of the manor of B, (which manor was in mortgage,) makes his will, thereby devising 1000*l.* to his younger son T, (being then about a year old,) to be paid to him when he should arrive at his age of 21, out of the manor of B, with a power to the executors by felling timber growing on the estate to raise such moneys as his personal estate should fall short of, for the payment of his debts and legacies. The younger son T dies about the age of two years, and the eldest son R about the age of six, upon which the estate comes to the uncle, and

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the mother having administered to the younger son, claims the 1000*l.* legacy. But Lord Commissioner Jekyll said, that it was determined about the latter end of Lord Somers's time, in the case of *Yates v. Phettiplace*, *supra*, that where one by will gave a portion to a child out of a real estate, payable at a future time, and the child died before that time, the portion should sink; nay, that it should sink as well for the benefit of an *hæres factus*, as of an *hæres natus*, for the former is substituted by the testator in the place of the latter; and the true reason is, that the legacy being given as a portion, when the child dies before the portion is payable, there is no occasion for it; and equity will not countenance the loading of an heir for the benefit of an administrator. And it being objected, that though this might be true as to a portion given out of a real estate, yet here the legacy was a charge also upon the personal estate, and therefore that if the real estate was not sufficient for the payment of the said legacy yet the personal estate should be liable; and that this was the plainer from the executor's being empowered to fell timber for the payment of such of the legacies as the personal estate was not sufficient to pay; the court said, this must be intended such of the legacies as the personal estate was liable to pay; it is true, were the legacy chargeable on the personal as well as real estate, that so much thereof as the personal estate would extend to pay, should go to the executors or administrators of the child; but this is a charge only upon the land.

Jennings v. Looks, 2 P. Wms. 276.

Sir R R settled all his lands in trust for the payment of debts and portions to his children, as he should direct by his will. Afterwards, he makes his will, and gives 1000*l.* apiece to his five sons, payable at their respective ages of 21, with interest in the meantime, and bequeaths all his personal estate to his lady for her sole use and benefit, and makes her executrix. Sir R dies, and afterwards R, one of the sons, dies under the age of 21, and Lady R takes out administration to him, and Mrs. W, the defendant, his sister, sues her in the spiritual court, (she being in possession both of the real and personal estate of Sir R R) for a distribution of the 1000*l.* bequeathed to her brother by her father's will. Lady R files a bill, and moves for an injunction to the spiritual court, because the portion of the son was charged on the real estate, and therefore ought not to be sued for in that court; and the whole personal is given to the plaintiff. Lord Chancellor granted the injunction.

Rich v. Wilson, Mosel. 68.

M T being entitled to the reversion of an estate after the death of his wife, "devised it to C D and his heirs, so as he should pay to his sister E O the sum of 100*l.*, within six months after the reversion came into possession, and devised the rest and residue of his personal estate, all his debts and legacies before bequeathed being first deducted, to C D and another, whom he made his executors." E O died in the lifetime of the wife, and upon the death of the wife E O's representative brings a bill against C D for the 100*l.* It was insisted by the plaintiff's counsel, that the legacy is vested, and only the time of payment postponed for the convenience of the estate, as it was a dry reversion. But Lord Hardwicke thought that the gift of the sum of money is only by direction for the payment; and that it cannot be said, this is an original gift so as to vest the legacy, and the payment only postponed to a future time. Another distinction was attempted, that the time of payment was not taken from the nature of the legacy, or the

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circumstances of the legatee, but from the nature of the estate, and that therefore this is different from all the cases. But Lord Chancellor said, if he should give in to this reasoning, he should overturn the cases of portions, or of other sums bequeathed; for that of late years it had been holden, that where a sum of money is given by way of portion, or as a general legacy charged upon land, if the party dies before the time, it cannot be received. In the present case there is no contingency, the time is single, within six months after the death of the tenant for life, when the reversion came in possession, so that it never could be raised, because the person died before the time for raising it.

Hall v Terry, 1 Atk. 502. Lord Hardwicke speaking of this case, in the *Attorney-General v. Tunstal*, says, there, the whole of the gift depended upon the time of payment.

T C devised all his land to J C and J P in trust, that they should sell his lands in M and P, and out of the purchase money pay his debts; and as to the rest of the lands in trust to receive the rents, and to make leases for 99 years determinable on three lives, and therewith to pay his debts and legacies, then to the use, &c.; and he bequeathed a legacy of 500*l.* to his nephew T P to be paid at his age of 21, or marriage. The nephew T P died before the age of 21, and unmarried. His administrator claimed this legacy as being a vested interest, and transmissible. After a long argument, Lord Hardwicke said, that the only inducement he had to suffer so long a debate was, in order to receive satisfaction as to the point which had been insisted upon in relation to this legacy being chargeable on a mixed fund, consisting of real and personal estate. He said, that was a difficulty which always stuck with him, and it was something very extraordinary, that the real estate which was only an auxiliary fund to the personal, should, in cases of this kind, be chargeable in a different manner, and not be made liable to the same rules and determinations with the primary security, the personal estate; but, he said, he found the resolutions so strong, that there was no difference between a charge on the real estate only, and a charge on the real and personal estate too; that he could not, at that time of day, think of determining in a different manner. He said, it was very clear, that charges on land, payable at a future day, could not be raised, if the party died before the day of payment; that there was no difference at all whether that charge was created by deed or will; nor, whether it was provided by way of portion for a child, or given merely as a legacy by collateral relations, or others; and this was the case in the *Duke of Chandos v. Talbot*, and *Jennings v. Looks*, in which he was counsel, for in neither of them was the provision made by a parent. That the true reason, why legacies charged on land, payable at a future day, shall not be raised, if the legatee dies before the day of payment, is, that the court will govern themselves, as far as is consistent with equity, by the rules of the common law. In the case of personal estate, the rule is the same here as in the civil law, that there may be a uniformity of judgments in the different courts: but in case of lands, the rule of the common law has always been adhered to; as, suppose a person should covenant to pay money to another at a future day, if the covenantee (*a*) dies before the day of payment, the money is not due to his representative. The same rule holds in a promise to pay money, &c.

Prowse v. Abingdon, 1 Atk. 482. So, *Boycot v. Cotton*, 1 Atk. 555, 556, in which the authority of *Jackson v. Farrant*, 2 Vern. 424, and *Cave v. Cave*, *Ibid.* 508, is denied. (*a*) But surely the law is not so, nor ever hath been so. That executors or ad-

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ministrators shall have a writ of covenant for a personal thing, see F. N. B. 145, D, 146, D; Reg. 165 b; Goss v. Nelson, 1 Burr. 227.

M C devised to G C, his heirs, executors, and administrators, all that her messuage in Great Lincoln's Inn Fields, with all her furniture, &c., and all her real and personal estate not otherwise disposed of, to the intent that, out of the said real and personal estates so devised, her several legacies might be paid. She then gave to T L 2000*l.* in trust for the use of his daughter M, and declared that he the said T L should, until the said M should attain the age of eighteen, or be married, which should first happen, place out the 2000*l.* at interest upon good security, and also should from time to time put out at interest the interest of the said sum, as the same should arise to a fit sum for that purpose, and should pay the 2000*l.*, with the interest and produce thereof, to the said M for her own use, upon her attaining her age of eighteen, or marriage; she likewise directed the 2000*l.* to be paid to T L, the trustee, within one year and a half after her decease. T L died in the lifetime of the testatrix; M died about half a year after the testatrix, unmarried. Lord Chancellor was of opinion, that, as the infant died before the time of payment to the trustee, the legacy was not raisable for the benefit of her representative. If she had survived the year and half, (for the death of the trustee made no difference,) she would have been entitled to the legacy; or, if she had died *after the term aforesaid*, and before eighteen or marriage, her representatives would have been entitled; but if this had been merely personal, as she died within the year and half, her representative could not have been entitled, for the whole gift is in the direction of the payment, which makes that the substance. In the present case, his lordship said, it is not a legacy merely out of personal estate, but out of both funds, and the real charged in the first place, by the testator's express direction, viz. her estate in Great Lincoln's Inn Fields. And this construction is more agreeable, as the sum was intended clearly as a portion for M; and the court always goes as far as it possibly can to hinder the raising of portions out of land for the benefit of representatives.

Van v. Clarke, 1 Atk. 510.

A S (*inter al.*) gives to three trustees 8000*l.* upon trust, that they should dispose thereof in the purchase of lands of inheritance in fee-simple, to be settled to the use of her grandson T M, and the heirs of his body; and for default of such issue, directed the trustees to convey the same to the Drapers' Company, upon trust, that they should, within three months after the estate should be conveyed to them, by mortgage, or sale of some part thereof, raise and pay to E L her nephew 2000*l.*, which she bequeathed to him, in case of the death of her grandson without issue. E L died in the lifetime of the grandson; and the grandson died a few years afterwards, under the age of twenty-one, and without issue. The question was, Whether this legacy of 2000*l.* was lapsed, as E L died before the contingency happened, or, whether it was transmissible to his personal representative? The master of the Rolls held, that it was lapsed: that the 8000*l.* being directed to be laid out in land, must be considered in equity as land: that the testatrix herself considered it as land, because she directs the 2000*l.* to be raised by mortgage or sale, which shows it must be out of land: that as the legacy therefore is to be paid out of real estate, it was within the general rule, and ought to sink in favour of the heir at law.

Attorney-General v. Milner, 3 Atk. 112.

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Legacies were given to infants out of land (charged generally with debts) payable at twenty-one, with interest at 3 *per cent*. One of the infants dying before that age, Sir L. Kenyon, after great consideration, decreed that the legacy lapsed.

Gawler v. Standewicke, 1 Br. Ch. Rep. 106, note.

A testator gave legacies to his natural children, payable at the age of twenty-one, to be raised by the means thereafter pointed out: he then directed an estate to be purchased, a sum to be raised for maintenance of two of his natural children, upon whom he had settled the estate he directed to be purchased, and ordered the residue of the rents and profits of the said estate to be applied to raise the legacies, and in default thereof, made the estate liable. One of the legatees died an infant. Lord Chancellor said, he thought at first it was a mere personal legacy; but he doubted, upon the whole, whether it must not be considered as charged upon the land, the testator having referred to the manner in which it was to be raised, and having afterwards provided for the payment of it, by charging his real estate. The moment the money ought to be laid out in land, it must be considered as a real fund, and therefore the legacy fell within the general rule, and was lapsed.

Harrison v. Naylor, 3 Br. Ch. Rep. 108.

This rule, however, that charges upon land payable at a *future* day shall not be raised, where the party dies before the day of payment, is subject to many exceptions, as, where the time of payment is postponed from the circumstances, not of the person, but the fund.

A bequest ran in these words: "I give and bequeath unto each of my said daughters the sum of 1000*l*. to be raised and to be paid unto them severally and respectively immediately after the decease of my wife, out of the rents, issues, and profits of my manors, lands, tenements, and hereditaments in W, or by sale or mortgage of the same, or a competent part thereof, together with interest for the said several sums of 1000*l*., after the rate aforesaid, from the decease of my said wife, until the said sums shall be duly paid to my said daughters, or their respective executors, administrators, or assigns: and my further will is, that in case either of my said daughters shall depart this life before me, then the survivor of my said daughters, her executors, administrators, and assigns, shall have and receive all and every the sum and sums of money herein by me before devised out of my said lands, to be raised in the manner herein-before appointed; and in such case, the part of the daughter so dying shall not cease or sink into the estate for the benefit of my heir, but shall remain and be raised for the benefit of my surviving daughter." The testator died, and left one son, T, and two daughters, D and J. In 1719, after the death of the testator, D intermarried with Sir W L: D died in 1736: A the mother died in the year following: upon which Sir W L brought his bill against T and J, in order to have the sum of 1000*l*., mentioned in the will, raised out of the estate, which was thereby charged with it. Lord Chancellor held, that it ought to be raised: that the testator had postponed the raising of it till after his wife's decease, not from the circumstances of the person, but because it did not suit the circumstances of his estate, that it should be raised before: that the intention of the testator, that it should vest, was shown most strongly in the clause, where he gives the whole to the surviving daughter: that that intention was further manifested, by his using the words *executors, administrators, and assigns*, imme-

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diately preceding the clause of survivorship; for his meaning was, that in case the daughters should die before the portion was raised, the executors should be entitled to have the 1000*l.* raised off the estate. On the whole, his lordship said, he thought the intention extremely clear under the will, that the portion should be raised, and that the postponing the time of payment was only for the convenience of the estate, because it would have distressed the son to have raised it in the mother's lifetime, before her jointure fell in.

Lowther v. Condon, 2 Atk. 127, 130; *Barnard*. Ch. Rep. 327, S. C.

J S having a considerable real and personal estate, devised as follows: "I give and bequeath unto my daughter M, at her age of twenty-one, or day of marriage, which shall first happen, the sum of 2500*l.*; and my will and meaning is, that if my son A should die without issue male of his body then living, or which may afterwards be born, that then my said daughter should have and receive at her age of twenty-one, or day of marriage, which shall first happen, the further sum of 3500*l.*, over and above the said sum of 2500*l.*; but in case the contingency of my said son's dying should not happen before the said age of my daughter, or her day of marriage, that then she shall receive and be paid the sum of 3500*l.* whenever it may after happen." Then he devises his real estate to his son in tail, and for want of such issue, remainder to his brother in fee; and then goes on thus: "And my will and meaning is, that the lands and premises hereby devised shall be liable to, and chargeable with the payment of the said sum of 3500*l.*, whenever it shall become due and payable;" and directs, that in case of failure of issue of his son, his daughter, her heirs or assigns, should join in a surrender of some copyhold lands to the use of his brother, otherwise the legacy of 3500*l.* to become void.—The daughter marries, having attained her age of twenty-one, and dies in her brother's lifetime, leaving the plaintiff, her husband, who took out administration to her, and then her brother dies without issue male. The question was, Whether the legacy of 3500*l.* should be raised out of the land, the personal estate being deficient; and whether it was such an interest in her as would go to the plaintiff, her administrator? Lord Chancellor said, that three things were by the will necessary to happen, to entitle M to this legacy of 3500*l.*, viz., the death of A the son without issue male; marriage, or her attaining the age of twenty-one; and that all three had happened; and that though it is to be raised out of land, it remains money still; and though she has not lived to receive it, yet, the contingency having happened, it must go to her husband, who is her representative, and who may well be thought to have married in contemplation of this additional fortune of 3500*l.*, though depending upon a contingency.

King v. Withers, Ca. temp. Talb. 117; 3 P. Wms. 414, S. C.; 4 Br. P. C. 228, S. C.

T H devised copyhold lands to his wife and her assigns for her life, and after her decease to his son S, till his grandson, the defendant T, attained the age of twenty-three, and no longer; and so soon as his grandson attained that age, then he gave them to his said grandson, his heirs and assigns for ever, on condition that the said grandson, his heirs or assigns, should pay or cause to be paid to his granddaughter E H the sum of 60*l.* within two years after his said grandson attained his age of twenty-three; and if his said grandson should happen to die without issue of his body, then he gave and devised the same to his son S H and his heirs, on condition of paying

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the sum of 100*l.* to E H within one year after his son S H enjoyed the said premises by virtue of this last devise; and his will further was, that if his said grandson or son should make default in payment of the said sum of 60*l.*, then it should be lawful for his said granddaughter E H, her executors and administrators, to enter into the said premises, and the rents thereof to receive and take till the 60*l.* should be paid.—E H married the plaintiff, and lived till after the defendant, her brother, attained his age of twenty-three, but died before the two years were expired after his attaining that age. It was decreed, that the 60*l.* was a vested legacy, and transmissible to E's representative: that the testator so appointing two years after his grandson attained twenty-three, for raising the 60*l.*, seemed to be done merely *for the convenience of the estate*: that if T the grandson had died within the two years, (for if he had died after, E would have been entitled only to the 60*l.*,) and the money had not been paid, and he had left a son, and the son had likewise died within the two years, and then E had died before the year was out which the testator had allowed to S H for payment of the 100*l.*, E's representative would clearly have been entitled to the 100*l.*: that the case of *King v. Withers*, *supra*, was directly in point for that purpose; and thence it might be argued, that it was the intention of the testator, that his granddaughter E should have one or the other. The devise was further considered as a conditional limitation, and therefore whatever right E gained thereby was a legal estate.

Emes v. Hancock, 2 Atk. 507.

A testator bequeathed unto each of his daughters A and M C 300*l.*, to be paid them by his executor J C, when he shall attain his age of twenty-six; and then went on thus: "but in regard my two daughters are already provided for by lands settled on them by me, and my late wife, and by legacies left them by their grandfather, and which I have paid to them; it is my intention that they shall not be entitled to any interest (a) for the said sums to them given by me as aforesaid: however, for the better securing the said several sums of 300*l.* given to my two daughters, my will is, that my two closes in S shall stand respectively charged with my personal estate, and be liable to the payment of the said several sums of 300*l.* to my two daughters at the time above mentioned, with a power to enter and hold till payment of principal and interest, from the time it shall become due;" and after the payment thereof he devised the premises to his son J C in fee, whom he makes executor and residuary legatee. Both the daughters arrived at their age of twenty-one, but died before J C attained his age of twenty-six: one of them married, and left two children; the other died unmarried, but by will gave the 300*l.* to her sister. Lord Hardwicke held these to be vested legacies, for that the time of payment was postponed, in order to prevent the burden of interest from falling upon the estate of the son till he attained his age of twenty-six. Besides, upon general rules of law, the legacies are vested, for the persons entitled might have had a legal remedy by ejectment. The words are, *with a power to enter and hold till payment*. This is a right of entry given them to hold the land in the nature of a tenancy by *elegit*, and is a chattel interest. The charge is not an equitable charge, but a legal one.

Sherman v. Collins, 3 Atk. 319. (a) These words, Lord Camden observed, operated as words of gift.

A testator devised all his real and personal estate to T B for life, and afterwards to his children, and for want of such issue, to his sister Martha

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for life, and after her decease, to J B for life, and then to his children, and for want of such issue, part of his real estate called M, to W and his heirs; the other part called C, to the defendant Foy and his heirs, paying out of it, when it falls, 500*l.*; viz., 100*l.* to S D, 150*l.* to W and O, 100*l.*, to N, and 50*l.* apiece to Elizabeth, Mary, and Margaret, the three daughters of his sister. J B died without issue, and his sister Martha died in his lifetime. Margaret, one of the three daughters, married the defendant G, and died two years after the testator. T B died without issue two years after Margaret, whereby the defendant Foy came to the possession of the estate devised to him and his heirs. The defendant G having taken out administration to his wife Margaret, assigned to the plaintiff the 50*l.* payable to his wife; and the question was, Whether this legacy was vested in Margaret? The court held that it was; for first the remainder vested immediately by the death of the testator; for Foy might sell or devise it, and, consequently, the 50*l.* is vested in those to whom it was payable; for if he had sold it, it must have been subject to the charge laid upon it by the testator. And farther, the estate and the charge upon it pass together, and the devisee must take it *cum onere*; for as it was the testator's intent that Foy should have the estate, it was as much his intent, that he should pay the money out of it when he had it.

Hutchins v. Foy, Com. Rep. 716.

J H devised part of his real estate for payment of debts, the surplus to his mother, and another part to his mother for life; and afterwards to W R his heirs and assigns; he and they paying thereout legacies to several persons, which sums he willed to be paid within 12 months next after his mother's decease, charging his land therewith accordingly. After the testator's death the mother entered, and possessed the real estate, and died. A legatee of 100*l.* survived her but a month, and his executors bring a bill for the legacy against the devisee of the real estate, who was not the heir at law. Lord Hardwicke held, that it was a vested legacy, and transmissible to the representatives; that the twelvemonth clause was not intended to suspend the vesting, and make it contingent; but only as a reasonable time to the devisee for payment, which he could not do before he was possessed. And his lordship cited the following case of Wilson v. Spencer, Jan. 31, 1732, which was determined on that ground only. There, the testator directed the payment of his debts and legacies by and out of such part of his personal estate as should not afterwards be specially devised; and if that proved deficient, then out of the real estate; and that his executor should within twelve months after his death levy and raise sufficient to pay 1000*l.* to his younger son, to be paid to him immediately when raised, charging all his real estate, if the personal estate not specifically devised proved deficient. The younger son died before the expiration of the year: his executors bring a bill for it against the eldest son, the devisee for life of the real estate, with a remainder to his sons. The defendant admitted it was intended for the brother's advancement; but insisted, that he dying unmarried before it was extinguished, and not to be raised; the personal estate was admitted to be deficient, and it was therefore chargeable on the real estate, and to take the fate out of real estate. The court held, it should be raised, which is an authority, that the year for raising was not sufficient to prevent the legacy from vesting. Upon the authority of Wilson v. Spencer, his lordship held, that the legacy in the principal case should be raised and paid with interest

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at 4 *per cent.* from a year after the mother's death, and that the plaintiff must have his costs.

Hodgson v. Rawson, 1 Ves. 44.

A testator, seised of the reversion of an estate, expectant upon the decease of his aunt, devised this estate to his wife for life, remainder to J D in fee; subject to the payment of 200*l.* to his daughter E, six months after his wife's decease; with power for the daughter in default of payment to seize the rents. E died in 1750; the mother in 1754; the aunt in 1760. Lord Northington held this a vested interest in the daughter, and decreed the 200*l.* to be paid with interest from the decease of the aunt, it appearing, from the words of the will, that the son was to pay this 200*l.* out of the rents of the estate.

Thompson v. Dow, 1 Br. Ch. Rep. 193, note. See Manning v. Herbert, Ambl. 575, S. P., upon nearly the same words.

A devised lands to M B, his sister, in fee, paying 100*l.* *per annum* to his wife for her life, and also several legacies to several of his nephews and cousins within 12 months after the death of his wife, with a proviso, that in case his wife should at his death have a child or children who should live to 21, he revoked the devises and bequests, except the annuity to his wife, and gave all his said lands, &c., to such child or children, his, her, or their heirs. Several of the legatees died in the lifetime of the wife, who had no child at the testator's death. It was decreed that their legacies were transmissible to their representatives.

Tunstall v. Brachen, Ambl. 167; 1 Br. Ch. Rep. 124, note, S. C.

W N devised his freehold estates to his son J in tail, remainder to his daughter P in tail, remainder to his daughter E for life, remainder to her son J N, and his heirs for ever, upon condition of his paying to his eldest sister, the plaintiff's mother, 100*l.* at or soon after his being possessed of the premises, and for non-payment the estate should be to the plaintiff's mother, &c. J, P, and E are all dead; the plaintiff's mother is also dead; and since her death, the remainder in fee is vested in J N, in possession. The plaintiff, as his mother's executor, is entitled to have the 100*l.* raised.

Embry v. Martin, Ambl. 230.

H S devised two houses to his wife for life, and immediately after her decease, to the defendant in fee, he paying thereout to the testator's cousins H T and T T 20*l.* apiece, within three months after the death of his wife. The testator died in 1752, and his wife entered. T T survived the testator, and by will gave the legacy to the plaintiff Jeal, but appointed no executor. The plaintiff Jeal obtained administration. H T survived the testator, and died in 1758 intestate. The testator's widow died in 1767, and E T entered. It was insisted by the defendant, that as T T and H T died in the life of the wife, the legacies were not payable. But Lord Bathurst declared, that they were vested, and transmissible to their representatives, and a charge upon the premises devised to E T.

Jeal v. Tickener, 1 Br. Ch. Rep. 120, note.

A testator devised real estates to trustees, to the use of T S M for life, remainder to trustees, &c., remainder to his first and other sons, in tail-general, remainder to daughters in tail-general, remainder to his wife for life, remainder to A W, his heirs and assigns for ever, with a proviso, that A W, or his heirs, if he or they should actually come into possession by virtue of the limitation in the will, should pay to his daughter E W 2000*l.*; and he

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thereby charged all the premises with the payment of the 2000*l.* to the said E W, at the end of two years next after the said A W or his heirs should come into possession as aforesaid. After the death of the testator, a commission of bankruptcy issued against A W, under which the defendant was chosen assignee. T S M and the testator's widow both died, the former without issue; upon which the reversion in fee-simple vested in the defendant, who entered and enjoyed two years. E W died in the lifetime of T S M and the testator's widow. Lord Bathurst nevertheless decreed the legacy given to her to be raised with interest from the end of two years after the defendant came into possession.

Clarke v. Ross, 1 Br. Ch. Rep. 120, note.

By a clause in the will of Sir J K, he gave, in case his nephew should depart this life before he should attain the age of 21, the several additional legacies hereafter mentioned, viz. to his wife 2000*l.*, to his sister J B 1000*l.*, to his sister M S 1000*l.*, to his sister E K 1000*l.*, and he directed those several legacies should be paid and payable within six months next after such the decease of his said nephew under the age of 21 years, and directed and empowered his trustees, their heirs and assigns, to raise those additional legacies by any mortgage or mortgages of the whole or a competent part of his estates thereby devised to them. The nephew died unmarried, under the age of 21. The question was, Whether as these legatees, though they survived the testator, died in the lifetime of the nephew, their personal representatives were entitled to the additional legacies given them on the contingency of the nephew dying under 21? The court held, that they were vested interests, and transmissible to the representatives.

Kemp v. Davy, 1 Br. Ch. Rep. 120, note.

A testator devised real estate to his wife T for her life, remainder to his son R in tail-male, remainder to his (the testator's) right heirs in fee, upon condition that R, or those then in possession of this estate, should, within six months after the death of the testator's wife, pay to his two daughters M and T 1200*l.*, viz. 600*l.* to each, and interest at 5 *per cent.* from the death of their said mother, with power of entry to the daughters in default of payment: the daughter T survived the testator, but died in the lifetime of her mother: M the other daughter administered to her sister, but died without claiming the 600*l.* in her right. The personal representative of the daughters brought a bill against R as heir at law and devisee of the testator for this sum of 600*l.* bequeathed to T the daughter, with interest from the mother's death; and upon the authorities of *Hutchins v. Foy*, and *Hodgson v. Rawson*, (both *supra*,) Lord Bathurst determined that the charge vested with the land, and decreed for the plaintiff.

Pawsey v. Edgar, 1 Br. Ch. Rep. 192, note.

H P devised his estate to his wife for life, remainder to his daughter M, and her heirs for ever, chargeable with 400*l.* to his four younger daughters, within one year after the death of his wife, with interest from the death of his wife. Two of the younger sisters died in the lifetime of the mother unmarried; the eldest daughter also died in her mother's lifetime, so that she was never possessed of the remainder in fee of the estate, but it descended to her only son. It was holden in the Exchequer, that the legacies to the younger daughters were vested interests, transmissible to their representatives.

Morgan v. Gardiner, 1 Br. Ch. Rep. 193, note.

R M devised an estate to his wife for life, and if there should be no issue

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between them, then to the defendant, charged with 100*l.* to W R, and 100*l.* to M B, to be paid within six months after the decease of his wife. Afterwards, M B being dead, the testator by a codicil, reciting that she was so, gave 50*l.* of that 100*l.* to W R, and 50*l.* thereof to A B, to be paid at the time when M B would have been entitled to receive it, if she had lived. W R survived the testator, but died in the lifetime of the wife, making the plaintiffs his executors, who, after the decease of testator's wife, filed their bill for the sums of 100*l.* and 50*l.* Lord Thurlow said, that this was a devise after the death of the wife to the defendant, and the testator charges the estate of the defendant (meaning the interest of the defendant in the estate) with the sums in question, which distributes the estate between the defendant and the legatees. Upon the death of the testator, the remainder vested in the defendant, and the moment it vested in the defendant, the charges vested in those to whom they were given. The legacies, therefore, of 100*l.* and 50*l.* must be raised for the plaintiffs, with interest from six months after the death of the wife.

Dawson v. Killet, 1 Br. Ch. Rep. 119.

{W B devised lands to his wife for life, and from and after her decease to trustees, upon trust to sell, and, among other bequests, to lay out 500*l.* in an annuity for his son. The son survived him, but died in the life of the wife. And it was decided that his legacy vested. The remainder to the trustees was a vested interest at the testator's death. If the wife had been then dead, the trust must have been immediately executed; the estate sold; and the money distributed. It was therefore merely on account of the estate for life in the widow, not with reference to the circumstances of the legatees, that the sale and payment were postponed.

9 Ves. J. 6, *Bayley v. Bishop*; 1 Dall. 8, *Price v. Watkins*, S. P.}

J M devised an estate to his second son J and his heirs for ever, after the decease or marriage of his (the testator's) wife E, with a proviso, that he should pay to the testator's daughter Mary, then the wife of the plaintiff, and since deceased, the sum of 100*l.*, and unto Martha 80*l.*, to be paid within one year after the death or marriage of his wife. Mary died in the life of her mother. Lord Thurlow held the legacy vested.

Goodwin v. Munday, 1 Br. Ch. Rep. 191.]

{J. Hutcheon, jun., in 1781, having his property vested in securities in the East Indies, by his will gave distinct legacies to several of his brothers and sisters, with a clause to each directing that if the legatee should die before he or she "might have received the legacy," it should go over to others named. Then he gave the residue to his father, "but in case of his death before he might have received the rest and residue," he gave it over to his brothers and sisters before mentioned and their children. He died soon after making his will; and his father died in 1784, without having received any part of the residue. The brothers and sisters to whom it was limited over thereupon claimed it; insisting that the testator did not mean to vest any interest in the legatees merely because they might happen to survive him, but intended, if they did not live to receive it, to substitute other persons to take it. But Lord Thurlow held that the residue was vested in the father from the death of the testator. He said he believed the testator had in contemplation some such purpose as that attributed to him; that there was a faint indication of a purpose that there should be some time or other when these interests should go over, and that they should not vest in

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the mean time ; but that he had not conceived that intention or expressed it with such definite certainty that it could be acted upon ; for it must be computed what time would be sufficient to enable the parties to receive their legacies, which was all too uncertain.

1 Ves. J. 366, *Hutcheon v. Manning* ; 4 Bro. C. C. 491, n. S. C. See the remarks on this case in 6 Ves. J. 536, and 11 Ves. J. 497.

But if a testator thinks proper to say distinctly that his legatees, pecuniary or residuary, shall not have the legacies or the residue unless they live to receive them in hard money, there is no rule against such an intention, if clearly expressed. Yet that would open a door to so much inconvenience and fraud, that the court never would willingly collect such an intention, unless driven to it by the state of the property and the expressions of the will.

6 Ves. J. 159, *Gaskell v. Harman* ; 11 Ves. J. 489, S. C.

C E devised several real estates to his wife for life, and as soon after her decease or refusal to release her dower as conveniently might be, that his brother should sell them, and the produce should be divided equally between his five nephews at such time as the sale should be completed, in case they should be then living ; but if any should die before the sale was completed, his share should go to his children, or if none, to the surviving nephews. The wife released her dower, and died in December, 1797 ; one of the nephews died in June, 1798, leaving children ; and no sale of the estates was made till August, 1799. The share of the deceased nephew did not vest, as he died before the sale.

8 Ves. J. 547, *Elwin v. Elwin* ; *Ibid.* 558, *Faulkener v. Hollingsworth*, cited.—Vide 4 Bro. C. C. 490, *Stapleton v. Palmer* ; 6 Ves. J. 520, *Sitwell v. Bernard* ; *Ibid.* 528, n., *Entwistle v. Marckland* ; *Ibid.* 529, *Stuart v. Bruere* ; *Ibid.* 461, *Innes v. Mitchell*.

Stock was bequeathed to A to be laid out in an annuity for her life. She died two days after the testator and before any alteration of the stock. The legacy notwithstanding vested, as she might have elected to take the stock, and then it should not be laid out in the annuity.

3 Ves. J. 305, *Barnes v. Rowley* ; 9 Ves. J. 11.}

§ When the time of payment of the legacy is postponed for the benefit of the estate, and not with reference to any particular circumstances in relation to the legatee, the legacy becomes vested at the death of the testator, and is transmissible to the personal representatives of the legatee, although he has died before the time of payment has arrived.

Birdsall v. Hewlett, 1 Paige, 32.g

||1. Where there is an immediate Gift, but the time of Payment is postponed.

RULE 1. When there is a gift of a legacy, or of a share of a residue, to be paid at or when legatee shall attain twenty-one, or any specified age ; (a) or at the death of a particular person ; (b) or when legatee shall have served out his apprenticeship, (c) the gift vests in legatee at the death of testator—the time only applies to the *payment*.

(a) *Bolger v. Mackell*, 5 Ves. 509 ; § *Chancey et al. v. Dickey et al.*, 2 Hawks, 497 ; *Johnson v. Baker*, 3 Murph. 318 ; *Perry's Adm'r v. Rhodes*, 2 Murph. 140.g (b) *Jackson v. Jackson*, 1 Ves. sen. 217. (c) *Sidney v. Vaughan*, 2 Br. P. C. 254.

Exception.—But in a case in which there was a gift of the residue in shares, to be paid at twenty-one ; it was held that the shares did not vest till that age, on the ground that the contents of the will sufficiently indicated

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the testator's intention, though it was not expressed, that the legatees or legatee who attained twenty-one should take the whole residue.

Mackell v. Winter, 3 Ves. 236, 536. β A legacy to a grandchild "when she comes of age", and "if she dies before she comes of lawful age or marries," then over, is contingent, and vests only upon her arrival at full age or marriage. *Kent v. Watson*, 2 Dev. Eq. 366. γ

RULE 2. So when there is a gift to be paid when testator's debts are paid, or when his assets are realised,^(a) or when an estate is sold,^(b) the legacy vests.

(a) *Gaskell v. Harman*, 6 Ves. 159; 11 Ves. 489. (b) *Stuart v. Bruere*, 6 Ves. 529, and see 8 Ves. 558.

Exceptions.—1. Where the testator sufficiently manifests his intention that the legacy is not to vest till the debts are paid.

Bernard v. Montague, 1 Mer. 422.

2.—Where the produce of real estate was bequeathed among persons "at such time as the sale should be completed, in case they were then living," the interests were held contingent until sale.

Elwin v. Elwin, 8 Ves. 547. β Where the testator ordered his real estate to be sold by his executors, after the death of his wife, to whom he had devised a life-estate in the same, and he gave the money arising from the sale to his eight children, by name, to be equally divided, share and share alike, and one of the children died before the land was sold; held that this was a vested interest, and it went to his representatives. *Fairly v. Kline*, 2 Penning. 754. γ

RULE 3. When there is a gift, and the time of payment is not merely a postponed and definite period, but is uncertain, and implies the motive of the gift, the gift does not vest till the specified period arrives. Thus, where there was a bequest of 200*l.* to Elizabeth, to be paid at the time of her marriage, provided she married with consent, it did not vest till married.

Atkins v. Hiccocks, 1 Atk. 500.

So, where the bequest was of 1000*l.* to Frances, to be paid to her as soon as she attained twenty-one, and in case she should live to attain that age and not otherwise, or upon her marriage, which should first happen;—Sir W. Grant, M. R., thought the age or marriage was a condition precedent.

Exception.—A bequest of a *residue* to trustees to pay annual produce to Phœbe and Anne until their marriages, and *then* to assign to them their several shares, was held to give a vested and disposable interest to the legatees before marriage.—It was held equivalent to a trust of the residue for P and A, to pay interest till married, and then the principal.

Booth v. Booth, 4 Ves. 399. See Sir W. Grant's observations on this case, 2 Mer. 386.

2.—When the Gift and Time of Payment are united.

RULE 1. If there be a *simple* gift of a legacy to A *at*,^(c) *if*,^(d) *provided*,^(e) *in case of*,^(g) *when*,^(h) *as soon as*,⁽ⁱ⁾ *from and after*,^(k) he attains twenty-one or marries, the gift does not vest till the age or marriage.

(c) *Smell v. Dee*, 2 Salk. 415; *Onslow v. South*, 1 Eq. Ca. Abr. 295, pl. 6; *Cruse v. Barley*, 3 P. Wms. 20. (d) See *Brownwood v. Edwards*, 2 Ves. sen. 243. (e) *Atkinson v. Turner*, 2 Atk. 41. (g) *Elton v. Elton*, 3 Atk. 504. (h) *Hanson v. Graham*, 6 Ves. 239; β *Giles v. Franks*, 2 Dev. Eq. 521; *Stevenson v. Schreiber*, 9 Gill & Johns. 324. γ (i) *Knight v. Knight*, 2 Sim. & Stu. 490. (k) *Leake v. Robinson*, 2 Mer. 387.

The principal and interest of a legacy may be included in one gift, and

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may be contingent; as a bequest of 2000*l.* with legal interest to C as soon as he attains twenty-one, is contingent.

Knight v. Knight, 2 Sim. & Stu. 490. See *Gordon v. Rutherford*, Turn. & Russ. 373, in which the gift was it seems a specific legacy.

RULE 2. But if the gift is not simply one upon condition, but is accompanied with circumstances showing that the terms, apparently requiring as a condition precedent the happening of an event, were only intended to mark the time when the gift should vest in possession, it is not contingent.

1.—Thus, where in the mean time, till the period when possession is to be taken, the whole annual produce of the fund is to be employed for the maintenance,^(a) or for the benefit,^(b) or upon trust^(c) for the legatee, the fund vests at once in the legatee.

(a) *Fomereau v. Fomereau*, 3 Atk. 645; *Hoath v. Hoath*, 2 Br. C. C. 4; *Walcott v. Hall*, Ibid. 305; and see 2 Meriv. 386; *Lane v. Goodge*, 9 Ves. 225; *Jones v. Mackilwain*, 1 Russell, 220. (b) *Hanson v. Graham*, 6 Ves. 239, 249. (c) *Branstrom v. Wilkinson*, 7 Ves. 421. See *Love v. L'Estrange*, 3 Br. P. C. 337. See *David and others v. Bridgman and others*, 2 Yerg. 558; *Hellman v. Hellman*, 4 Rawle, 440; *Schrivver v. Cobean*, 4 Watts, 130; *Price v. Watkins*, 1 Dall. 8; *Patterson v. Hawthorn*, 12 S. & R. 112; *Stone v. Massey*, 2 Yeates, 363; *Donner's Appeal*, 2 Watts & S. 372; *King v. King*, 1 Watts & S. 205; *Corbin v. Wilson*, 2 Ashm. 178; *Newport v. Cook*, 2 Ashm. 332.

And this rule, that the giving of the whole annual interest vests a legacy, is not to be overturned by words of vague import; as by a direction, after giving the interest, that the legacy is not to be otherwise claimed or inherited, directly or indirectly, until the age of twenty-one.

Dodson v. Hay, 3 Br. C. C. 404; but see *Barker v. Lee*, Turn. & Russ. 413, a case of a residue given entire.

But where the gifts of the interest and of the capital, though to the same person, are perfectly distinct, and that without there being any reason, as the minority of the legatee, for the distinction, the giving of the interest will not vest the capital sooner than the words bequeathing such capital import.

Thus where testatrix gave to Robert the dividends upon 500*l.* 3*l.* per cent. consols, until he should arrive at the age of thirty-two years, at which time she directed her executors to transfer to him the principal sum for his own use; it was held that the capital did not vest till Robert attained thirty-two.

Batsford v. Kebbell, 3 Ves. 363, referred to 3 Ves. 367; 5 Ves. 514; 3 Mer. 342; 1 Russell, 224.

2.—Words though apparently constituting a condition precedent are understood to mark only the time when the legacy is to vest in possession, if the intermediate interest, though not given for the benefit of the legatee, is only an *exception* out of the whole property of a certain interest, to endure till legatee attains twenty-one, or till debts are paid, &c.

See *Lane v. Goodge*, 9 Ves. 226, 231; *Taylor v. Biddall*, 2 Mod. 289; *Manfield v. Dugard*, 1 Eq. Ca. Abr. 195, pl. 4; *Boraston's case*, 3 Rep. 19, 1 New R. 317.

But where testator bequeathed furniture, pictures, &c., to the use of his wife, desiring that they should be distributed amongst his children on the youngest attaining twenty-one, at her and his executors' discretion, it was held that children who died before the youngest, who lived to twenty-one, attained that age, took nothing; as it was evident that the discretion of executors could only be applicable to those who were then living.

Ford v. Rawlins, 1 Sim. & Stu. 328.

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RULE 3. When there is a bequest to A for life, and *after* his decease, or "from and after" or "at" his decease, then to B, B takes a vested interest.

Monkhouse v. Holme, 1 Br. C. C. 298; *Attorney-General v. Crispin*, *Ibid.* 386; *Benyon v. Maddison*, 2 Br. C. C. 75; *Taylor v. Langford*, 3 Ves. 119; *Wadley v. North*, *Ibid.* 364.

So, where testator gave to Pringle 200*l.* at his wife's decease, P's interest was vested.

Blamire v. Geldart, 16 Ves. 314.

But if there be a bequest to A, and after his decease to his children, and it be inferred from the words of the will that only children living at the death of A are intended to take, their shares will not vest till that time.

Thus, where there was a bequest of the interest of 1500*l.* to Capel for life, and after his decease testator gave the said sum to his (Capel's) children equally; it was held that the shares of children were not vested; because, 1. the capital was not given till the death of Capel; 2. it was inferred from a provision in the will that children living at Capel's decease were only intended to take.

Billingsley v. Wills, 3 Atk. 219. See *Bennett v. Seymour*, Amb. 521; *Reeves v. Brymer*, 4 Ves. 692; and see 1 Jac. & W. 146.

So, if there be a bequest to A, and after her decease to her children, with a bequest over if she die *without any child*; (a) or, if she should leave but one child then the whole to go to that one, the shares of the children are contingent. (b)

(a) *Thickness v. Liege*, 3 Br. P. C. 365, 373. See and consider this case; and see *Schenck v. Legh*, 9 Ves. 300; and *Randall v. Metcalfe*, cited *Ibid.* 314. (b) *Smith v. Vaughan*, Vin. Abr. tit. *Devise*, pl. 32; *Spencer v. Bullock*, 2 Ves. jun. 687; and see 2 Wils. C. C. 64.

3. Legacies with Executory Bequests over.

RULE 1. A legacy which is given immediately to A, and is in its terms vested, is not rendered contingent by being given over upon the happening of a specified event.

As a bequest to children in equal shares, and if either die before twenty-one, his share to the survivor, the children take vested interests, subject to be divested by dying under twenty-one.

Davidson v. Dallas, 14 Ves. 576. *β* Testator bequeaths his chattels to his wife, until his youngest daughter arrives at the age of twenty-one years, and to be divided among his wife and daughters, this is a vested legacy in the daughters, upon the death of the testator; for the division of the property is not annexed to the substance of the legacy, but to the time of enjoyment. *Perry's Admin. v. Rhodes*, 2 Murph. 140. *γ*

RULE 2. The right or interest which an executory legatee takes is not lost by his death before the event happens on which the bequest is to vest in possession.

Thus, if there be a bequest to A absolutely, but if she die without leaving issue living at her death, then to J S, and A does so die without issue, but J S died previously, then the personal representative of J S is entitled.

Pinbury v. Elkin, 1 P. Wms. 563; *Barnes v. Allen*, 1 Br. C. C. 181; *S. C.* 3 Ves. 208; *Stanley v. Wise*, 1 Cox, 432; and see *Fearne*, Ex. Dev. 555, 7th edit.; *Wilmot v. Wilmot*, 8 Ves. 10.

CONSTRUCTION OF WORDS LIMITING AN EXECUTORY BEQUEST OVER.

1. If these be not sufficiently precise and clear, the bequest over cannot

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take place, and the whole interest vests absolutely in the first taker; as where testator gave a legacy over in case the first taker died before he might have received it.

Hutchin v. Mannington, 1 Ves. jun. 366. See Lord Eldon's comments, 11 Ves. 497; and see *Elwin v. Elwin*, where the period is sufficiently marked, 8 Ves. 547. β Where there is an express limitation of a chattel interest, by words, which, if applied to a freehold estate, would create an estate-tail, the whole interest vests absolutely in the first taker, the limitation over being too remote. *Moffat's Executors v. Strong*, 10 Johns. 12. See *Williamson v. Ledbetter*, 2 Munford, 521; *Davidge v. Chancy*, 4 Harr. & M'Hen. 393. γ

2. When the words of limitation over are "in case of the death of legatee;" these are confined to the legatee's dying *before the testator*, if it appear from the will that the bequests were alternative, and that the second or executory bequest was only intended as a substitute in case the first taker did not survive the testator.

Turner v. Moor, 6 Ves. 557; *Cambridge v. Rous*, 8 Ves. 13; *Montagu v. Nucella*, 1 Russell, 165.

Thus a bequest to Clementina of 8000*l.*, "but should she happen to die," to her children. So a bequest to Helen, "and, in case of her death," over.

Webster v. Hale, 8 Ves. 410.

So, a bequest of a residue to P, and in case of her death to the children of W, P surviving testator was held absolutely entitled.

Ommaney v. Bevan, 18 Ves. 291; *S. P. Slade v. Milner*, 4 Madd. 144.

But the words "in case of legatee's death" will not be confined to a dying before the testator, if it appear from the will that the testator only intended to give the legatee a life-interest.

Billings v. Sandom, 1 Br. C. C. 393; *Lord Douglas v. Chalmer*, 2 Ves. jun. 501.

So if there be an absolute bequest to A in remainder, and not immediate, "and in case of A's death," to B; B will be entitled if A die before the first taker.

Galland v. Leonard, 1 Swanst. 161; *Harvey v. McLaughlin*, 1 Price, 264.

3. A bequest to A and his children, "but in case A die unmarried and without issue." "Unmarried" is to be understood to mean "never having been married;" but "and" is to be read "or," so as to make a double contingency.

Maberly v. Strode, 3 Ves. 450.

Thus, on a bequest of a residue to three children, but if any of them died "without being married and having children;" Sir W. Grant, M. R., construed these words, "without ever having been married, or without having had a child or children."

Bell v. Phyn, 7 Ves. 454.

4. Words limiting an executory bequest, by which a previous vested interest may be divested, are construed strictly; and, unless the event on which the bequest is limited over literally happen, the primary gift will not be divested.

Thus a bequest to Abigail for life, with remainder to Chetwode absolutely, but if then dead to Charles and Philip, *or the whole to the survivor*. Philip survived Charles, and Chetwode died in lifetime of Abigail, but Philip also died in her lifetime, and therefore was held not entitled to the whole, but to a moiety only.

Browne v. Lord Kenyon, 3 Madd. 410

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So a bequest to A for life, remainder to her children absolutely, *or such of them as should be living at her decease*; all the children died in A's lifetime, therefore the bequest to them was not disturbed by the bequest to those who survived wife, for none survived, and the representatives of the children were entitled.

Sturges v. Pearson, 4 Madd. 411. See *Wall v. Tomlinson*, 16 Ves. 413; *Harrison v. Foreman*, 5 Ves. 207; and see *Skey v. Barnes*, 3 Mer. 335. β Where a bequest was made to one of a sum of money, "to be kept in stock, and the interest to be paid to the legatee annually during her life, and after her death to be equally divided among her heirs," and there was no trustee of the legacy named by the testator; held, that the legatee had an annuity only during her life, and that at her decease the principal belonged to her heirs. *Saunderson v. Stearns*, executor, 6 Mass. 37.*g*

5. An absolute bequest is not affected by a discretionary power vested in a stranger to give the fund over, when such power fails by the death of the donee.

Keates v. Burton, 14 Ves. 434. See *Robinson v. Smith*, 6 Madd. 194.

6. When an executory bequest is limited on the death of the first taker before the legacy is "*payable*." This word, though accompanied by "assignable or transferable," is if possible referred to the period when the legacy vests, if the legacy is in the nature of a *portion*, or provision for a child. In other cases its construction must depend upon the words of the will.

Jefferies v. Reynous, stated 9 Ves. 311; 6 Bro. P. C. 398. See *Perfect v. Lord Curzon*, 5 Madd. 443; *Maitland v. Chalie*, 6 Madd. 243.

Thus, where there was a bequest to Rebecca for life, with remainder to nephews and nieces equally, the shares to be paid at twenty-one; but if any of the legatees died before their shares became *payable*, then over to the survivors. The share of a nephew who attained twenty-one, but died in the lifetime of Rebecca, was held to go to his representatives.

Hallifax v. Wilson, 16 Ves. 168.

4. A Bequest subject to a Power of Appointment.

RULE. If there be a bequest to A for life, remainder to children, subject to a power given to A to appoint the fund, in such shares as she shall think proper, among them, the children take vested interests; but if any of them die before A, A may appoint the whole to the survivors; if, however, A does not effectually appoint the whole fund, the representatives of a child dying in A's lifetime are entitled to a share.

Boyle v. Bishop of Peterborough, 1 Ves. jun. 399; *M'Ghie v. M'Ghie*, 2 Madd. 378; *Wilson v. Pigott*, 2 Ves. jun. 351; *Butcher v. Butcher*, 1 Ves. & B. 79, 92.

CONSTRUCTION OF "SURVIVORS."

If a fund is given to three persons equally to be divided, shares to be paid at twenty-one, and it is directed, if any die under twenty-one, the share or shares to go to the survivors or survivor; the survivorship is referred to twenty-one, so that if one attain twenty-one, and afterwards die, and then a share survives, his representatives are entitled to a part of such share.

Wilmot v. Wilmot, 8 Ves. 10. And when "survivors" is construed as "others," see 14 Ves. 578.

β In general when legacies are given to three or more persons, as tenants in common, with a bequest to the survivors upon the death of any of them within a given time, the original legacies only, and not the shares which

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accrued by survivorship, will survive. As an exception to this rule may be mentioned the case where the fund is left as an aggregate one, and made divisible among many persons as legatees, with benefit of survivorship among them.

M'Kay v. Hendon, 3 Murph. 21.

5. Legacies payable out of Land.

If a legacy be charged upon both real and personal estate, or upon real estate only, and be given to A (whether a child or stranger) at twenty-one, or marriage, or *to be paid* at that age or marriage, or in other terms showing that the time of payment had regard to the legatee, and not to the estate or the convenience of the owner, the legacy, so far as the land charged is concerned, lapses or sinks into the land on the death of the legatee before the time of payment.

Pawlett v. Pawlett, 1 Vern. 321; *Duke of Chandos v. Talbot*, 2 P. Wms. 602; *Prowse v. Abingdon*, 1 Atk. 493; *Harrison v. Naylor*, 3 Br. C. C. 108. β The testator bequeathed to his daughter Sarah five thousand dollars, "to be paid to her by the said Samuel, out of the estate given to him, in annual payments of five hundred dollars a year." Held, that this legacy is a charge on the estate of the devisee, in the devised premises, and not upon his person nor upon the land. *Washington v. Taylor*, Sax. Ch. R. 314.

But this rule is not adopted when the payment of the legacy is postponed, not on account of the legatee, but of the estate or its owner; (a) or, when the testator manifests an intention that the legacy should not lapse by the death of the legatee before the time of payment. (b)

(a) *King v. Withers*, Forrest, 117; S. C. 3 Br. P. C. 135; *Walker v. Main*, 1 Jac. & W. 1, 7. (b) *Lowther v. Condon*, 2 Atk. 127; *Watkins v. Cheek*, 2 Sim. & Stu. 199.

So, when there is a devise in remainder to A, "paying out of the estate when it falls 500*l.*;" and a bequest of the 500*l.* to Martha. Though Martha should die before A comes into possession, her legacy passes to her representatives.

Hutchins v. Foy, Com. Rep. 716, 723.

So, where testator devised to Thomas in fee on attaining twenty-five, on condition that he, his heirs or assigns, paid to Elizabeth 60*l.* within two years after his attaining twenty-five, and a right of entry was given to Elizabeth on non-payment. Elizabeth's personal representative was held entitled, though she died before the expiration of the two years. Great stress was laid on the fact that Elizabeth and her executors or administrators had a legal title to recover the money; the devise operating as a conditional limitation.

Emes v. Hancock, 2 Atk. 507; *Sherman v. Collins*, 3 Atk. 319.

It may be stated generally, that if there be a devise to A of an estate in remainder, charged with legacies when it vests in possession, the legacies do not lapse by the deaths of legatees before the period of payment.

Hodgson v. Rawson, 1 Ves. sen. 44; *Embrey v. Martin*, Amb. 230; *Manning v. Herbert*, Amb. 575; *Jeal v. Tichener*, 1 Br. C. C. 120, note; *Clarke v. Ross*, 2 Dick. 529; *Pawsey v. Edgar*, 1 Br. C. C. 192, note; *Dawson v. Killat*, 1 Br. C. C. 119, S. P. Ibid. 191.]

β A devise to A B of a tract of land "free and clear from any encumbrance, except as hereafter mentioned," with a limitation over, "in case devisee die without issue," followed with directions, that in consideration of the

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devise, A B should pay, at different periods, certain sums to different persons: held, that A B was personally liable for those sums which became payable during his lifetime; that the amount falling due after his death was a charge upon the land devised, and not upon any portion of A B's estate.

Executors of Dicker v. Executors of Dicker, 3 Ohio, 165.

Where testatrix gave certain pecuniary legacies, to be paid out of her estate, and had, at the time of making her will, sufficient personal property to pay such legacies; held, that they were not charged on her real estate.

Swift's Ex'r v. Edson et al., 5 Conn. 531.

To make pecuniary legacies a charge upon the real estate, as against the residuary devisee, a clear intention must be manifest from the will, that such devisee shall take subject to such legacies.

Gridley v. Andrews, 8 Conn. 1; Wright v. Denn, 10 Wheat. 204. See Archer v. Deneale, 1 Pet. 585; Kemp's Executrix v. M'Pherson, 7 Har. & J. 320; Downman v. Rust, 6 Rand. 587.

When a legacy is charged on land, and no time of payment is mentioned in the will, it carries interest from the time of the testator's death.

Van Bramer v. Hoffman's Executors, 2 Johns. Cas. 200.g

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|| A CONDITION must be expressed in language sufficiently precise, to enable a court to say whether it has been performed or not.

§ See Spofford v. Manning, 6 Paige, 383; Mackay v. Moore, G. M. Dud. 94; Child v. Gilbert, 3 My. & Keen, 71; Lenox v. Lenox, 10 Sim. 400; Murray v. Tancred, 10 Sim. 465.g

A testator bequeathed, "provided my son changes the course of life he has too long followed, and will give up all his low company and frequenting public houses entirely, I then leave him, but not otherwise, the interest of 5500*l.* for life." Sir W. Grant, M. R., held the condition not too vague to be enforced, and directed the master to inquire, whether the condition had been satisfied.

Tattersall v. Howel, 2 Mer. 26. § A testator devised as follows: "I give and bequeath to my son A all my lands and effects, to him and his heirs for ever; but if he should never return, I give and bequeath to my brother B's eldest son, two lots of land, to him and his heirs, which he shall fully possess, *he making himself appear to be the eldest son of B.*" Held, that a present interest vested in C, who was the eldest son of B, and that the words requiring him to prove himself entitled to that character were senseless and nugatory, being merely what the law would have required without them. Den v. Brown, 2 Halst. 305.g

§ Where words of condition are used in connection with a devise, and there is another and subsequent devise of the same premises, the words of condition are not strictly considered as such, or rather have not the force and effect of words of condition, and are called words of limitation.

Den v. Hanse, 6 Halst. 244.g

Whether a condition be precedent or subsequent, that is, whether it must be performed before the legatee can be entitled to an absolute interest in the bequest, or not till after, of course depends upon the words and intention of the testator. But a testator in making a bequest may use words of condition, which, however, shall not be construed as such, if it clearly appear that they do not involve the motive and reason of the bequest.

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Thus a bequest to A for life, remainder to C for life, "and after C's death, in case he should become entitled to such interest," to divide the principal between D and E. C died in A's lifetime, yet it was held the limitation to D and E took effect.

Pearsall v. Simpson, 15 Ves. 29. See 1 Roper on Leg. 650. β There are no technical words which determine whether a devise be on a condition precedent or subsequent; if the language of the will shows that the act on which the estate depends must be performed before it can vest, the condition is precedent. If, on the contrary, the act does not precede the vesting of the estate, but may accompany or follow it, the condition is subsequent. *Finlay et al. v. King's Lessee*, 3 Pet. 374. γ

So, where there was a bequest upon trust for such children as testator should leave at his death; but if all of them died under twenty-one, the fund was to go to the wife; there were no children, yet the wife was held entitled.

Meadows v. Parry, 1 Ves. & B. 124. See *Avelyn v. Ward*, 1 Ves. sen. 420; *Parry v. Boodle*, 1 Cox, 183.

If a testator by his own act render the performance of a condition he has imposed impossible, the bequest takes place, discharged of the condition.

Darley v. Longworthy, 3 Br. P. C. 359.

So, if the condition becomes impossible by the act of God.

Sir James Lowther v. Cavendish, Amb. 356; 1 Eden, 99, S. C.; *Keates v. Burton*, 14 Ves. 434; *Aislabie v. Rice*, 3 Madd. 256.

So, if a condition be illegal, or contrary to the policy of the law,—as if a legacy be given to a *feme covert*, if she is living separate from her husband,—the condition is void, and the legatee is entitled absolutely; so, if the legacy be upon an illegal condition to assign to a charitable purpose.

Brown v. Peck, 1 Eden, 140; *Poor v. Mial*, 6 Madd. 32. $\parallel$

If a legacy be given on condition not to dispute the will, and the legatee commence a suit, whereby he disputes the validity of the will, yet this is no (a) forfeiture of the legacy, if there was *probabilis causa litigandi*.

2 Vern. 91; {1 Atk. 404, *Morris v. Burroughs*; 2 P. Wms. 526, *Cleaver v. Spurling*; 3 P. Wms. 344, *Lloyd v. Spillet*.} (a) If the lord of a copyhold manor come to a copyholder, and require him to do his services, and the copyholder answer, if they are due he will do them, but it shall be tried at law first, whether they are due or not; this is no forfeiture, being no wilful refusal. Roll. Abr. 506; Roll. Rep. 429; 3 Buls. 80, 268; 4 Co. 21 b.

$\parallel$ But it seems otherwise, if in case of the legatee disputing the will the legacy is given over; or if the testator direct the legacy to fall into the residue upon a breach of the condition, and dispose of that fund. (b)

Cleaver v. Spurling, 2 P. Wms. 526. (b) See *Lloyd v. Branton*, 3 Mer. 118. $\parallel$

β Testator devised lands to two of his sons, "they paying" to his two daughters a certain sum each, within one year after his decease; held that this was a devise upon condition, and, the sons having failed to make the paying within the time prescribed, no estate vested in them.

Wheeler v. Walker, 2 Conn. 196. γ

But what we are here chiefly to consider is, how far conditions, annexed to legacies which restrain marriage, are to be performed, and how, and in what case, the neglect or non-performance of them will forfeit the legacy.

And here we must observe as a general rule, that all conditions in restraint of marriage are to be considered strictly, being prejudicial to society, as they hinder the propagation of the species.

Swinh. 266.

Therefore by our law, as also by the civil law, a devise upon condition

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not to marry, or not to marry a person of such a profession or calling, is void, whether there be a limitation over or not; for (a) every person ought to be at liberty to marry when he pleases; and therefore conditions restrictive of that power are against law, and void.

Godolph. Orph. Leg. 45; Swinb. 266; Vern. 20; Mod. 86. (a) If an annuity be bequeathed by a man to his wife for so many years, if she shall remain a widow so long, this is a good conditional bequest, because of the particular interest every husband has in his wife's remaining a widow; for thereby she will the better take care of the concerns of his family, in respect of which he may well allow her a maintenance for that time, to cease when she removes herself into the interest of another family. Godolph. Orph. Leg. 45.——But if a stranger gives a legacy upon such condition, it is not good; for there is no more reason for restraining a widow from marrying than a maid. Godolph. 46.——Where a man devised, after debts and legacies paid, the surplus of his estate to his wife and his son John, equally betwixt them, and adds, *whom I make my executors*, and farther wills, that she should continue his true widow; but if she marry again, *my will is, she shall render the right of being my executrix to my son Roger, to be partner with his brother John in the executorship*; it was held, that by the wife's marrying again, she had as well lost her share of the surplus as her right to the executorship. 2 Vern. 308, Barton v. Barton.

Also, by the civil law, a gift or devise upon condition not to marry without (b) consent is void, though there be a limitation over; for the maxim there is, *matrimonium debet esse liberum*.

Swinb. 267. (b) If one be appointed executor or legatee, upon condition he marry with the consent and approbation of another, and if he marry against their consent, that the executorship or legacy shall go to another; yet he shall have the executorship or legacy: But in this case it is said, that he is bound to ask consent, and to marry; for both these parts of the condition are lawful, though the part is not that restrains him from marrying against the consent of another. Godolph. 46.

But though conditions which restrain marriage generally are void, yet, both by our law and the civil law, a condition that restrains marriage as to time, place, or person, is good; as not to marry before twenty-one, not to marry at York, not to marry a papist, &c. ||Or not to marry a Scotchman.(c)||

Swinb. 267; 8 Vern. 20; 2 Br. Ch. Rep. 488. (c) ||Perrin v. Lyon, 9 East, 170; 1 Shep. Touch. by Preston, 132.||

{J P devised real and personal estate to trustees, to pay thereout an annuity to his wife for life, and out of the residue to pay sufficient for the maintenance, education, and support of his only daughter, until she should attain the age of 21 years or marry; and when she should attain 21 or marry, then to her in fee: but in case his daughter should die under age and unmarried, then the estates to go to his wife for life, and after her decease to the two children of his nephew as tenants in common in fee: with a proviso that if either his wife or daughter should marry a Scotchman, then his wife or daughter so marrying should forfeit all benefit under his will, and the estates given to her should descend to such person or persons as would be entitled under his will in the same manner as if his wife or daughter were dead. It was held that such partial restraint of marriage was legal; and that the daughter having while under age married a Scotchman and died leaving a son, such son could not inherit, nor her husband be tenant by the curtesy; but that the limitation over (the testator's wife being also dead) to the two children of the testator's nephew (who was still living) took effect immediately on such marriage.

9 East, 170, Perrin v. Lyon.}

But the prevailing distinction in the courts of equity as to this matter is between such conditions as are good, and bind the legatee, and such as are only *in terrorem*; as to which it is clearly agreed, that if a legacy be given

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to a person upon condition that he or she marry with the consent of J S, that in such case the condition is only *in terrorem*, and the legatee does not forfeit, though the marriage was without such consent: but if in this case the legacy had been limited over to another, the marriage without consent had been a forfeiture. And the reason thereof is, not only from the intention of the testator appearing more strongly in the latter than in the first case, but also because the courts cannot in this case relieve against the forfeiture without doing an injury to the person to whom it is limited over. (a)

2 Chan. Ca. 22, 138; Vent. 199; Vern. 20; 2 Vern. 293; 5 Vin. Abr. 343, pl. 41; Atk. Rep. 502; Prec. Chan. 565, the same distinction; and there said, that though a lawyer may know it to be no forfeiture, not being limited over, yet the parties themselves might not be so learned, and therefore it would be some terror to them to venture to break it; and without this distinction, strangers, executors, might run away with a great part of a man's estate from his children. [(a) Hence, if in the event of a marriage without consent the legacy or portion be given over, a demurrer will lie to a bill for a discovery of the fact of the marriage. *Chauncey v. Tahourdin*, 2 Atk. 392; *Chancey v. Fenhoulet*, 2 Ves. 265.]

[This distinction as to the legacy being given over or not, it is true, does prevail in our courts of equity, and may in general enable us to decide on the validity of any condition of marriage, where the gift or legacy, to which such condition is annexed, is charged upon personal estate. But where the gift is of real estate, or charged upon real estate, in that case it becomes material to consider whether the condition be precedent or subsequent, for interests arising out of land must be governed by the rules of the common law. If, therefore, such condition of marriage be precedent, it must be strictly performed, in order to entitle the party claiming to the benefit of the gift.]

If by lease 9000*l.* are secured for a feme sole in case she marries not contrary to the liking of A, and if she doth, then for such person as A shall nominate; and for want of such nomination, for A, and she marries without the consent of A, yet he cannot dispose of the lease otherwise than for her benefit; for it would be the most unreasonable thing imaginable, that his giving or refusing his consent should have any influence in an affair that was to turn so much to his own advantage.

1 Chan. Ca. 58, *Fleming and Waldgrave*; 2 Vern. 573, S. C. cited; and there said, that there may be a difference between a condition that a person cannot marry without consent, and where it is that the party shall not marry against consent. [So, by Lord Hardwicke, in 3 Atk. 335. As to this case of *Fleming v. Waldgrave*, it was said by the attorney-general, and agreed by the master of the Rolls in *Reeves v. Herne*, *infra*, that the legacy *here* vested immediately, it being given upon her not marrying without consent, &c.; and his honour remembered a like case in the time of Wright, S. C., where the condition being, if she did not marry with consent, &c., the legacy was decreed her immediately, she entering into a recognisance to refund, in case she married without consent, &c. A testator gave his granddaughter 200*l.* on condition she continued with his executors till she was twenty-one; but if she was taken from them by her father, (who was a papist,) or married against the consent of his executors, then he gave her but 10*l.* The granddaughter was placed by his executors with a clergyman, who, before she was twenty-one, with consent of one of the executors, permitted her to make a visit to her father, who took that opportunity to marry her to a papist. She was decreed the legacy at the Rolls; but upon a re-hearing Lord Keeper held, that she should have only the 10*l.*; and he said, that in this case there was no difference between a condition that she should not marry without consent, and that she should not marry against consent. *Creagh v. Wilson*, 2 Vern. 572. *Qu.* Whether there was any limitation over?]

If A devise a messuage, &c. to B his wife for life, remainder to C his granddaughter in tail, upon condition that she marry with the consent of his wife and D and E or the major part of them, and if she marry without

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their consent, or die without issue, the same to remain to F and her heirs; and C marries without the consent of any of them, who, as soon as they hear of it, declare their dislike to the marriage, but afterwards consent to it; yet C shall not be relieved in equity, for the subsequent assent cannot divest the estate which was before vested in F, neither can there be any collateral averment that the condition was intended only *in terrorem*.

Vent. 199; Mod. 300; 1 Chan. Ca. 138, Fry and Porter. See also *Bertie v. Lord Falkland*, *supra*, vol. ii. p. 297.

[J S charged his real estate with 500*l.*, to be paid his sister Alice Herne within one month after her marriage, but so nevertheless as she married with the approbation of his brother Joseph Herne, (if living,) and in case she married without his consent, the 500*l.* were not to be raised. Alice Herne married in the lifetime of Joseph Herne, and without his consent, and the question was, Whether she was entitled to the 500*l.* or not? For here, it was said, that this was a condition only *in terrorem*, and that the construction of such conditions had always been, that where there is no devise over, such condition is void; otherwise where limited over; and here it is not. On the other hand, it was argued, that this is a condition precedent, and nothing arises or becomes due but upon the marrying with consent; and this being a devise of money out of land, or of a charge upon the land, it is to be considered as a devise of land, and governed by the same rules; and then being a plain condition precedent, nothing can arise; and for this were cited the cases of *Fry v. Porter*, and *Berthie v. Lord Falkland*. The master of the Rolls said, that the civil law makes no distinction in *personal* legacies, between conditions precedent and subsequent; neither does this court as to mere *personal* legacies given upon condition of marrying with consent. But this court differs from the civil law in this; that whereas by that law all conditions in restraint of marriage are void, this court says, they are not void, where the legacy is given over, and another person particularly substituted by the testator to have the benefit of it, in case the condition be not complied with. But this must be a special nomination as a legatee; and therefore a residuary legatee or executor shall not have the benefit of such non-performance. And his honour remembered a case to this purpose, where, on a legacy given upon condition of marrying with consent, and if not, to sink into the residue of testator's estate which he gave to J S, &c., it was holden, that though the marriage was without such consent, yet it was not lost, because it would have been the same if the testator had said nothing about its sinking into the *residuum*, and therefore was construed only *in terrorem*. So it is in the case of a trust of a term limited of lands for raising portions with such restriction, this court governs itself by the same rules as in case of a devise of a legacy with such condition; because though the term be a legal estate and interest, yet the trust of a term is a creation of equity only. But it is otherwise in case of a devise of lands; there conditions precedent and subsequent take place. And this was Fry and Porter's case of an infant bound by condition relating to her marriage, it being a condition precedent: and the present case being a charge upon land, is to be governed by the same rule, and is to be considered as land; the will must be attested in the same manner; and this being plainly a condition precedent, and nothing vested, (as it is in the case of a trust-term, where the term is vested, and the trust only left open,) it is too hard for this court to charge the land contrary to the express will of the testator; and to say the money should be raised, when the testa-

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tor has said it shall not: and a charge upon the land cannot arise otherwise than as a devise of the land itself.

Reeves v. Herne, Vin. Abr. tit. *Condition*, (Z. d.) pl. 41. *Sed vide infr. contr.*

A by settlement after marriage created a trust-term of 100 years by mortgage or sale to raise 2000*l.* for the portion of each of his daughters, provided they married with their mother's consent, and directed a yearly payment out of the rent till they married; and if any of them died before marriage with such consent, her portion was to cease, and the estate was to be exonerated thereof; or, if it were raised, it was to be paid to the person to whom the estate should belong. By will, he created another trust-term to raise by sale or mortgage 4500*l.*, whereof 2000*l.* were to be paid to each of his daughters, in augmentation of their fortunes, subject to the conditions in the settlement; and by a codicil (in pursuance of a power of revocation) he created another trust-term for the better raising of his daughters' portions. A died. The daughters married without consent. The master of the Rolls held, that the portions should be raised, the husband making a competent settlement. But this decree was reversed by Lord Chancellor Hardwicke, assisted by Lord C. J. Lee, Lord C. J. Willes, and Comyns, J., for they considered portions or interests directed to be raised out of land as having nothing testamentary in them, and that they were therefore not to be governed by the rules of the civil or canon law, but by those of the common law: that, in that law, no rule was more fixed than that portions charged upon land did not vest till the time of payment arrived: and that the present condition to marry with consent was a lawful one, and a condition *precedent*; and that being such, nothing vested in the daughters until that condition was performed.

Hervey v. Aston, Ca. temp. Talb. 212; 1 Atk. 361, S. C.; Com. Rep. 726, S. C. {*Willes*, 83, S. C.}

{G L devised lands to trustees for 500 years, in trust to raise portions for his daughters, to be paid on marriage, on condition that they should be married with consent of their mother, or, after her death, of the trustees, and that the husband should previously make a settlement; and the residue of the personal estate, subject to debts and legacies, to be applied to discharging the portions in ease of the real estate, or for any purpose the trustees might judge most beneficial for the devisee. One of the daughters having married with the consent of the mother and the privity of the trustee, but without any settlement, by the neglect of the trustee; the husband having before and after the marriage offered all that was required of him, and been ready to execute a settlement within the condition, relief was given upon those circumstances, by raising the portion upon executing the settlement.

5 Ves. J. 117, *O'Callaghan v. Cooper*.}

E P devised her real estate to her daughter Martha and her heirs for ever, subject to such charges as should afterwards in her will be expressed: then follows this clause: "Provided always, and it is my will, that if my daughter Mary marry by and with the consent of the trustees, (therein named,) or the major part of them, and signified in writing before such marriage had, then, and not otherwise, I give and devise unto my said daughter Mary the sum of 800*l.*; and it is my will that my said daughter Martha shall pay unto my said daughter Mary the sum of 30*l.* yearly, during the said Mary's continuing sole and unmarried, by 15*l.* each May-day and All-Saints-day. And I

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do hereby charge all my aforesaid real estate with all my debts and legacies of all kinds." Martha and Mary survived the testatrix. The latter married the plaintiff without the consent of the trustees. Upon her death, the plaintiff, as her representative and administrator, filed a bill for an account of the personal estate, and that the same might be applied in payment of the said legacy of 800*l.*, and so much of the arrears of the annuity of 30*l. per annum* as were due to Mary before her marriage; but in case the personal estate should not be sufficient, that then the real estate, or so much thereof as would make good the deficiency, might be sold, and the money arising therefrom applied for that purpose. Lord Chancellor said, that the real estate was not originally charged with this legacy, but only as auxiliary in failure of the personalty; and the charge upon the lands depended upon a condition precedent, which never was performed; that this could not be considered as a legacy charged, or chargeable upon the real estate, but as a mere personal legacy, and as such, was to be governed by the rules of the civil and canon law. He therefore directed, that the plaintiff be paid the arrears of the 30*l. pro rata*, till the time of the marriage; and in case the personal estate should be exhausted by the payment of debts or other legacies, that the plaintiff should stand in the place of such creditors and legatees *pro tanto*, as had received satisfaction, and that so much of the real estate should be sold as would be sufficient to satisfy the legacy of 800*l.* and the arrears of the annuity.

Reynish v. Martin, 3 Atk. 330; 1 Wils. 130, S. C.

A testator gave to trustees 4000*l.* to the use of J W, if she married with consent; if not, then only 1000*l.*, and a similar legacy to the use of M W: then followed this clause: "*If either of these girls should marry into the family of G or R, and have a son, I give all my estate to him for life,*" (with remainder over;) "*if they shall not marry, then I give all my estate to Randal.*" A bill was filed, and there was a decree that the money should be invested in the funds till the event should happen, with leave for the parties interested to apply, as occasions should arise. The girls being married with consent, but neither of them into the families of R or G, Randal filed his bill for the residue, as forfeited to him. But, by Lord Thurlow—Nothing could vest till they married, marriage being a condition precedent: then can any thing vest till the whole condition becomes impossible? The plaintiff supposes, that if the girls once married, they had lost all chance of marrying into the family of R or G. If the testator had said so, it would have been very well. Suppose one of them, after the death of her husband, to marry into one of the favoured families, and to have a son, who comes here to claim the estate: the court would not incline to refuse him. The decree that the money should be invested, &c., must be carried into execution.

Randal v. Payne, 1 Br. Ch. Rep. 55.]

A devised 300*l.* to B, her daughter, and that if she married under twenty-one, without consent of the executors, or the major part of them, the legacy to go to the children of her sister, the wife of C, and made C and two others executors; B being at the house of C, there marries his son, by a former wife, with his privity, being under twenty-one; B and her husband bring a bill for the legacy; C, in favour of his other children, insists that the legacy is forfeited; the other executors confessed they had notice of the courtship,

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and did not contradict or disapprove of it, and the 300*l.* were decreed the plaintiffs, there being at least a tacit consent.

Vern. 580, *Meagret v. Meagret*.

[A father devised lands in trust to permit his daughter S to receive the rents until her marriage or death, and in case she married with the consent of the trustees, then to convey the premises to her and her heirs; but if she died before marriage, or married without such consent, then to convey to other persons. The daughter afterwards married with the consent of her father, who settled part of the lands on her and her husband, and died. By the father's consenting in his lifetime the condition is dispensed with.

Clerk v. Berkley, 2 Vern. 720.

A legacy was given to a daughter with a condition annexed to it, that she should marry with her mother's consent. The daughter sued for the legacy, and it was pleaded in bar, that she did not marry with her mother's consent; notwithstanding which, sentence was given in her favour, that she should have the legacy.

Pigot's case, cited in Moor, 857.

The plaintiff's bill was for 400*l.* left her to be paid at her age of 21, or day of marriage, so as she married with the assent of the trustees, and her mother, and eldest brother. The defendant insisted, that the plaintiff was about to marry without such assent, and refused payment. But the court declared it just and reasonable, that the said 400*l.* with damages should be paid to the plaintiff.

Norwood v. Norwood, 1 Ch. Rep. 65.

R P bequeathed to his two daughters Eleanor and Alice 200*l.* apiece, to be paid at their ages of 21 years, or days of marriage, and he also gave them 200*l.* more by a marginal note in his will with this clause, "*if they behave themselves dutifully to their mother.*" Alice died, and Eleanor administered to her, and married the plaintiff without the consent of the defendant her mother, who was executrix of her father's will. The Court of Chancery declared, that as to the 200*l.* positively given by the will, the defendant ought to pay the same to the plaintiff; but as to the 200*l.* given by the marginal note in the will upon their dutiful behaviour to the defendant, she having married herself without the consent of her mother, they referred that point to the judges. The judges certified, that the 200*l.* mentioned in the marginal note, as well as the 200*l.* in the body of the will, belonged to the plaintiff Eleanor, her marriage notwithstanding.

Vintner v. Pix, 1 Ch. Rep. 65.

A suit was for a portion of 8000*l.* given to the plaintiff's wife. The defendant pleaded, that it was given her, provided she married with the consent of A, and if not, that she should have but 100*l.* *per annum*; and that she married without the consent of A. It was ordered, that the plea stand overruled. And the court all declared this proviso was but *in terrorem*, to make the person careful, and that it would not defeat the portion. But it was said, that if the party who gave the portion had limited it to another, in the case of her marriage without the consent of A, there it would have been otherwise.

Bellasis v. Ermine, 1 Ch. Ca. 22.

A sum of 1500*l.* was to be put out at interest for the use of the plaintiff Anne, and the principal and proceeds thereof were to be paid to her at her

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age of 21, or marriage; but if she should marry without the consent of the defendant Jewke and his wife, her father and mother, or one of them, or the survivor of them, then 500*l.*, part of the said 1500*l.*, was to be paid to such person as the defendant Jewke's wife, by writing under her hand, and without her husband, should appoint. The plaintiffs filed their bill for the 1500*l.*, stating that the defendant Jewke's wife died in 1668, without making any appointment, so that the plaintiff Anne was become entitled to the whole 1500*l.* and the proceeds thereof. The defendant Jewke insisted, that Mary, his wife, died in 1670; but before her death in 1666, by deed-poll directed, that in case the plaintiff Anne married without the consent of her, the said Mary, or the defendant Jewke, her husband, then 500*l.*, part of the said 1500*l.*, was to be paid to her and the defendant, or the survivor of them, and that the said deed was made upon mature deliberation, to keep the plaintiff Anne in due obedience: that the plaintiff Sutton having in a clandestine manner married the plaintiff Anne, without the defendant's privity and consent, and after he had forbidden his daughter to marry him on the forfeiture of his blessing, or what otherwise she might expect from him, he the said defendant, by means thereof, and by being administrator to his late wife, became entitled to 500*l.*, part of the said 1500*l.* The question therefore was, Whether the plaintiff Anne was entitled to the whole 1500*l.*, or, whether she had not forfeited 500*l.* thereof by her marriage without her father's consent and privity, and contrary to his direction and advice? Lord Chancellor was fully satisfied that the plaintiff Anne's marriage was without the defendant's privity, and against his consent, and that therefore she could not have the 500*l.*

Sutton and Wife v. Jewke, 2 Ch. Rep. 50.

A sum of 500*l.* was bequeathed to the plaintiff's wife, if she married with the consent of certain trustees; and in case she did not, then 20*l. per annum* for her life. She married the plaintiff without the consent of the trustees, and he preferred his bill for the 500*l.* It was urged on behalf of the defendant, that this differed from the common case of a devise on a condition *in terrorem*; for it had always been holden, that where there is a devise over to a third person for non-performance of the condition, there, if the party marry without consent, all shall go to the third person, because he hath a conditional interest by the will; but if there be no devise over, then it is esteemed only *in terrorem*, and the party shall have the legacy, notwithstanding the breach of the condition. But here, that this is tantamount, or as strong as a devise over, when the party himself saith, that if she marry without consent, she shall have but 20*l. per annum*. But it was answered by Lord Chancellor, that this differed not from the reason of the common case of a devise *in terrorem*, and the reason, he said, he had from the Lord Chief Justice, (Hale,) who (when it was objected in another case in this court, that this court did not make men's wills for them, and give their estates quite contrary to their intent) answered, that this court holds plea of legacies, and judges of them by the rules of the civil law, and by that law any condition added to restrain marriage is void; so that where an interest doth not accrue to a third person by the breach of the condition, such a condition is void, and only *in terrorem*; and therefore decreed the 500*l.* to the plaintiff.

Hicks v. Pendarvis, 2 Freem. 41.

A testator, having two daughters, bequeathed to each of them 20,000*l.*,

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to be paid them at their ages of 25 years, or marriage, which should first happen, so as such marriage was had with the consent of the mother and other trustees, and after such time as they respectively had attained the age of sixteen years: if either of them married before sixteen, or without consent, then such daughter to have only 10,000*l.* And he directed, that the surplus of his personal estate should be invested in lands, and settled on his daughters and their issue with cross remainders. In the testator's lifetime a treaty of marriage was set on foot between the plaintiff and one of the daughters; but before any agreement could be made, the testator died. After his death, however, the treaty was renewed, and the marriage was had with the consent of all the trustees, but before the lady was sixteen. The court decreed the 20,000*l.* to the plaintiff.

Lord Salisbury *v.* Bennet, 2 Vern. 223; Skin. 285, S. C.; 2 Ventr. 367, S. C., but differently reported, for it is said there that the court decreed the earl only 10,000*l.*, for that both parts of the condition must be observed. But these histories of the case seem to refer to different periods of time; the last to the original hearing before the Lord Keeper; the two former to a re-hearing before the Lords Commissioners.

A bequeathed 3000*l.* to his daughter, the plaintiff Garret's wife, at 21, or marriage, and recommended her to the care of S, provided that if she married without the consent of S, her legacy of 3000*l.* was to cease, and she was to have but 500*l.*, and made the defendant, his son, executor and residuary legatee. The plaintiff married the daughter without the consent of S; yet the court decreed her the whole 3000*l.* with interest from the marriage; and principally, because it was not expressly devised over, but to fall into the surplus.

Garret *v.* Pritty, 2 Vern. 293.]

A having issue three daughters, B, C, and D, devised 1000*l.* to be paid B, at the age of twenty-one, or marriage, upon condition that she married with the consent of his executors; and likewise devised to her several messuages, &c. upon the like condition; and, after several other legacies and bequests, he devised the residue of his estate to his executors, for the benefit of his children. B married, against the consent of the executors, a person who made his addresses to her in her father's lifetime, which the father knew, and was dissatisfied at; she had likewise notice given her by the executors of her father's will, and that by marrying without their consent she would be in danger of forfeiting her legacy; and that they could not approve of that match, because they knew that her father disliked it in his lifetime; yet, it was held, that there being no express limitation over, the devise of the residue being after debts and legacies paid, that the condition was only *in terrorem*, and that the marriage, without consent, did not amount to a forfeiture of the legacy, &c.

Prec. Chan. 562, Semphil *v.* Bayley, decreed in the Duchy Court by Lechmere, Chancellor, and King, C. J., against the opinion of Justice Dormer.

A devised to his daughter M 100*l.*, to be paid by his executors upon her day of marriage, or age of twenty-five years, which should first happen, upon condition that she should marry with the consent of such and such persons; and if she married without their consent, then to have 50*l.* only, and no more, and gave the residue of his personal estate to the defendants; M married the plaintiff, without such consent, before she was twenty. And it was held by the master of the Rolls, that this was more than a clause *in terrorem*, and that the devise of the surplus of the personal estate was a devise over of the 50*l.*, on M's disobedience.

Abr. Eq. 112, Amos *v.* Horner.

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[P by his will (*inter al.*) gave to each of his granddaughters that should be living and unmarried at the time of his decease, on their respective days of marriage, the sum of 1500*l.*, and desired, that none of his granddaughters should marry without the consent of the father and mother, or the survivor of them; and therefore, if any or either of them should marry without such consent, then by his will he revoked what was thereby directed to be paid to such granddaughter or granddaughters, and such of them should not be entitled to any benefit by virtue of such his will, further than what the father and mother, or the survivor of them, should direct; and he afterwards directed, that after the several legacies and sums directed to be paid were satisfied, if any sum of money should remain in the hands of the trustees, the survivors or survivor of them, the same should be paid to his daughter P for life, and after her decease to the defendant and his heirs. The plaintiff, one of the daughters, married without the consent of the father and mother, and brought a bill for the legacy. Her mother appointed trustees of the legacy for the plaintiff for her separate use for life, and to her issue, but if she had no issue, then to the defendant. Lord Hardwicke held, that the plaintiff was entitled absolutely to this legacy; that it was merely personal; and though an express devise, that if the legatee should not perform the condition, the legacy should sink into the *residuum*, amounts to a devise over, yet that there was no such direction here; that if this had been a particular fund, which was given to the trustees, as certain stocks, or certain mortgages, and the will had said, the legatee shall have no more than the father and mother shall appoint, it would then have been a devise over of the remainder of that particular fund; but that this was only a description of the *residuum* of the personal estate in the hands of the trustees.

Wheeler v. Bingham, 3 Atk. 364.

A testator bequeathed part of his personal estate to trustees, to pay one moiety thereof to M T at her age of 21 years, if unmarried; and the other moiety to her at her age of 25 years, if unmarried; but if she should marry before she should be 21, with consent of her mother, then one moiety to be settled on her and her issue in such manner as her mother should think proper, and the other moiety to be disposed of as M T should think fit. But in case M T should die before 25 years unmarried, then the whole of this legacy was bequeathed to her mother, to whom there was also a gift of the general residue of the real and personal estate. M T married before she was 21, against the consent of her mother. Lord Thurlow held, that the bequest to M T was hereby rendered void, and became the property of her mother, as part of the residue; for that a bequest of the residue is as effectual to defeat a personal legacy or a portion payable out of money, when the condition which is to vest the legacy has not been performed, as a specific devise over.

Scott v. Tyler, 2 Br. Ch. Rep. 431.

A testator devised 1000*l.* apiece to daughters, if they married with the consent of B, and if they married without such consent, then they should have but 500*l.* apiece, and the residue should go to the son. The daughters, being 30 years of age, sued for their legacies, and it was alleged in their behalf, that now being of that age, it was not material whether they married with or without consent, being of understanding and discretion to dispose of themselves. But it was resolved, that the testator was chancel-

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lor of his own estate, and having added this restriction, and a limitation over, the Court of Chancery could not alter it. Their full legacies were decreed to them ; but they were to enter into recognisances for security of repayment in case they married without such consent.

Lady Kilmurry's case, cited in 2 Freem. 59.

A testator devised in the following words: "I give and bequeath to my kinswoman Mary Barlow the sum of 1000*l.*, to be paid her at her age of 21 years, or marriage, which shall first happen. *Item*, In case the said Mary Barlow shall marry with any one of the surname of Barlow, then I give her the further sum of 1000*l.*, to be paid her on the day of such her marriage with a Barlow aforesaid. But if the said Mary Barlow shall die unmarried, or shall marry a person not bearing the surname of Barlow, then I give the last-mentioned sum of 1000*l.* unto Charles Barlow." Mary Barlow married one Robert Bateman, and thereupon Charles Barlow preferred his bill for the last-mentioned 1000*l.* as forfeited by this marriage. The defendant, Robert Bateman, by his answer admitted, that *on the occasion of his marriage, and not before*, he assumed and took upon him the name of Barlow, that his father's name was Bateman, and that he assumed and took upon him the name of Barlow, *in order to entitle him to the said sum of 1000*l.* bequeathed to the said Mary on the condition aforesaid.* The master of the Rolls held, that the condition was complied with by the defendant's taking the name of Barlow, and dismissed the plaintiff's bill. But on appeal to the House of Lords, it was declared, that the appellant was entitled to the legacy of 1000*l.* conditionally bequeathed to him, and the decree of the master of the Rolls was reversed.

Barlow v. Bateman, 3 P. Wms. 65 ; 4 Br. P. C. 194, S. C.]

{ A testator bequeathed a legacy to his daughter, to be paid within twelve months after his decease: but if she should marry A, then he revoked the legacy. She remained unmarried till about fourteen months after the testator's death, and then married A. They obtained a decree for the legacy; the Lord Chancellor saying that it was not the case of a condition precedent, and that he could only refer the event, on which the legacy was to be revoked, to the time during which the payment was suspended.

5 Ves. J. 527, Osborn v. Brown. }

One by will devised 1300*l.* to his daughter A, to be paid at her age of twenty-one years, and if she died without issue before twenty-one, then to go over to B, provided that if she married before twenty-one, without consent of certain persons, then to go over to C. She did marry before twenty-one, without such consent: and upon a bill brought by B, it was decreed that A should give security, &c. for the money, if she died before twenty-one without issue; and the master of the Rolls, who heard the cause, said, the law was now settled accordingly; but the decree was so ordered as to serve both contingencies; viz., that upon her marriage before twenty-one, without consent, the money should go to C, yet so that if she died before twenty-one without issue, it should go to B according to the devise.

Mich. 1688, Paulett and Dogget, in Can.

A by will gave portions to his daughters, without mentioning any time of payment, upon condition that they married with the consent of his wife; and if any married without such consent, her portion to go over. On a bill brought by the daughters for their portions, it was decreed accordingly, but on security to refund in case the condition should be broken; for it was

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held, that though the marriage without consent was but a condition subsequent, yet the court could not relieve against the forfeiture, by reason of the devise over, although it was admitted to be a hard condition, no time being limited, but going to a marriage at any time, even after the age of twenty-one years.

2 Vern. 452, Aston and Aston.

The defendant's father devised to him, who was his heir at law, all his lands, &c. (except such and such parts,) charged with the sum of 2500*l.* to his daughter (since married to the plaintiff) at her age of twenty-one years, or marriage, which should first happen; and devised the excepted lands, in trust, to be sold for the payment of his debts; provided that if his said daughter should marry in the lifetime of her mother, without her consent first had in writing, then 500*l.*, part of the said 2500*l.*, should cease, and should be applied towards payment of his debts charged on the said excepted lands, and appoints his wife to be guardian of his said daughter, and makes her executrix, and dies; the daughter attains her age of twenty-one years, and, without the consent or privity of her mother, intermarries with the plaintiff, who was a gentleman of some estate, and called to the bar, but had made no settlement or provision for his wife; and therefore the defendant, the heir at law, refused to raise or pay any part of his sister's portion; and insisted likewise, that by her marriage without her mother's consent, 500*l.*, part of her fortune, was become forfeited. Whereupon the plaintiffs brought their bill to have the whole portion raised by sale of the land charged therewith. *Per Lord Keeper*: This is a portion to be raised out of lands, and therefore to be considered as land: and though it be to go towards payment of debts on breach of the condition, and there appear one hundred and twenty creditors concerned, yet none that are in danger of losing their debts; and it is then to be considered as it stands upon the condition itself, and therefore the plaintiff must have her whole portion; for the testator has appointed two periods of time to entitle her to it; viz. marriage, or the age of twenty-one; and as she has attained that age, it becomes a vested and settled interest in her, not to be divested by the marriage without the consent of the mother, for that consent cannot, in any reason, be carried farther than during her minority.

Abr. Eq. 112, 113, King v. Withers.

[A case arose upon the words of two wills, the one made by the father, and the other made by the mother of Mary Graydon, the plaintiff in the cross bill. The father's will was as follows: "I give the sum of 1000*l.* to my only daughter Mary Graydon, to be paid her at her age of twenty-one years, or day of marriage, which shall first happen, provided she marry by and with the consent of my executors; but, in case she dies before the money becomes payable on the condition aforesaid, then I give the said 1000*l.* equally between my two youngest sons, Benjamin and Gregory Graydon, Mrs. Mary Graydon, grandmother of Mary Graydon, Mary Graydon the mother, and Mr. Jeremy Graydon the uncle, to be my joint and sole executors." The mother's will was in these words: "*Item*, I give to my daughter Mary Graydon all my wearing apparel of all sorts, with all my dressing plate, jewels, watch-chain, &c. Then my will is, that in case my daughter Mary Graydon shall marry before she comes to the age of twenty-one years, without the consent and approbation of my executor, under his hand first had and obtained, (if he be living,) that then she shall not be en-

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titled to any part of such legacies as I have herein left her, but her whole share shall be equally divided between my sons Benjamin and Gregory Graydon ;" and the residue, after her debts and legacies paid, the testatrix gave to her three children, Benjamin, Gregory, and Mary, equally to be divided between them, or the survivors of them, share and share alike, and appointed her son J. Graydon to be her sole executor. The bill was brought by the plaintiff in the original cause against the defendant Hicks, as the husband of Mary Graydon, to relinquish the 1000*l.* which were left to the wife under the will of the father, she having married without the consent of the executors, and contrary to the direction of his will ; and likewise to relinquish the legacies under the will of the mother. The executors under the will of the father were all dead before the marriage of Mary Graydon ; and J. Graydon, appointed executor under the will of the mother, and who was to give his consent to Mary Graydon's marriage, renounced the executorship in the most formal manner in the ecclesiastical court. The cross bill was brought by Mary Graydon, as a feme sole, against the plaintiff in the original cause, as one of the devisees over under both wills, in case of Mary Graydon's marriage without consent ; and likewise against Mr. Time-well, who took out administration to the mother, on the executor's renouncing ; and also administration *de bonis non* to the father. Lord Hardwicke dismissed the cross bill, there being abundant evidence of Mary Graydon being married to Hicks. As to the original bill, his lordship held Mary Graydon entitled to the 1000*l.* under her father's will, the condition upon which it was given being subsequent,^(a) and having become impossible to be performed, by the death, before her marriage, of the persons whose consent was required ; but he declared that the portion given under the mother's will was forfeited by the marriage without consent.

Graydon v. Hicks, and Graydon v. Graydon, 2 Atk. 16. (a) So, Peyton v. Bury, 2 P. Wms. 626.

J S bequeathed to his daughter in these words: "*Item*, I leave and bequeath to my said daughter Anne 2000*l.* to be paid her on the day of her marriage, or at the age of twenty-one years, which shall first happen ; and in case my said daughter Anne shall marry with the consent of R S, &c., or any two of them, I leave her the additional sum of 2000*l.* more, otherwise not." Anne married without the consent required in the will, and to a person to whom her father had expressed strong objections in his lifetime. On a bill brought by her and husband for both these legacies, it was decreed, that she was entitled to the first, but had forfeited the second. This decree was affirmed in the House of Lords by consent of parties

Holmes v. Lysaght, 4 Br. P. C. 103.

A father by his will gave the plaintiff Agnes, his daughter, 3000*l.* payable at her age of twenty-one, or day of marriage, if she married with the consent of his executors ; provided, if either of the legatees died before their legacies became payable as aforesaid, then such legacy was to be divided between the survivor of her brother and sisters. Agnes married the plaintiff Underwood at her age of fifteen, without the consent of the executors. The question was, Whether, as Agnes was married without the consent of the executors, this devise was not to be considered as a devise over ; and that, consequently, the legacy will not vest unless she arrive at her age of twenty-one ? But Mr. Justice Parker said, as this is a mere personal legacy, he was of opinion, it was a devise *in terrorem* only, and that it vested absolutely in the daughter ; and that marriage, one of the contingencies upon

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which it became payable, having happened, the executors must be decreed to pay it to the plaintiffs.

Underwood v. Morris, 2 Atk. 184.

W C by his will gave five-sixteenth parts of the residue of his personal estate to trustees, to lay out the same, and to pay the dividends, &c., to his daughter Rachael, on her attaining her age of twenty-eight years, or day of marriage, which should first happen, provided his daughter should marry with the approbation of his said executors, or such of them as should be then living. He gave the remaining eleven-sixteenth parts among his other four children; and in case either of his sons or daughters should die before his, her, or their share or shares should become payable, then the part or share, parts or shares, of him, her, or them so dying, should go and be paid among all the rest of his children who should then be living, and the issue of a deceased child or children (if any) *per stirpes*, and not *per capita*, at the same time as their original shares would become due. Rachael married J C, one of the defendants, without the consent of the executors, and had a child, (to whom J C administered,) and died under twenty-eight. It was insisted for the plaintiffs that the portion never vested in Rachael, she marrying without consent, and not attaining twenty-eight years of age. On the other side it was argued, that the portion vested on the marriage, notwithstanding the proviso, which was only *in terrorem*, for which was cited the above case of *Underwood v. Morris*; and that, whether the condition be precedent or subsequent, it will not prevent the legacy from vesting, unless it be given over. But Lord Loughborough doubted the authority of (a) *Underwood v. Morris*, and decreed that it did not vest: but there being five children of the testator, he held the infant child of Rachael to be entitled to one-fifth of the legacy, under the devise over, (as being "the issue of a deceased child,") and decreed the same to her father in her right.

Hemmings v. Munkley, 1 Br. Ch. Rep. 303. (a) So, by Lord Thurlow—"The case of *Underwood v. Morris*, by Baron Parker, does not seem to have been closely considered. I agree with the late Lords Commissioners in denying the authority." 2 Br. Ch. Rep. 488.

A testator gave to M 8000*l.*, and to her sister S 5000*l.*, which several sums were to be paid to them at their ages of twenty-one, or day of marriage, which should first happen, provided they married with the consent of their father and mother, or the survivor of them; otherwise their legacies should sink into his personal estate. And it was the testator's will, that if the said S and M, or either of them, should thereafter marry with any person or persons whomsoever, without the consent of their father and mother, and the trustees named in the said will, or the greater number of them living, signified under their hand; that such of them so marrying should have or receive no more benefit or advantage by his will, or any thing therein contained, than if they were actually dead, or not named in his said will. Lord Hardwicke held, that the legacies vested in M and S on their attaining their age of twenty-one, and though either of them afterwards married without consent, yet it would be of no effect; for the marriage with consent must be construed to relate to the time of the legacies vesting.

Pullen v. Ready, 2 Atk. 587.

The testator having only one child, a daughter, devised all his real and personal estate to J S in trust, after paying an annuity to his widow, for his daughter, if she married with the consent and approbation of J S; but if she should marry without such consent and approbation, then the premises to

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go to, &c. The daughter married within a month after the testator's death, without even asking the consent of J S, but about eleven months after her marriage, she obtained his approbation in writing. The question being, whether she had forfeited her estate or not; Lord Hardwicke held, that he was at liberty to construe the word *and* to mean *or*, which he accordingly did, and then the subsequent approbation was sufficient, and the previous consent was not necessary. He also held, that supposing the condition had made consent necessary, yet, that notice to the daughter, being heir at law, was necessary to work a forfeiture.

Burleton v. Humfrey, Ambl. 256.

A testator devised to trustees, upon trust for his only son for life, then to the use of such woman as should be his son's wife at his son's death, for her life; remainder to the issue of his son's body in tail; remainder to the testator's two daughters in fee: "Provided always, and it was his very will, true intent, and express meaning, that in case his said son should marry with any woman not having a competent marriage portion, or without the consent and approbation of the said trustees, their heirs and assigns, in writing under their hands and seals, to be executed in the presence of two or more credible witnesses first had and obtained; then his said trustees, and their heirs and assigns, should stand and be seised to and for the use of his (the testator's) said two daughters and their heirs for ever; any trust, use, &c., notwithstanding. And his will, true intent, and meaning was, and he did declare, that the said proviso and condition therein before expressly mentioned was not intended by him, nor to be construed or taken *in terrorem*; but a condition, for want of performance whereof in every respect, the said lands, &c., should in no case be vested in such wife of his said son, nor the heirs of that marriage; but, on the contrary, that his said trustees and their heirs should stand seised of the premises, to the only use and behoof of his said two daughters and their heirs in manner aforesaid." The Court of K. B. held, that all clauses and conditions in restraint of marriage ought to be construed with the utmost rigour and strictness, against such restraint, and in favour of the person attempted to be restrained: that the testator meant, that the son's complying with either part of the alternative should be a performance of the condition: and that therefore he had not incurred a forfeiture by marrying (as the special verdict found he had done) a woman, who, at the time of her marriage with him, had a competent marriage portion, though he married her without any consent or approbation of the trustees.

Long v. Dennis, 4 Burr. 2052; 1 Bl. Rep. 630, S. C.

The testator bequeathed to each of his daughters 1500*l.*, to be paid to them respectively at the time of marriage with the consent of his executors, whom he also made guardians of his daughters during their minority. There was likewise a clause in the will for their maintenance and education till their portions became payable. One of the daughters, after having attained twenty-one, died unmarried; and the question was, Whether the portion survived, that is, whether the time of payment was confined to the marriage? Lord Camden, after observing that it was very unnatural for a parent to impose a consent to a marriage during his daughter's whole life, said that, considering all the clauses of this will, the portions must be understood to be payable at twenty-one, or marriage with consent.

Knapp v. Noyes, Ambl. 662.

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A E bequeathed the sum of 1500*l.* to his granddaughter, to be at her own disposal, pursuant to the request of his deceased daughter E D, in case she married with the consent and approbation of his son J E and his wife; and in case of their deaths before that time, then with the consent and approbation of their trustees, and not otherwise. The granddaughter survived the testator, but died at fourteen years of age, and unmarried. The legacy never vested.

Elton v. Elton, 1 Wils. 159.

A testator bequeathed the plaintiff 200*l.*, provided she married with the consent of her father and mother, or the survivor of them. The plaintiff brought her bill to have the legacy raised and paid to her; and the question was, Whether she must not be married before she was entitled to have the 200*l.*? The master of the Rolls was clearly of opinion, that there must be a marriage first.

Garbut v. Hilton, cited 1 Wils. 159.]

{As courts of equity look upon conditions in restraint of marriage unfavourably, they are not strict in requiring them to be complied with in every minute particular. If the consent be given *in substance*, it is sufficient, and the want of circumstances will be dispensed with. Thus when the major part of the trustees consent, or when an implied assent is given, or a general assent to any marriage the legatee may contract, the legacy is not forfeited.

2 Chan. Rep. 13, Wiseman v. Foster; 1 Atk. 375, Harvey v. Aston; 2 Vern. 580, Mesgret v. Mesgret; 2 Atk. 261, Daley v. Desbouverie; 4 Bro. C. C. 326, Mercer v. Hull.

So it will not be forfeited if the person whose consent is required encourage the marriage in the first instance, and afterwards refuse to consent without sufficient cause.

2 Ves. 534, Campbell v. Netterville; Ambl. 263, Lord Strange v. Smith.

But where a conditional consent was given upon the offer of a settlement, and was retracted on a subsequent refusal to make the settlement, and the marriage took place afterwards without any other consent, the legacy was holden to be forfeited.

10 Ves. J. 230, Dashwood v. Lord Bulkeley.}

||It seems now settled, that marriage with consent, whether before or after twenty-one, may be made a condition precedent, whether there be a devise over or not.

Aston v. Aston, 2 Vern. 452; Creagh v. Wilson, 2 Vern. 572; Gillet v. Wray, 1 P. Wms. 284; Elton v. Elton, 1 Wils. 159; 3 Atk. 504; Hennings v. Munkley, 1 Br. C. C. 303; Scott v. Tyler, 2 Br. C. C. 431; S. C. 2 Dick. 712; Stackpole v. Beaumont, 3 Ves. 89. But see *dictum* in Malcolm v. O'Callaghan, 2 Madd. 349, 353, *per* Sir T. Plumer, V. C.

Testator declared, if either Jane or Mary married into the families of Prudence or Resignation, and had a son, then he gave all his estate to such son; but if they did not so marry, then the estate was to go to A. Jane and Mary married, but not into the aforesaid families, and A claimed the estate; but it was held, that during the lives of Jane and Mary the claim was premature, for one of them might afterwards satisfy the condition.

Randal v. Payne, 1 Br. C. C. 55.

¶A legacy, uncertain as to the time of payment and the persons to take,

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being limited over in case of the death of the legatee before a certain event, is contingent and not vested.

Perroneau v. Perroneau's Executors, 1 Desaus. 531.*g*

CONDITION OF MARRIAGE WITH CONSENT.

If this be required as a condition precedent, the consent of the persons authorized to give it *after* the marriage is of no avail.

Malcolm v. O'Callaghan, 2 Madd. 349; *Reynish v. Martin*, 3 Atk. 331. See Lord Eldon's observations in *Clarke v. Parker*, 19 Ves. 15; and *Long v. Rickotts*, 2 Sim. & Stu. 179.

The consent to satisfy such a condition precedent must, if vested in trustees, be given by all the acting trustees, unless the testator expressly declare that the consent of the majority shall be sufficient.

Clarke v. Parker, 19 Ves. 1; *Worthington v. Evans*, 1 Sim. & Stu. 165.

If a consent in writing be required, it may be given by letter; and, indeed, it seems that a court of equity will be satisfied, though the consent is not formally expressed in writing.

Worthington v. Evans, 1 Sim. & Stu. 165.

If a legacy vest in A, subject to be divested by marriage without consent of certain persons, and such consent becomes impossible to obtain by the death of the described persons, the legacy is absolute and discharged of the condition.

Peyton v. Bury, 2 P. Wms. 626; *Graddon v. Hicks*, 2 Atk. 16, 18; *Aislabie v. Rice*, 3 Madd. 256; *Grant v. Dyer*, 2 Dow. P. C. 73.

A general consent to the legatee, to marry whomsoever she pleases, is sufficient.

Pollock v. Croft, 1 Mer. 181; *Mercer v. Hall*, 4 Br. C. C. 327.

An absolute and unconditional consent once given cannot be retracted, unless some objection occur which ought to have prevented the consent being given at all.

Strange v. Smith, Amb. 263; 10 Ves. 242; *Merry v. Ryves*, 1 Eden, 1; *D'Aguilar v. Drinkwater*, 2 Ves. & B. 234.

But consent may be given conditionally, and will then of course require the fulfilment of the condition before it is effectual. It seems, however, that a settlement after marriage will satisfy a conditional consent.

Dashwood v. Lord Bulkeley, 10 Ves. 230, 244; *D'Aguilar v. Drinkwater*, 2 Ves. & B. 225.

If a person whose consent is requisite knows of and tacitly acquiesces in a courtship, his consent is implied.

Campbell v. Lord Netterville, cited 2 Ves. sen. 534; 10 Ves. 243; *Mesgrett v. Mesgrett*, 2 Vern. 580.

A marriage in the lifetime of testator, with his consent or subsequent approbation, is equivalent to a marriage after his death with the requisite consent.

Clarke v. Berkeley, 2 Vern. 720; *Parnell v. Lyon*, 1 Ves. & B. 479; *Wheeler v. Warner*, 1 Sim. & Stu. 304.

Thus, a bequest was made to Mary Young on the day of her marriage, with any other person than Henry Twynam; and if she married him, then over. She married H. Twynam in the lifetime and with the consent of the testator, and she was held entitled to the bequest.

Smith v. Cawdery, 2 Sim. & Stu. 358.

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A condition requiring consent is satisfied by the *first* marriage of the legatee, though she become a widow in testator's lifetime, having married with his approbation.

Hutcheson v. Hammond, 3 Br. C. C. 128, 146; Crommelin v. Crommelin, 3 Ves. 227.

If a legacy be given to A, to be paid at twenty-one, or upon marriage with consent, with a bequest over if A marries without consent, this bequest over is confined to the period of A's minority; and if A attains twenty-one, she is entitled to the legacy absolutely.

Desbody v. Boyville, 2 P. Wms. 547; Knapp v. Noyes, Amb. 662.

So, if a legacy be given to be paid at the expiration of one year after testator's death, with a limitation over if legatee marry B; yet should legatee survive the time of payment, and then marry B, she will be entitled to the legacy.

Osborn v. Brown, 5 Ves. 527.

But if a legacy be given to be paid at twenty-one, or marriage with consent, with a limitation over in case legatee die under twenty-one, or marry without consent, and legatee does marry during minority without consent, the legacy goes over though legatee afterwards attains twenty-one.

Chauncy v. Graydon, 2 Atk. 616.

When, however, a contingent legacy was given; as "when A attained twenty-one, or married before that age with consent, but if he should not attain twenty-one, or marry before that age with consent," then over; and A did marry before twenty-one, but *without* consent, yet upon attaining that age he was held entitled to the legacy.

Austen v. Halsey, 13 Ves. 126; Knight v. Cameron, 14 Ves. 389.

If a vested legacy be given, subject to be divested upon the marriage of legatee without consent, but the legacy is not given over or directed to fall into the residue, the condition is inoperative, and *in terrorem* only.

Garret v. Pritty, stated 3 Mer. 120; S. C. 2 Vern. 293.

So, an express revocation of a legacy, in the event of not complying with a condition, subsequent of marrying with consent, though accompanied by a declaration that the legatee was in such event to have no further benefit under the will than his father should direct, is not equivalent to a limitation over.

Wheeler v. Bingham, 3 Atk. 364.

But if there be a limitation over, or the legacy is directed to sink into the residue which is bequeathed, the condition must be fulfilled.

Stratton v. Grymes, 2 Vern. 357; Lloyd v. Branton, 3 Mer. 108, 118.

As to a condition of marrying one of the testator's name, see cases below.

Barlow v. Bateman, 3 P. Wms. 65; 2 Br. P. C. 272; Leigh v. Leigh, 15 Ves. 107; Doe v. Yates, 5 Barn. & A. 544.

§ A devise to A, on condition that he shall marry B, if uncontrolled by other words, takes effect immediately, and the devisee performs the condition, if he marry B at any time during his life.

Finlay et al. v. King's Lessee, 3 Pet. 374.

The testator gave his daughter a legacy during her separation from her husband. The daughter and her husband lived separately at the time of making the will, and cohabited together subsequently at the time when the testator made a codicil changing his executors, and at the time of his death

(F) Of Conditional Legacies.

but immediately after his decease they separated and continued to live separately until within a short time before their filing the bill against the executors for the legacy. Held, that the plaintiffs were not entitled to the legacy.

Cooper v. Ramsen, 3 Johns. Ch. 382.*g*

As to NOTICE to be given to legatees of conditions, Lord Hardwicke observed, "where a condition is annexed to a devise of real or personal estate, and no notice required by the will to be given, nor any person obliged to give it, the legatees must perform the condition or cannot be entitled; and if they omit to do so, a forfeiture incurs when there is a limitation over."

Chauncy v. Graydon, 2 Atk. 619, and see 3 Meriv. 7.

CONDITIONS AGAINST CHARGING, OR DISPOSING OF, OR ALIENING A BEQUEST.

If there be a bequest to A of the whole interest in a fund, but with a bequest over if he should attempt to dispose of it; (a) or if he should not receive it, or dispose of it by will or otherwise, (b) the bequest is absolute, and the bequest over void.

(a) Bradley v. Peixoto, 3 Ves. 324. (b) Ross v. Ross, 1 Jac. & W. 154.

If there be a bequest to A of an annuity for life, "upon this express condition," that in case he should assign or dispose of or otherwise charge it, so as not to be entitled to the profit, receipt, use, and enjoyment thereof, then the annuity should cease, determine, and be void; the bankruptcy of the annuitant will not determine the annuity, it being a proceeding *in invitum*.

Wilkinson v. Wilkinson, Coop. 259; S. C. 3 Swanst. 515, 528; and see Cooper v. Wyatt, 5 Madd. 482.

And if there be a bequest to A of a life-interest, with a proviso, that it should not be grantable, transferable, or otherwise assignable by way of anticipation; but there is no limitation over in case of default, it seems that the proviso is inoperative and void.

Brandon v. Robinson, 18 Ves. 429. See Barton v. Briscoe, Jacob, 603.

So where testator bequeathed to his wife for life, should she survive and continue unmarried, with a bequest over after her *decease*, and wife survived testator, and afterwards married; it was held, nevertheless, that wife was entitled for her life.

Marples v. Bainbridge, 1 Mad. 590. See Richards v. Baker, 2 Atk. 321.

But if the bequest be to a female, a condition against anticipation is good against her during coverture.

Barton v. Briscoe, Jacob, 603.

A bequest to A till bankruptcy, or insolvency, or any other event, is good, if upon the happening of the event the bequest is given over.

Doe v. Hawke, 2 East, 481; Shee v. Hale, 13 Ves. 405; Wilkinson v. Wilkinson, 3 Swanst. 515; Cooper v. Wyatt, 5 Madd. 412; and see Brandon v. Robinson, 18 Ves. 429.

A CONDITION OF EXECUTING A RELEASE of all demands within a certain time is sometimes annexed to a legacy; if there be no gift over, the legatee may be entitled to his legacy upon executing the release, though not within the given time.

Simpson v. Vickers, 14 Ves. 341, 348; Taylor v. Popham, 1 Br. C. C. 168.

If a legacy be given to A, provided he claim it within a certain period,
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and in default it is given over, or directed to sink into the residue, A is not entitled to the legacy if he does not claim it within the prescribed period, though he claims it as soon as he is informed of the testator's bequest.

Tulk v. Houlditch, 1 Ves. & B. 248; *Burgess v. Robinson*, 3 Mer. 7, 1 Madd. 172.

The time within which a condition must be performed may be computed inclusive or exclusive of the day of testator's death, as will best answer his intention; but *prima facie*, it seems, the time begins to run on the day following the testator's death.

Lester v. Garland, 15 Ves. 248.

If testator give a legacy to A, and A is afterwards named an executor, the legacy is *prima facie* to be considered as given to him as executor; and an executor cannot claim his legacy without proving the will, and *bond fide* acting in the trusts.

Harrison v. Rowley, 4 Ves. 216; *Humberston v. Humberston*, 1 P. Wms. 333; *Harford v. Browning*, 1 Cox, 302; *Read v. Devaynes*, 3 Br. C. C. 95; *Abbot v. Massie*, 3 Ves. 148; *Stackpole v. Howell*, 13 Ves. 417.

Testator gave 50*l.* to his cousin Thomas King, and appointed him executor. Leach, V. C., held, though not without doubt, that the legacy was in respect of the relationship and not of the office.

Dix v. Reid, 1 Sim. & Stu. 237.]

By his will the testator gave the residue of his estate real and personal to A B, "his heirs and assigns for ever," charged with the payment of debts, funeral expenses, and some small legacies, "provided that in case the said A B doth not return to Philadelphia from his present intended voyage to South America, or in case he doth not return to Philadelphia within a reasonable time after my decease, but departs this life without lawful issue, then and in such case or cases, all my said message, lot and residuary estate, real and personal, intended for the said A B, shall go to, and I do hereby devise and bequeath the same to C D, &c., their heirs and assigns," subject to the same charges. Held that the proviso must be construed to refer to a dying without issue on the contemplated voyage. A B having returned from the voyage in the lifetime of the testator took a fee-simple in the real estate.

McCarthy v. Dawson, 1 Whart. 4.

When a legacy is given to an executor with the implied condition of performing services, the question generally is, whether there has been a sufficient and faithful assumption of the character to entitle the party to it.

Morris v. Kent, 2 Edw. 175.*g*

(G) Of Specific and Pecuniary Legacies, and the Difference between them.

[THERE are two kinds of gifts included under the description of specific legacies. First, when a particular chattel is specifically described, and distinguished from all others of the same kind. Secondly, something of a particular species, which the executor may satisfy by delivering something of the same kind, as a horse, &c. The first kind may be more properly called an individual legacy, and if such, so bequeathed, is not found among the testator's effects, it fails; or, if given first to A and then to B, they must divide it; or, if it is disposed of in the life of the testator, it is an ademption of such legacy.(a)

Per Lord Hardwicke in *Purse v. Snaplin*, 1 Atk. 417. *Re* Samuel Walker's estate, 3 Rawle, 229, 237; *Blackstone v. Blackstone*, 3 Watts, 335; *Dimond v. M'Dowell*,

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7 Watts, 510; Gallaher v. Gallaher, 6 Watts, 473; Cogdall's Executor v. His widow, 3 Desaus. 373, 381; Walton v. Walton, 7 Johns. Ch. 262; Warren v. Wigfall, 3 Desaus. 47; Boys v. Williams, 3 Sim. 563; Nelson v. Carter, 5 Sim. 530; Wilcox v. Rhoades, 2 Russ. 452; White v. Green, 1 Ired. Eq. 45; Smith v. Lampton, 8 Dana, 69; Kent v. Somervell, 7 Gill and Johns. 365; Attorney-General v. Grote, 2 Russ. & My. 699; Knight v. Davis, 3 My. & Keen, 358; Miller v. Little, 2 Bear. 259; Robinson v. Addison, 2 Bear. 515; Stephenson v. Dowson, 3 Bear. 342; Jenkins v. Hanahan, 1 Cheves' Ch. Cas. 129.g [(a) Barker v. Rayner, 5 Madd. 208; Evans v. Fripp, 6 Ibid. 91.]

Although it may be difficult to make pecuniary legacies specific, yet money may be so distinguished as to be the subject of a specific bequest, as money in a certain chest,(a) &c.; or a particular sum of money in the hands of B;(b) or a particular debt.(c) So, a bequest of stock in a particular fund is specific;(d) or a legacy to be paid out of the profits of a farm which the testator directs to be carried on.(e) So, a bequest of part of a specific chattel may be equally a specific legacy; as where the testator gives part of the debt due to him from A,(g) or part of his stock in a particular fund.(h)

(a) Lawson v. Stich, 1 Atk. 508. β Legacies in the following words: "I order five hundred dollars to be kept in gold and silver money for each of my children, to be paid and given to my four children at lawful age or married;" held, that they are not specific legacies, unless the sums bequeathed are in specie, separated and put in parcels, and each parcel identified and described, and given to a legatee. Mathis v. Mathis, 3 Har. 59.g (b) Hinton v. Pinke, 1 P. Wms. 540. (c) Ellis v. Walker, Amb. 310; Ashburner v. Macguire, 2 Br. Ch. Rep. 108; β Nash v. Nash's Administrator, 1 Hayw. 228.g (d) Ashton v. Ashton, Ca. temp. Talb. 152; Avelyn v. Ward, 1 Ves. 424; Drinkwater v. Falconer, 2 Ves. 623. {See the cases referred to in note (f) to the next paragraph. Testator bequeathed a part of his three per cent. consolidated bank annuities. Upon evidence that he had no bank stock at the date of his will or his death, but that he had three per cent. South Sea annuities, it was considered as a mistake of the testator as to the particular stock belonging to him; and an equal amount of the stock which he had was directed to be transferred to the legatee. 3 Ves. J. 308, n. Dobson v. Waterman, Ibid. 306; Selwood v. Mildmay, acc.} (e) Mayott v. Mayott, 2 Br. Ch. Rep. 125. (g) Heath v. Perry, 3 Atk. 103. (h) Sleech v. Thorington, 2 Ves. 563. {4 Ves. J. 177, Richardson v. Brown; 5 Ves. J. 461, Barton v. Cooke; 7 Ves. J. 522, Sibley v. Perry. But a legacy of "1000*l.* out of my reduced bank annuities" is pecuniary, to be raised by sale of the stock. The leaning is against construing legacies specific, unless clearly intended. 4 Ves. J. 748, Kirby v. Potter; 9 Ves. J. 146, Deane v. Teet. So a legacy given generally at first, and afterwards directed to be paid out of a specific security, is not specific. It gives the legatee a preference as to that security, above other legatees. And if that security fails, the legacy will be paid out of the general assets. 4 Ves. J. 150, Roberts v. Pocock; 5 Ves. J. 199, Raymond v. Broadbelt, 9 Ves. J. 152.}

But a mere bequest of *quantity*, whether of money or of any other chattel, is a general legacy, as of a quantity of stock;(i) and where the testator has not such stock at his death, it is a direction to the executor to procure so much stock for the legatee.(k) Personal annuities given by will (l) are general legacies, though this seems to have been doubted in one case.(m)

(i) Purse v. Snaplin, 1 Atk. 414; Sleech v. Thorington, 2 Ves. 562; Bronsdon v. Winter, Amb. 57; Bishop of Peterborough v. Mortlock, 1 Br. Ch. Rep. 565. {7 Ves. J. 522, Sibley v. Perry; 8 Ves. J. 410, Webster v. Hale; 9 Ves. J. 180, Wilson v. Brownsmith; 11 Ves. J. 607, Lambert v. Lambert.} (k) Partridge v. Partridge, Ca. temp. Talb. 227; Bronsdon v. Winter, *ubi supra*; {4 Ves. J. 675, Chambers v. Minchin; 7 Ves. J. 399.} (l) Hume v. Edwards, 3 Atk. 693; Lewin v. Lewin, 2 Ves. 417. {See 9 Ves. J., 566, Smith v. Pybus.} (m) Peacock v. Monk, 1 Ves. 133.]

β Testator bequeathed ten negroes to A, seven to B, and seven to C. After making his will he sold all his negroes, and died possessed of a large estate. Equity will order the executors to lay out so much of the estate as may be necessary to purchase the negroes to make good the legacies.

Walker v. Kelly, 3 Murph. 265.g

(G) Of Specific and Pecuniary Legacies.

A specific legacy differs from a pecuniary legacy, or a sum of money, in that the legatee is not, in case of deficiency of assets, to (a) abate in proportion, as pecuniary legatees must do.

2 Chan. Ca. 25, 171; Vern. 31; 2 Salk. 416, pl. 3. ¶1 P. Wms. 422, 540, 679; 3 P. Wms. 385; 3 Br. C. C. 160.¶ (a) But though a specific legatee has a preference, and is not to abate in proportion with other legatees, where the estate falls short, as to the payment of debts, yet he cannot in any case have more than the testator could or did devise to him; and therefore where a freeman of London devised a lease for years to J S, who was evicted of a moiety thereof by the widow claiming it by the custom; it was held, that the specific legatee should have no satisfaction for this eviction out of the surplus, the testator having power to dispose only of a moiety. 2 Vern. 111. [But where the reversion of a leasehold estate for three lives was devised to A for life, afterwards to B, and then to B's son, and a creditor of the testator filed a bill to charge the estate with his debts, Lord King said, that as this was a specific devise, all the rest of the testator's personal estate not specifically devised must be first applied to pay the debts; and if there were any other specific devise, the same ought to come in average with this, and pay its proportion; but if that would not serve, all must be sold to pay the testator's debts. *Duke of Devonshire v. Atkins*, 2 P. Wms. 381.]

So, if a man devise his personal estate at W, this is as much a specific legacy as if he had enumerated the several particulars of it; and though the other legacies fall short, yet the legatee must have this specific legacy entire.

2 Vern. 688, *Sayer & Sayer*; Prec. Chan. 392, S. C.; {5 Ves. J. 149, *Nisbet v. Murray*.}

But if the testator devise his personal estate at A, and his personal estate at B, and then devise a legacy out of his personal estate, and have no personal estate but what lies in those two places, the pecuniary legacy must be paid out of these specific legacies thus particularly devised.

Prec. Chan. 393.

So, if after several specific legacies the testator devise a pecuniary legacy, or sum of money, out of all his personal estate whatsoever; in this case the pecuniary legacy shall come out of the estate at large.

Prec. Chan. 393, 394. β Where testatrix bequeathed all her property specifically, and directed two negroes to be purchased for A and B, rather than divide families of negroes, held, upon a deficiency of assets, that all the legacies must abate rateably. *White v. Beatty*, 1 Dev. Eq. 87.β

If a horse, or term for years, which is specifically devised to another, be taken in execution by creditors {1} on a judgment obtained, (as they may be,) the specific legatee shall have recompense in equity against the executors or residuary legatees for the value, who are to have nothing till after the debts and legacies are paid.

{1} If the executor sells a specific legacy, the purchaser will hold it against the legatee, whether or not there were debts requiring the sale; unless it appears that the purchaser had notice that there were no debts, or they had been paid, or that he colluded with the executor. 2 P. Wms. 148, *Ewer v. Corbet*, and the cases cited in Mr. Cox's notes. See 2 Hen. & Mun. 69, *Sale v. Roy*; Ibid. 245, *Anderson v. Fox*. But after the assent of an executor to a specific legacy the property is changed; and a creditor obtaining judgment against the executor cannot levy an execution on the property in the hands of the legatee. He may pursue the executor at law for a devastavit, or follow the property in equity, making all the legatees parties, that the charge may not fall on one, but be borne equally by all. And if the property is levied on and sold under the execution the purchaser acquires no title. 1 Wash. 308, *Burnley v. Lambert*.}

J S having 4000*l.* secured to him by bond in the names of A and B, in trust for himself, devised it to his daughter, (now married to the plaintiff,) and made her residuary legatee, and by the same will devised a lease he

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nad in farm to R D, and there not appearing assets at his death to pay his debts, this farm devised to R D was sold for payment of debts; afterwards, by decree of this court, the 4000*l.* was adjudged to be assets to pay debts, and was brought into court, there to remain for that purpose. The plaintiff proposed to have what remained of the 4000*l.* paid out of court to him, all debts being (as it was said) paid, and the defendant R D opposed it till he had first had a satisfaction out of it for the value of the farm devised to him, and sold for the payment of debts. The court held, that the devise of this sum of money was a specific legacy, and therefore R D can have but a proportionable part of the value of his specific legacy out of it.

Abr. Eq. 298, Lord Castleton v. Lord Fanshaw.

||The following are instances of *specific bequests* of individual chattels. So many of the testator's horses as should amount to 800*l.* The remainder of the stock of horses.(a) All the horses which I may have in my stable at the time of my decease.(b) Jewels.(c) All my household furniture at C.(d) All my household goods, household furniture, jewels, plate, pictures, horses, linen, woollen, and all other movables in my said house.(e) The brooch which I received as a present from A.(g) Every specific bequest is limited in its nature, and excludes whatever it does not contain; and there is no material difference between limiting an extensive description by an exception, and giving at once a more limited description: *e. g.* all my furniture at L, plate only excepted.(h)

Richards v. Richards, 9 Price, 219, 226. (a) Ibid., and see 4 Ves. 177. (b) Fontaine v. Tyler, 9 Price, 98. (c) 8 Vin. Abr. 441, pl. 3. (d) Heseltine v. Heseltine, 3 Madd. 276. (e) Barton v. Cooke, 5 Ves. 461. See 9 Pr. 221 and 226; 6 Ves. 345. (g) Touchat. 433. (h) Langham v. Sanford, 17 Ves. 449; S. C. on appeal, 2 Mer. 18.

So, a bequest of all my personal estate in Jamaica.

Nisbett v. Murray, 5 Ves. 150.

So, a devise of a college lease is specific.(i) So, all my tithes payable out of C.(k)

(i) Abney v. Miller, 2 Atk. 593. (k) 2 Ves. sen. 419; 1 Br. C. C. 263.

A devise of corn in a barn is a legacy of quantity.(l) So, a legacy of all testator's cattle, or of sheep generally, is not specific.(m)

(l) 2 Atk. 599; S. P. 3 Atk. 121. (m) 3 Atk. 121; 1 Jac. & W. 602.

β The children of a female slave, who is specifically devised, born after the execution of the will, and before the death of the testator, go to the residuary legatee.

Jones v. Jones, Conf. Rep. 310.

A legacy of "stock in trade and all purchases made therewith," gives to the legatee the profits thereof.

Bullock v. Bullock, 2 Dev. Eq. 307.

A bequest to a wife as follows: "I leave her the whole property that she brought me, (except two negro slaves, A and B,) to her and her heirs for ever," was held to be specific, and protected from abating with the pecuniary legacies.

Warren v. Wigfall, 3 Desaus. 47.

A bequest to a wife in the following words: "I give and bequeath to my wife A the annual sum of 300*l.* sterling, each and every year during her natural life, in order that she may live in quiet and easy circumstances,"

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and which, with other legacies afterwards given to her, was expressed to be in lieu of dower, was held to be specific.

Loocock v. Clarkson, 1 Desaus. 471; *Stuart v. Carson's Executors*, 1 Desaus. 501.*g*

A bequest of personal estate is not specific, merely because it is coupled with a devise of real estate, which is necessarily specific.

Howe v. The Earl of Dartmouth, 7 Ves. 137.

ANNUITIES.—These may be charged specifically, on a certain fund, so as to depend entirely upon it; as where testator bequeathed 40*l.* a year out of his chattel estate at Ken.

Long v. Short, 1 P. Wms. 403; and see 2 Ves. sen. 623.

But if an annuity is merely directed to be paid out of personal estate, or is charged upon a certain *corpus*, it is not deemed specific, and so may stand though the fund fail.

Hume v. Edwards, 3 Atk. 693; *Alton v. Medlicot*, cited 2 Ves. 417; *Mann v. Copland*, 2 Madd. 223.

So, the bequest of an annuity of 50*l.*; and, "I will that so much capital sum be kept in the 3*l.* per cent. consols to pay the same," is not specific.

Sibley v. Perry, 7 Ves. 523, 530, and see Lord Eldon's observations, 9 Ves. 152.

MONEY LEGACIES.—So, if testator give a sum of money, and charges it upon a certain fund, or the produce of real estate, it is not specific, and shall not fail though the fund fails.

Savile v. Blacket, 1 P. Wms. 778; *Fowler v. Willoughby*, 2 Sim. & Stu. 354. *g* A legacy of money is specific only in those cases in which the money is identified and distinguished from all other money, as money in such a bag, or such a bond, or to be paid out of such security, or in such hands. *Nash v. Nash's Admin.*, 1 Hay. 228.*g*

But if testator, after directing an estate to be sold, and stating that the produce would amount to 10,000*l.*, gives that sum as follows: 7000*l.* to A, 1000*l.* to B, 500*l.* to C, and the overplus to D, and the estate only sold for 7000*l.*; it was held that the legacies were specific, and that the legatees should abate among themselves, D being entitled in the proportion of 1500*l.* the assumed overplus.

Page v. Leapingwell, 18 Ves. 463.

Upon a settlement of partnership accounts, 2000*l.* was found due to A. This sum A bequeathed upon trust for certain persons, "if he did not draw it out of trade before he died." Held specific.

Ellis v. Walker, Amb. 309.

Legacies not specific.—400*l.* cash; (a) 50*l.* for a ring; (b) 60*l.* apiece to executors; (c) a sum to be purchased in bank annuities, out of personal estate; (d) the 500*l.* we have now out upon mortgage, and then a gift of the said 500*l.* (e)

(a) *Richards v. Richards*, 9 Pri. 219. (b) *Apreece v. Apreece*, 1 Ves. & B. 364. (c) *Attorney-General v. Robins*, 2 P. Wms. 23. (d) *Gibbons v. Hills*, 1 Dick. 324, and see 1 P. Wms. 539. (e) *Le Grice v. Finch*, 3 Mer. 50. See 15 Ves. 384.

STOCK LEGACIES.—There is no case deciding a legacy to be specific, without something marking the specific thing, the very *corpus*; without describing it as standing in testator's name, or by the expression "my stock."

Verba Lord Eldon, 7 Ves. 529, in *Sibley v. Cook*. See *Parrott v. Worsfold*, 1 Jac & W. 601.

g A bequest of all the testator's "right, interest, and property, in thirty shares of the Bank of the United States," was held to be a specific legacy.

Walton v. Walton, 7 Johns. Ch. R. 258.*g*

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Specific bequests.—My capital stock of 1000*l.* in the India Company's stock.

Ashburner v. M'Guire, 2 Br. C. C. 108.

3000*l.* stock in the 3*l.* per cent. consols, being part of my stock now standing in my name.

Barton v. Cooke, 5 Ves. 461.

A bequest of 6000*l.* South Sea annuities, upon trust to *sell*, and lay out in the purchase of land.

Ashton v. Ashton, 3 P. Wms. 384. See 2 Ves. sen. 564.

Testatrix gave 2500*l.* in different sums, by the name of South Sea annuity stock, and then bequeathed to her coachman the remaining 13*l.* 13*s.* South Sea stock standing in her name.

Sleech v. Thorington, 2 Ves. sen. 561, 564. See Stafford v. Horton, 1 Br. C. C. 482; and Richardson v. Brown, 4 Ves. 177; Attorney-General v. Grote, 3 Mer. 316.

If I have not so much as 10,000*l.* capital stock in the 3*l.* per cent. reduced or consols, or one or both of them, I will that my executors make up the capital sum of 10,000*l.* in the reduced or consols, or one or both of them, and hold the same upon trust.

Fontaine v. Tyler, 9 Price, 94. This is an instance of a specific bequest, with a general legacy in case of its failure.

10*l.* *per annum* for life, to be paid out of my dividends of 400*l.* in the South Sea annuities now standing in my name; and I give to C my 400*l.* in the South Sea annuities, subject to the annuity.

Drinkwater v. Falconer, 2 Ves. sen. 693.

400*l.* out of 700*l.* now lying in the 3*l.* per cent. consols.

Morley v. Bird, 3 Ves. 628, 631.

All the stock I have in the three per cents., being about 5000*l.*, except 500*l.*

Humphreys v. Humphreys, 2 Cox, 184.

Stock legacies not specific.—1000*l.* capital South Sea stock.

Partridge v. Partridge, Forrest. 226. See Wilson v. Brownsmith, 9 Ves. 180. S. P.

The interest of 100*l.* new South Sea annuities to A for life, and after his death to be divided among his children.

Simmons v. Vallance, 4 Br. C. C. 345.

A bequest of a sum in a certain stock, without more particularly referring to or marking the *corpus*, is not specific, though the testator has the identical stock at his decease.

Purse v. Snaplin, 1 Atk. 415; Bronsdon v. Winter, Amb. 57; Bishop of Peterborough v. Mortlock, 1 Br. C. C. 565; Webster v. Hale, 8 Ves. 410.

So, where testator directed his executor to transfer 1000*l.* stock in the public funds, called the 3*l.* per cent. consols.

Sibley v. Perry, 7 Ves. 523; and see Lord Eldon's observations in Deane v. Test, 9 Ves. 152.

A bequest of 1000*l.* out of my reduced bank annuities *prima facie* is taken to be a bequest of 1000*l.* sterling, with a direction out of what fund it is to be paid, and is not a specific legacy.

Kirby v. Potter, 4 Ves. 748; Deane v. Test, 9 Ves. 146.

So, a bequest of the sum of 12,000*l.* out of my funded property to be transferred, was held to be a general legacy of sterling money.

Lambert v. Lambert, 11 Ves. 607.

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A bequest by A, of Jamaica, of 10,000*l.* current money of Jamaica, invested or to be invested in the funds of Great Britain, not specific.

Raymond v. Brodbelt, 5 Ves. 199.

So the bequest, after a specific legacy, of all other stocks or funds which the testator might be possessed of at the time of his decease.

Parrott v. Worsfold, 1 Jac. & W. 594.

So, a bequest of 1000*l.*, to be paid so soon as my property in India shall be realized in England.

Sadler v. Turner, 8 Ves. 617.

Testatrix having a power to appoint 14,000*l.* stock, gave nine legacies of 1000*l.* each, part thereof; and gave the residue of the said stock, and all other her personal estate, to A. Held, that the residue of the stock was not a specific legacy.

Richardson v. Brown, 4 Ves. 177. See 2 Ves. sen. 561, 564; 1 Eq. Cas. Abr. 271; Page v. Leapingwell, 18 Ves. 463.¶

REQUEST OF DEBTS AND SUMS OF MONEY SECURED.

Specific bequests.—The interest arising from C's bond for life; and then a gift of the principal of the said bond.

Ashburner v. McGuire, 2 Br. C. C. 108; Innes v. Johnson, 4 Ves. 568; *β* Stout v. Hart, 2 Halst. 414.¶

8000*l.* vested in the bank of, &c.; for which sum, payable with interest, I have the promissory note of the bankers. Before the bequest was made, testator had endorsed the note—"I give this note to B," (the legatee.)

Chaworth v. Beech, 4 Ves. 555.

7000*l.* navy bills, the testator reciting that he was possessed of about that sum.

Pitt v. Camelford, 3 Br. C. C. 160.

The interest of a certain sum due on a bond.

Stanley v. Potter, 2 Cox, 180; 4 Ves. 559.

5000*l.* sterling, in two bills, which bills are now lying for acceptance at the India House, London.

Gillaume v. Adderley, 15 Ves. 384.

The sum of money which my executors may receive on the note of 400*l.* given to me by Messrs. C and Co., bankrupts.

Fryer v. Morris, 9 Ves. 360.

40*l.*, being part of a debt due from C; and the rest of what is due, being about 40*l.* more, to D and E.

Ford v. Fleming, 1 Eq. Ca. Abr. 302, pl. 3; S. C. 2 P. W. 469. See Richardson v. Brown, 4 Ves. 177; Page v. Leapingwell, 18 Ves. 463.

1000*l.* to B, payable at twenty-one; to be retained in the hands of A, who was testator's banker, and had money of testator's in his hands.

Phillips v. Carey, cited 1 Atk. 507. See 3 Atk. 103, Heath v. Perry. But see 2 Br. C. C. 113.

β A bequest of "all my notes of hand that will remain after paying off the legacies herein before given, which I suppose will be from twenty to thirty thousand dollars," is so far specific, that the legacy is to be applied to the payment of general legacies, only on the event of the undisposed residue being insufficient for their discharge.

Perry v. Maxwell, 2 Dev. Eq. R. 488.

(G) Of Specific and Pecuniary Legacies.

If a specific legacy be made of a note, and afterwards, but before the death of the testator, a payment is made on it, the legatee cannot claim the amount of the note from the executor.

Hepp v. Lafonta's Executors, 4 Mart. N. S. 428.

A legacy of five hundred dollars in a particular drawer, is satisfied by paying such a sum as may be found in the drawer, even if it do not amount to five hundred dollars.

Catholic Church v. Meller, 5 Mart. N. S. 102.

A devise of all money on a bond against P I, is a specific legacy.

Stout v. Hart, 2 Halst. 414.

Testator bequeathed to his wife as follows: "all the rest, residue, and remainder of the moneys belonging to my estate at the time of my decease." Held that the word *moneys* must be taken in its ordinary acceptation, and meant cash, and not bonds, mortgages, and other choses in action.

Mann v. Mann, 1 Johns. Ch. R. 233; S. C. 14 Johns. 1.g

Bequests not specific.—400*l.* East India bonds.

Sleech v. Thorington, 2 Ves. sen. 560, 563.

5000*l.* sterling, or 50,000 current rupees, which testator expressed to be now vested in the Company's bonds.

Gillaume v. Adderley, 15 Ves. 385, 389; and see *Le Grice v. Finch*, 3 Mer. 50.

β Testator bequeathed to his wife in the following words: "I wish her to get Stanford [a slave] in her third of the property if she chooses," is not a specific legacy of the slave to the wife, but gives the right to take him at a valuation, and, if that valuation should be more than her share, she must account for the surplus.

Young v. Carson, 1 Dev. & Bat. 360.g

GENERAL LEGACIES CHARGED ON PARTICULAR FUNDS.

A will is to be read, with an inclination to hold it a general legacy, with reference only to the particular fund, as that out of which it is in the first place to be paid.

Verba Sir R. P. Arden, M. R. 4 Ves. 555.

Such a legacy does not abate; and a fund so charged cannot be applied to the prejudice of the legatee, except for the payment of debts.

4 Ves. 159; 9 Ves. 152; 1 Mer. 179.

It is a legacy of this kind, and not specific, when testator merely directs that it shall be paid out of certain moneys, or a certain debt to be received.

Roberts v. Pocock, 4 Ves. 150; *Kirby v. Potter*, 4 Ves. 748; *Deane v. Test*, 9 Ves. 146; *Smith v. Fitzgerald*, 3 Ves. & B. 2; *Acton v. Acton*, 1 Mer. 178; *Booth v. Blundell*, 1 Mer. 193; *Fowler v. Willoughby*, 2 Sim. & Stu. 354.

But if testator give several sums, and directs them to be paid out of a certain debt, and then gives the remainder of the said debt, it seems that the legacies are specific.

Badrick v. Stevens, 3 Br. C. C. 431, and see 1 Roper, 214.]

β Testator directed as follows: "After my debts are paid, it is my will and desire that my stock of hogs and cattle, my notes and accounts, shall go to U W." The executor paid debts out of the undisposed surplus, and not out of the legacy thus left to U W. Held that the application of the executor was right.

Battle v. Yeates' Ex'r, 2 Hayw. 304.

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§(G 2) Of Accumulative and Substitutional Legacies.

TESTATOR bequeathed as follows: "I do give and bequeath unto my two granddaughters, Christina Jones and Deborah Jones, each four hundred dollars, to be paid to them by my executors. If they are not of age at my decease, I order my executors to pay out of my estate to Christina Jones four hundred dollars one year after my decease; and to pay Deborah Jones four hundred dollars two years after my decease, in full of their legacies bequeathed to them." Held, that each legatee is entitled to eight hundred dollars.

Jones v. Creveling, 4 Harr. 128.

When the sum bequeathed is repeated in the same writing, the legatee can take only one of the sums bequeathed, for the second is held to be a substitution, unless a different intention is manifest in the will.

Jones v. Creveling, 4 Harr. 128; 2 Rep. Leg. 19.

Several annuities given by the same will, (a) or by a will and a codicil, (b) held to be accumulative.

(a) Mackinnon v. Peach, 2 Keen, 555. (b) Spire v. Smith, 1 Beav. 419.

Testator gave a legacy by his will, and another of larger amount by a codicil. Held, that he intended an accumulation.

Guy v. Sharp, 1 Coop. temp. Brough. 82.

Annuities of 900*l.* and 500*l.* respectively bequeathed by the testator to his two sisters, held not to be a satisfaction of annuities of 300*l.* each, granted in his lifetime by him to them for a valuable consideration.

Hales v. Darell, 3 Beav. 324.

The legatee will take two legacies by different instruments, unless a substitution be evidently intended, from the character of the second instrument, or the expressions used, or the same sum be twice given, and the same motive expressed in both instruments.

Wray v. Field, 6 Mad. 300; S. C. 2 Russ. 257; Mackensie v. Mackensie, 2 Russ. 262; Lord v. Sutcliffe, 2 Sim. 273; Watson v. Reed, 5 Sim. 431.

But where an intention appears that the legacies shall not be cumulative, they are substitutional, although given by different instruments.

Gillespie v. Alexander, 2 Sim. & Stu. 145; Fraser v. Byng, 1 Russ. & My. 90; Guy v. Sharp, 1 My. & Keen, 589; Hemming v. Gurrey, 1 Dow & Clark, 35; S. C. 1 Bligh. N. S. 479.

When one legacy is substituted for another, the substitute will, in general, carry with it the same incidents as the original.

Hammond v. Hammond, 2 Bland, 306*g*

(H) Of abating, refunding, and giving Security for that Purpose.

PECUNIARY legatees shall abate in proportion to the deficiency of assets; and therefore, if the ecclesiastical court go about to compel an executor to pay a legacy without security to refund, a prohibition will be granted; for, though an executor may pay a legacy without such caution or security, yet he is not obliged to do it.

Cro. Eliz. 467; Moor, 413; Owen, 72; Allen, 40. § Specific legacies do not abate until all the general legacies have been exhausted; but when that is the case, and there are several specific legacies, and debts remain unpaid, the specific legacies, as a class, must abate proportionably. 2 Bl. Com. 513; 2 Ves. sen. 561, 564; 1 P. Wms. 680; 2 P. Wms. 383; Davies v. Bush, 1 Young, 341; White v. Beattie, Dev. Eq. R. 320; Moore v. Tobin, C. W. Dud. Eq. R. 161*g*

So, if a man devise several legacies, as 100*l.* to one, and 50*l.* to another,

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&c.; there, although he directs the legacy of 100*l.* to be paid in the first place, yet if the other legacies fall short, then the legatee of the 100*l.* must make a proportionable abatement of his legacy.

Vern. 31, *Brown and Allen*; [S. P. *Beeston v. Booth*, 4 Madd. 161.]

So, if a legacy be given to executors for care and pains, yet this shall give such legacy no preference, but the executors must abate in proportion.

2 Vern. 434, *Fretwell and Stacey*; [S. P. *Heron v. Heron*, 2 Atk. 171.]

[So, legacies to *servants* are entitled to no preference.

Attorney-General v. Robins, 2 P. Wms. 23; *Alton v. Medlicot*, cited 2 Ves. sen. 417.

So, legacies to creditors, who had accepted a composition for and had released their debts, must abate.

Coppin v. Coppin, 2 P. Wms. 292.

So, legacies for *rings*, (a) or for a monument, (b) are not favoured.

(a) *Apreece v. Apreece*, 1 Ves. & B. 364. (b) *Blackshaw v. Rogers*, cited 4 Br. C. C. 349; but see *Masters v. Masters*, 1 P. Wms. 423. β A legacy of piety, for the erection of headstones at the graves of the parents or other near relation of the testator, does not abate rateably and should be paid in full. *Wood v. Vanderburgh*, 6 Paige, 278.*g*

Annuities must abate together with other general legacies.

Hume v. Edwards, 3 Atk. 693; *Hinton v. Pinke*, 1 P. Wms. 539.

General legacies to a wife and children are not protected from abatement, unless there be sufficient evidence of the testator's intention for that purpose.

Blower v. Morret, 2 Ves. sen. 420; β *Duncan v. Alt*, 3 Penns. 384. A specific legacy given in lieu of dower, or other claim on the estate, is exempted from contributing towards the payment of debts. *Stewart v. Executors of Corson*, 1 Desaus. 500; *Heath v. Dendy*, 1 Russ. 543; *Wood v. Vanderburgh*, 6 Paige, 278. But see *Jett v. Bernard*, 3 Call, 11; *Mitchell v. Blain*, 5 Paige, 588.*g*

β A legacy given to an executor for care and pains, is not to be regarded in the light of a debt, or as founded on contract, nor to be governed by the principles applicable to contracts; a legatee of this description, therefore, must abate equally with other legatees.

Morris v. Kent, 2 Edw. 175.*g*

Testator bequeathed 2000*l.* apiece to his two sons, and 2000*l.* to his daughter; and directed, if the assets should fall short, his daughter's legacy should nevertheless be paid in full, and that his sons' legacies should abate. Testator left sufficient assets to pay the legacies in full, but they were wasted by his executor;—held, on the presumed intention of the testator, that the daughter was entitled to her legacy in full.

Marsh v. Evans, 1 P. Wms. 668.

But the testator appointing different times for payment of legacies is not sufficient to protect any from abatement.

Blower v. Morret, 2 Ves. sen. 420; 4 Madd. 168

If certain legacies are directed to be paid out of the residue, they will of course fail, if there be not sufficient to pay the others in full.

Beeston v. Booth, 4 Madd. 162, 172; *Lewin v. Lewin*, 2 Ves. sen. 415, 421.

Testator, after bequeathing several legacies, and among others one of 200*l.* to a charity, declared there would still be a surplus, and then gave further legacies. By a codicil, he gave another legacy, and directed, in case his assets should not be sufficient to pay all his legacies in full, the legacy in the codicil should be substituted for the charitable legacy. Held, that the

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direction in the codicil placed *all* the legacies on the same footing, and that all should abate *pari passu*, as the assets were deficient.

Attorney-General v. Robins, 2 P. Wms. 23.

But a legacy given to a wife in lieu of dower shall not abate; for it is not a mere gift, but is on a consideration.

Burridge v. Bradyl, 1 P. Wms. 127; Blower v. Morret, 2 Ves. sen. 420; Davenhill v. Fletcher, Amb. 244; Heath v. Dendy, 1 Russell, 543.]

As to refunding and abating, it seems clear, that creditors may compel legatees in equity to refund when assets become deficient, although there was no provision made for refunding at the time the legacies were paid.

Vern. 94; 2 Vent. 358, 360; 2 Vern. 205.

So where A, being indebted to B, made C his executor, and C wasted the estate, and died, having devised several legacies, and made D executor, which legacies D paid; and B having exhibited a bill against D, the executor of C, for his debt due from the first testator, and against the legatees in the will of C, to compel them to refund their legacies; there not being sufficient assets of the first testator, it was decreed accordingly; (a) for a creditor may follow the assets in equity, into whose hands soever they come.

Vern. 162; 1 P. Wms. 495. (a) 2 Vern. 205, laid down as a rule.

Also, one legatee may compel a pecuniary legatee to refund, where the assets become deficient, though there was no provision made for refunding, and although he hath still remedy against the executor, and may compel him to pay it out of his own purse, if he voluntarily paid away the assets to the other legatees.

Chan. Ca. 136, 248; 2 Chan. Ca. 132; Vent. 360.

||But if on the death of testator there be sufficient to pay all the legacies, but some only are paid, and then the executor wastes the assets, and causes a deficiency, the legatees unpaid cannot compel those who are paid to refund; their only remedy is against the executor, and if he become bankrupt, their claim is barred by his certificate.

Anonymous, 1 P. Wms. 495; Walcot v. Hall, 2 Br. C. C. 305; S. C. in Mr. Cox's note, 1 P. Wms. 495. See 2 Ves. sen. 194; 2 Meriv. 386.]

But it seems to be agreed, that an executor who voluntarily pays a legacy, or assents to the devise thereof, cannot, either in favour of other legatees or creditors, compel the legatee to refund, but that in such case he must bear the loss himself.

2 Chan. Ca. 9, 145; Vern. 90, 453, 460; 2 Vern. 205.

||The rule is, whenever an executor pays a legacy, it is presumed he has sufficient to pay *all* legacies; and the court will oblige him, if solvent, to pay the rest, and not permit him to maintain a suit to compel the legatee, whom he *voluntarily* paid, to refund.

Verba Sir John Strange, M. R., in Orr v. Kaimes, 2 Ves. sen. 194. See Coppin v. Coppin, 2 P. Wms. 292, 296; Keylinge's 1 Eq. Cas. Abr. 239, pl. 25.] If, however, executors, incorrectly supposing the real estate to be charged with the payment of debts, pay the legacies, they may by bill in equity compel the legatees to refund. M'Campbell v. M'Campbell, 5 Lit. 97.]

But it is said, that if an executor pays out the assets in legacies, and afterwards debts appear, of which he had no notice at the time of payment of the legacies; or, if he had been compelled by a decree in equity to pay legacies; that in these cases he may, by bill in equity, compel the legatees to refund, although he took no caution or security for that purpose.

Chan. Ca. 136; 2 Vern. 205; 1 P. Wms. 495.

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[On a bill by an executor against a legatee to refund a legacy voluntarily paid him by the executor, the assets falling short to satisfy the testator's debts; it was decreed by Sir J. Jekyll, master of the Rolls, that the defendant should refund to the plaintiff; and that an executor may bring a bill against a legatee to refund a legacy voluntarily paid him, as well as a creditor; for the executor, paying a debt of the testator out of his own pocket, stands in the place of the creditor, and has the same equity against a legatee to compel him to refund.

Davis v. Davis. Vin. Abr. tit. *Devise*, (Q. d.), 423, pl. 35; {1 Wash. 312. See 3 Bos. & Pul. 169.}

But if an executor had at first enough to pay all the legacies, and afterwards, by his wasting the assets, occasions a deficiency, in such case a legatee who has recovered his legacy shall not be compelled to refund, but shall retain the advantage of his legal diligence, which the other legatees neglected by not bringing their suit in time, before the wasting by the executor; whereas, if the other legatees had commenced their suit before such waste committed, they might have met with the like success, *et vigilantibus, non dormientibus jura subveniunt*.

Anon. 2 P. Wms. 495. {See 3 Cran. 262, 263.}

J P by will gave to the plaintiff 50*l.*, to be paid to him at his age of twenty-one years, or day of marriage, the same to be put out at interest in the name of his executor, C P H, &c. He then disposed of the residue, and appointed C P H executor, who proved the will, retained the 50*l.* for the plaintiff's legacy, and afterwards became bankrupt, and obtained his certificate. The plaintiff having attained his age of twenty-one, filed his bill against the executor and the residuary legatees for payment of the legacy. The master of the Rolls, Sir L. Kenyon, said, the residuary legatees could not be liable; that the distinction was between the cases where there was originally a deficiency of assets, and where the executor had wasted them; in the former case a legatee who had been paid more than his proportion, must refund to the others; but here, the residuary legatees had received no more than they were entitled to, and the executor was therefore the only person to be resorted to. And his honour, being of opinion that this demand, as against the executor, was barred by his certificate, dismissed the bill.

Walcot v. Hall, 1 Cox's P. Wms. 495, note. In Orr v. Kaines, 2 Ves. 194, Sir J. Strange is reported to use these words: "The rule, of which there are several cases in Eq. Ca. Abr., is, that whenever an executor pays a legacy, the presumption is, he has sufficient to pay all legacies, and the court will oblige him, if solvent, to pay the rest, and not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund; *although, if the executor proves insolvent, so that there is no other way, the court will admit a bill by the other legatees to compel that legatee to refund.*"

{D devised all his estate to his executor, in trust to convert the same into money, and after payment of debts, to invest the surplus in the funds, or put it out on interest. He then bequeaths 1500*l.* to E to be paid at the age of 21, subject to the subsequent provisoes; and directs 1000*l.* to be set apart, and the interest to be paid to S during her life; and after bequeathing other pecuniary legacies says, provided "that in case the personal estate and the produce arising from the real estate which I shall die seised and possessed of shall not be sufficient to answer the said annuities and legacies herein before by me bequeathed, then and in such case I direct that the said annuities and legacies shall not abate in proportion; but the whole of such deficiency (if any there shall be) shall be deducted out of the 1500*l.* be-

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queathed to E," whom he also makes his residuary legatee. The estate was more than sufficient, at the time of the testator's death, to pay all debts, annuities, and legacies, but afterwards, by the bankruptcy of the executor, became insufficient. It was held that E's legacy of 1500*l.* should be liable to S's annuity.

3 Cran. 249, *Silsby v. Young*; 1 P. Wms. 668, *Marsh v. Evans, acc.* }

|| It is a rule of equity, that whensoever a legacy is paid by an executor, and afterwards an *unknown* debt appears when the assets are gone, the executor may make a legatee refund, though he have no equity at all against the creditor. And this is the reason why the Court of Chancery, when it decrees a legacy, never requires security from the legatee to refund, if debts appear, for the law of the court is security enough; and otherwise, few legacies could ever be paid: for if men must find security against all dormant debts or contingent covenants before they receive their legacies, this security must lie out for ever, and very few will be able to find such security. It is true, the Spiritual Court requires security before they give sentence for a legacy, and cannot be prohibited if they do so; but this court never does it but in very extraordinary circumstances.

Per Lord Nottingham in *Jewon v. Grant*, 3 Swanst. 659; and see cases cited in the editor's note. || *See Berry v. Headington*, 3 J. J. Marsh. 321.*g*

¶ As between legatees of the *corpus* and of the income, they must contribute to the payment of debts according to their respective interests, upon the same principle as tenant for life and remainder-man; unless a manifest intention appears in the will itself.

Heath v. Heath, 2 Hill's Ch. 101.*g*

|| *Interest upon legacy refunded.*—"If a legacy have been erroneously paid to a legatee who has no further property in the estate; in recalling that payment, I apprehend that the rule of the court is not to charge interest; but if the legatee is entitled to another fund making interest in the hands of the court, justice must be done out of his share."

Verba Lord Eldon in *Gittins v. Steele*, 1 Swanst. 24. || *A legatee is not obliged to pay interest on property delivered to him, which he is obliged to refund. M'Vanzie v. Smith*, 2 Hayw. 372.*g*

¶ When a residuary legatee receives the estate or any part of it from the executor, with a knowledge that the other legacies have not been paid, nor provided for, he may be required to refund with interest, to the same extent to which the executor is liable to the other legatees.

Stephenson v. Axson, 1 Bail. Eq. 274.*g*

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THE testator's making his will, and appointing an executor, is a disposition of all his personal estate, after debts and legacies paid, to such executor, without more words; but if the testator appoints, that after his debts and legacies paid, J S shall have the surplus, or what remains; then is J S residuary legatee, and may sue for and recover such surplus or residue, and is also, upon the executor's refusal to prove the will, entitled, from his interest therein, to administration, with the will annexed.

Vide tit. Executors and Administrators. || And 2 Roper, ch. xxiv. sect. ii. p. 590. ||

If a residuary legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or adminis-

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trator of such legatee shall have the whole residue of the personal estate which remains over, &c., and not the executor of the first testator.

Carth. 52, *per Curiam*.

Also, if there be a residuary legatee, and the executor omit part of the testator's effects out of the inventory, or undervalue those which he puts in, the residuary legatee may file a bill of discovery against him before he has paid the testator's debt.

Palm. 409.

If a man devise all the rest and residue of his personal estate, after debts and legacies paid, to J S, and several of the creditors are barred by the statute of limitations, who notwithstanding bring actions against the executor, and he refuses to plead the statute of limitations, yet equity will not, in favour of J S to whom the surplus is devised, compel the executor to plead the statute.

Abr. Eq. 305, Lord Castleton v. Lord Fanshaw.

{A general residuary clause passes all personal estate which is not otherwise sufficiently disposed of; as where a legacy lapses by the death of the legatee in the life of the testator, or where a bequest of a leasehold estate, being to a charity, is void by st. 9 Geo. 2, c. 36. The next of kin cannot claim the property as not disposed of. But the rule is otherwise as to real estate. There, in case of lapse, the heir at law is entitled.

4 Ves. J. 708; 5 Ves. J. 495; 8 Ves. J. 561, *Brown v. Higgs*; 4 Ves. J. 732, *Shanley v. Baker*; *Ibid.* 802, *Kennell v. Abbot*; 8 Ves. J. 12, 25, *Cambridge v. Rous*; *Ibid.* 588, *Roach v. Haines*; *Willes*, 293, *Doe v. Underdown*; *Ambl.* 645, *Gravenor v. Halum*. If a legacy charged on real estate fails, it sinks for the benefit of the specific devisee, as arising out of his estate. *Ambl.* 487, *Jackson v. Hurlock*; 1 Bro. C. C. 61, *Wright v. Row*; 4 Ves. J. 811, *Kennell v. Abbot*; 12 Ves. J. 497, *Baker v. Hall*;}.

{A general residuary bequest carries all the personal estate of the testator which is undisposed of at his decease by a valid bequest. "Residue means all of which no effectual disposition is made by the will."

Cambridge v. Rous, 8 Ves. 25; *Bird v. Le Fevre*, 15 Ves. 589; *Roberts v. Cooke*, 16 Ves. 451; *Smith v. Fitzgerald*, 3 Ves. & B. 3; *Leake v. Robinson*, 2 Mer. 392; *Skrymsher v. Northcote*, 1 Swanst. 570; *Bland v. Lamb*, 5 Madd. 412.

Hence legacies which lapse, whether by death of legatee in testator's lifetime, invalid disposition, or other casualty, fall into the residue.

Thus, a legacy payable out of an aggregate fund composed of the produce of real and personal estate, which was void by the statute 9 Geo. 2, c. 36, fell into the residue.

Duroir v. Motteux, 1 Ves. sen. 320; 1 Sim. & Stu. 292.

So, a legacy given by a *feme covert* under a power to a person whom she supposed to be her husband, but who was previously married and had deceived her, was held void on account of the fraud, and fell into the residue.

Kennell v. Abbott, 4 Ves. 803.

So, where there is an interval of time in which the interest upon a legacy is not disposed of, as before the persons come into existence who are to take it, the interest forms part of the residue.

Harris v. Lloyd, Turn. & Russ. 310. See *Leake v. Robinson*, 2 Mer. 384.

After-acquired personal estate passes by a residuary clause, though it be a million.

Bland v. Lamb, 5 Madd. 412; S. C. on appeal, 2 Jac. & W. 399. See *Legge v. Asgill*, Turn. & Russ. 265, note. β A residuary clause, unless expressly restrained,

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always passes what is not otherwise disposed of. *Reeves v. Reeves*, 1 Dev. Eq. 386. See *Taylor v. Lucas*, 4 Hawks, 215; *Harrell v. Hoskins*, 2 Dev. & Bat. 479; *Frazer v. Alexander*, 2 Dev. Eq. 348; *Speight v. Galling*, 2 Dev. Eq. 5; *Powell v. Powell*, N. C. Term R. 315; *Woolmer's Estate*, 3 Whart. 477; *James v. James*, 4 Paige, 115; *Gore v. Stevens*, 1 Dana, 206; *Frazier v. Frazier*, 2 Leigh, 642; *Sorrey v. Bright*, 1 Dev. & Batt. 116; *Peag v. Barber*, 1 Hill, Ch. 97; *Sinkler v. Sinkler*, 2 Desaus. 138; *Sutton v. Sharp*, 1 Russ. 146; *Harris v. Lloyd*, Turn. & Russ. 314.*g*

But the gift of a residue may be circumscribed and confined.

Davers v. Dewes, 3 P. W. 40; *Attorney-General v. Johnstone*, Amb. 377; S. C. cited Turn. & Russ. 268, note.

No particular form of words is required to pass a residue; it is sufficient if the testator's intention, to include every thing not otherwise disposed of, is shown.

Thus testatrix, after giving several specific legacies of stock, concluded: "I believe there will be sufficient money left to pay my funeral expenses." In a codicil she said, "If there is money left unemployed I desire it may be given in charity;" and she then gave several specific chattels. Held that the general residue was well given to charity.

Legge v. Asgill, Turn. & Russ. 265, note.

So, a bequest of "my furniture and live-stock, or what else I may then be possessed of at my decease," passed the residuary estate, though followed by specific bequests and devises to the same person, and by gifts of pecuniary legacies to other persons.

Fleming v. Burrows, 1 Russell, 276; *Bennet v. Bachelor*, 1 Ves. jun. 63; S. C. 3 Br. C. C. 29; *¶ Dowson v. Gaskoin*, 2 Keen, 14; *Leighton v. Bailie*, 3 My. & Keen, 267; *Taylor v. Taylor*, 6 Sim. 246; *Boys v. Morgan*, 9 Sim. 289; S. C. 3 My. & Craig, 661.*g*

But where testator, after giving several general stock legacies, (most of them to charities,) desired that his books and furniture should be sold, and that mourning should be given to his servants, and rings to several friends, concluded, "In case there is any money remaining I should wish it to be given in private charity." Held that the general residue, consisting of leaseholds, stock in the funds, &c., did not pass by these words.

Ommaney v. Butcher, Turn. & Russ. 260.

If the residue be given in shares, some of which lapse by the death of legatees in testator's lifetime, the lapsed shares go to the next of kin, and not to the residuary legatees who survive testator.

Skrymsher v. Northcote, 1 Swanst. 566.

With respect to lapsed legacies, a presumption arises in favour of the residuary legatee. The testator is supposed to give them away from the residuary legatee only for the sake of the particular legatees. But when the disposition of the residue itself fails, to the extent to which it fails the will is inoperative.

Testator gave residue to the legatees in proportion to their legacies; *all* legatees, pecuniary and specific, even of rings, were held entitled.

Nannock v. Horton, 7 Ves. 391.

But in another case a similar bequest was, upon the words, restricted to general pecuniary legatees.

Henwood v. Overend, 1 Mer. 23.

Testator, after giving certain legacies, directed his trustees "to pay unto my devisees as under," and enumerated several; and then gave the residue

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"unto all my devisees above named;"—held that *all* the legatees were entitled.

Coope v. Banning, 1 Sim. & Stu. 535.

Testator by his will gave the residue to certain relations; he afterwards by a codicil gave legacies to two of them;—held, nevertheless, that they were entitled to share in the residue.

Sherer v. Bishop, 4 Br. C. C. 55.

Testator directed the interest of a certain fund to be paid in equal proportions between his mother and sisters, and the principal afterwards to the children of the sisters; and, after several legacies, desired that "in the proportions already noticed" his mother and sisters should be the residuary legatees;—held that the sisters were entitled to the residue absolutely.

Grassick v. Drummond, 1 Sim. & Stu. 517.

"It is said that the residuary legatee is to take the money when made up; but I say he has in a sense a lien upon the fund as it is, and may come here for the specific fund."

Verba Lord Eldon in *M'Leod v. Drummond*, 17 Ves. 169.¶

β A legacy to one of the testator's next of kin, "which will include every part of my estate intended for him," does not bar his claim to a share of the residue.

Ford v. Whedbee, 1 Dev. & Bat. 16.

Testator gave several legacies, and directed his executors to sell the remainder of his estate, both real and personal, not before disposed of, and, after paying his debts, to dispose of the surplus as they might think proper. Held that this clause having bequeathed to the executors all the rest of his estates not before disposed of, leaves nothing which the next of kin can claim.

Powell et al. v. Powell's Executors, N. C. Term Rep. 315.

A testator is presumed to intend not to die intestate as to any part of his estate.

Reeves v. Reeves, 1 Dev. Eq. 386.

The residue is never to be considered as a specific legacy, nor to abate in proportion only to a particular legacy.

Nash v. Nash, 1 Hayw. 228.g

(K) Of the Payment of Legacies: And herein,

1. *What shall be a good Payment, and to whom to be made.*

An executor, in the payment of a legacy, ought to be careful that he takes a proper receipt,(a) or has sufficient vouchers of the payment; and the rather, because it is held to be such an equitable demand as is not (b) barred by the statute of limitations.

Prec. Chan. 228. [(a) The receipt, by 36 G. 3, c. 52, must be on a stamp for every species of legacy. See tit. *Stamps*.] (b) *Vern.* 256; but where after length of time a legacy was presumed to have been paid, vide 2 *Vern.* 21, 484.

¶ *Presumptive payment*.—If a legatee neglect for twenty years to demand his legacy, such delay is *prima facie* evidence of payment.

Jones v. Turberville, 2 Ves. jun. 11; 4 Br. C. C. 115, S. C. See 2 Ves. jun. 280; β *Benzein v. Lenoir*, 1 Car. Law Repos. 508; but see *Lindsay v. Lindsay*, 1 Desaus. 151, *contra*.g

Sir John Leach, V. C., declared he should hold, that where an executor

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and residuary legatee twenty years after the death of the testator sold a leasehold charged by the will with legacies, and no demand has during all that time been made upon it, there was evidence that the charges had been paid.

Montresor v. Williams, May, A. D. 1823; *Roper on Legacies*, c. 14, sect. 3, p. 792, 3d edit.

Retainer.—If the legatee be indebted to testator, the legacy, or a sufficient part, may be retained to answer such debt.

Jeffs v. Wood, 2 P. Wms. 129; *Ranking v. Barnard*, 5 Madd. 32. See *Richards v. Richards*, 9 Price, 219.

If a legacy be given generally, without any direction as to the currency in which it is to be paid, it must be paid in the currency of the country in which the testator resided.

Saunders v. Drake, 2 Atk. 465; *Pierson v. Garnet*, 2 Br. C. C. 39, 47; *Malcolm v. Martin*, 3 Br. C. C. 50; 2 Bli. P. C. 91.

The rule is the same though the legacy be charged on lands in a country in which the testator does not reside.

Wallis v. Brightwell, 2 P. Wms. 88; 2 Bli. P. C. 91.

Legatees are entitled to be paid their legacies in the country in which they reside, according to their value in the country in which the testator resided, at the end of one year next after his death.

Phipps v. The Earl of Anglesea, 1 P. Wms. 696; 2 Bli. P. C. 89; *Cokerell v. Barber*, 16 Ves. 461; but with respect to a rent charge, see *Lansdowne v. Lansdowne*, 2 Bli. P. C. 60.

Also, an executor ought to be careful that he pay it to the proper hand that has authority to receive it, and that without a decree or order of a Court of Equity he cannot pay it to the (a) father, or any other relation of an infant.

Chan. Ca. 245. (a) Where a father libelled in the spiritual court that his children's legacies, being infants, might be paid to him, and a prohibition granted. Godb. 243.

As where a legacy of 100*l.* was devised to an infant of about ten years of age, the executor paid this legacy to the father, and took his receipt for it; when the infant came of age, the father told him he had such a legacy of his in his hands, but could not pay it immediately, but however would not have him trouble the executor about it, for that he would give it him; upon this the son rested satisfied for about fourteen or fifteen years, and he and his father carried on a joint trade together, and then became bankrupts; and upon a commission taken out against the son, this legacy, among other things, was assigned for the benefit of his creditors; and the plaintiff, the assignee of the commission, brought his bill against the executor, to have an account and payment of the legacy; and for the defendant it was insisted, that this would be an extreme hardship on him, if he should be obliged to pay it over again; that he had already fairly and honestly paid it to the father whilst he was in good circumstances, and if application had been made sooner, he might have had his recompense over against the father; that the father was by nature guardian to his children, and such payments to him have formerly been allowed good, though now, indeed, this court has thought fit to extend its care farther for such children, and disallowed such payments; but the circumstances of this case were such, that the defendant, it was hoped, would not be answerable again for it. Lord Chancellor Cowper said, that if the father had not made his son such promise of recompense, and the son had acquiesced all that time, the case might have

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been more doubtful; but this promise of his father drew him to forbear applying to the executor sooner, and since his father had not, nor could now make good his promise, being a bankrupt likewise, the reason of the son's forbearance was at an end; and he thought the rule of this court, in not suffering parents to receive their children's legacies, was founded on very good reason; and therefore, lest this case might hereafter be cited as a precedent, when the circumstances attending it were forgotten, and to discountenance and deter others from paying such legacies to the parents, (though he did not deny the hardships of this particular case,) he decreed against the executor, which was affirmed on a rehearing.

Abr. Eq. 300, *Dagley v. Tolferry*; 1 P. Wms. 285, S. C.; Gilb. Rep. 103, S. C.; 4 Burn's E. L. 321, S. C. || See *Philips v. Paget*, 2 Atk. 60; 3 Atk. 629.]

|| With reference to the above case, Lord Alvanley, M. R., said, "Although the money was directed to be and was paid to the father, and the son acquiesced a great length of time, still it was competent to him or his representatives to demand it; because a contrary determination would encourage such payments, and a son must acquiesce, or *pursue* his father; or, which is the same thing, by commencing a suit against the executor, occasion *him* to pursue the father. If the legatee had not stood in such relation to the person to whom the legacy was paid, I take it the bill would have been dismissed."

Cooper v. Thornton, 3 Br. C. C. 98.

But if a legacy be given to A to be equally divided between himself and his family, or to A for his and his children's use, the legacy may be paid to A.

Cooper v. Thornton, 3 Br. C. C. 96, 186; *Robinson v. Tickell*, 8 Ves. 142. But see *Anon.* 2 Anst. 453.

Executors may not pay any part of the capital of a legacy for the *advancement* of an infant.

Davies v. Austen, 3 Br. C. C. 178; *Lee v. Brown*, 4 Ves. 362; *Walker v. Wetherell*, 6 Ves. 473. See *Evans v. Massey*, 1 You. & Jer. 196.

Executors may, by 36 Geo. 3, c. 52, pay legacies given to infants or persons abroad into the Court of Chancery.||

[Mrs. Paget gives a legacy of 100*l.* to each of the three children of Mr. Philips, and makes the defendant her executor, leaving him the bulk of her estate, provided he pays the three legacies of 100*l.* within a year after her death, pursuant to her will. The defendant, within the time, pays into the children's own hands their legacies: the eldest of them was sixteen years old at the time, the next fourteen, and the youngest nine only. The children now brought their bill against the defendant, to be paid their several legacies, suggesting that their father had embezzled the money paid by the defendant during their infancy, and was insolvent, and that this was a fraudulent payment to the father, and therefore it must be paid over again. The defendant in his answer denied he knew this money ever came to the father's hands. Lord Chancellor asked the counsel for the defendant if they knew any instance where an executor paying so large a sum as 100*l.* into the hands of minors, has been allowed such payments? Indeed, in cases where legacies have been very small, the payment has been allowed by the court. But in this case, notwithstanding the sum is above 100*l.*, yet, as the payment by the executor to the children themselves is so fully proved, and not at all controverted by the plaintiffs, and their losing the benefit of it is owing

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to the negligence and insolvency of the father, his lordship said, he would not strain the rules of the court to make the executor pay it over again; especially, as he made this payment to save a forfeiture, it being an express condition of his own taking under the will, that he should discharge these legacies within a year after Mrs. Paget's death. But the next day, the Lord Chancellor said, that, upon looking into the cases, he found this a very doubtful point; and unless the defendant would agree to give the plaintiffs something, he would not determine it, without taking time to consider of it. The defendant, upon this recommendation of the court, agreed to pay in 50*l.* to be divided between the three plaintiffs; and each side were to abide by their costs; and it was made part of the decree, that the 50*l.* were paid by consent of all parties; and his lordship directed each of the plaintiffs, upon receiving their respective shares, to release their legacies under the will. The case of *Dagley v. Tolferry*, *supra*, p. 307, he said, must have some other circumstances; for the rule is laid down too strictly, that in all cases where executors pay infants' legacies to fathers, in order to deter executors from such payments, they shall be paid over again. Lord Cowper confirmed the decree of the master of the Rolls in that case; but he seems, even by this report of the case, to have had a remorse of judgment at the time; for on looking into the registrar's office, it appears, his lordship ordered the deposit to be divided between the parties.

Philips v. Paget, 2 Atk. 80.

In *Rotheram v. Fanshaw*, 3 Atk. 629, Lord Hardwicke said, *arguendo*, that where a suit is instituted in the spiritual court for an infant's legacy, by a father, to have it paid into his hands, the court will grant an injunction; because it will not allow the money of an infant to come into the father's hands.

B T by will gave several pecuniary legacies, and among the rest, "to Thomas Cooper, of — Street, Westminster, one hundred pounds, to be equally divided between himself and his family," and made — Winstanley and the defendant (his wife) executors, and the defendant residuary legatee, and died in 1768. In November, 1769, Winstanley paid the legacy to Thomas Cooper, who, at that time, had a wife and seven children, six of whom were adults, and the seventh an infant. The father lived till 1775, when he died, no demand having been made by any of his children of this legacy. Henrietta, the youngest child, came of age in 1777. In 1784 she and the other children made a demand of this legacy; and in 1779 they filed their bill (after the death of Winstanley) against the defendant as executrix and residuary legatee of the testator, for the legacy, insisting that the payment to Thomas Cooper was not a good payment, and that, therefore, the defendant was liable to pay it over again. The master of the Rolls said, it is argued on the part of the plaintiffs, that the payment to the father of legacies given to his children, who are not of age, is a bad payment. In early times, it appears from the case of *Holloway v. Collins*, in the 26th and 27th Car. 2, 1 Eq. Abr. 300, that the payment to the father of a legacy to the child was held good: but, since the case of *Dagley v. Tolferry*, *supra*, the idea of the court has been, that it is not a good payment: and that even in the case of an adult child it is not good, unless done by the consent of the child, or made so by a subsequent ratification. In that case the rule was laid down, and was laid down very harshly, as the testator, on his death-bed, had given directions that the legacy should be paid to the father, and there had been mutual accounts between the father and the child, and an acqui-

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escence for near fifteen years. It appears, from the registrar's book, that evidence was read, that the legacy was ordered by the testator to be paid to the father: but that circumstance can make no difference, as I doubt much whether such evidence ought to be read. It would be a dangerous thing to admit evidence that a legacy given to one person was ordered to be paid to another. From the registrar's book of the year 1714, fol. 414, it appears, that the defendant was decreed to pay the plaintiff his legacy with costs, but no interest; and from the book A of the year 1715, fol. 40, that an appeal being brought before Lord Cowper, the decree was affirmed; but as it was thought a hard case the deposit was divided. I lay the matter out of the case, that it was directed to be paid to the father; and although it was so directed, and the money paid, and although the son acquiesced a great length of time, it should be still competent to him or his representatives to demand it; because a contrary determination would encourage such payments, and because the son must acquiesce, or pursue his father; or, which is the same thing, by bringing his suit against the executor, occasion his pursuing the father; and that I take to be the ground on which Sir J. Trevor and Lord Cowper went; and if the legatee did not stand in that relation to the person to whom the legacy was paid, the bill would be dismissed. The only other case is *Philips v. Paget*, *supra*. It went off upon a compromise, so that we have no account of it but from Mr. Atkins's book. There, the executor was misled by the testator's directions to pay the legacies within a given time. Then let us consider the circumstances of the present case, for I do not mean to interfere with the doctrine of *Dagley v. Tolferry*, *supra*, that a payment to the father is bad. The present case is a stronger case for the executors than that of *Philips v. Paget*. Here, after several other legacies, all with the words, "I give to," &c., is the following: "*To Thomas Cowper, to be divided between himself and his family.*" I should do the harshest thing in the world to make the executor pay it over again. It is true, the testator has not inserted the words *by him to be divided*. If he had, there could not have been a doubt: but if he meant the executors to divide, why did he mention Thomas Cowper? What did he mean by the word *himself*? That can only be applicable, if Thomas Cowper is to divide. Then it is not only to him and his children, but to his *family*, which is much more extensive. It is to be paid to him, and he, as a trustee, is to divide it. If any of the children had called upon him to have it secured, it must have been so. Therefore, if in *Philips v. Paget* the executor was discharged, *a multo magis*, he must be so here. Supposing it to be paid by Winstanley in the manner that was wrong; for I must allow it to be wrong, if it was not meant to be paid to Thomas Cowper; Cowper died in 1775; from that time the plaintiffs might have called upon the executor without his being able to pursue the father. In 1777, the youngest came of age: why did they not then file their bill against Winstanley, who did not die till after this bill was filed? For six years they took no step. If they had brought their bill, they might have recovered against Winstanley. But, under the circumstances of the case, I believe it was well paid, and that it was intended that he should receive it. If one was to give a legacy to the senior six clerk, to be divided between himself and the other six clerks, I think it should be paid to the senior, and the executor not be put to inquire who the other six clerks were. And that if it had been the case of a bequest of goods to A to be divided between himself and family, A,

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with the assent of the executor, might bring trover for the goods. His honour, therefore, dismissed the bill.

Cooper v. Thornton, 3 Br. Ch. Rep. 96.

Where a testator bequeathed his personal estate to trustees, in trust to pay (*inter al.*) 500*l.* to an infant, and directed, that such of his legatees as might be infants at the time of his decease should receive interest at the rate of 5*l. per cent.* till their respective legacies should be paid, which he desired might be to the boys at the age of 21 years, &c. ; it was holden, that the executors could not justify paying any part of the principal before that time to the infant, or to his use, except for express necessities.

Davies v. Austen, 3 Br. Ch. Rep. 178; {1 Ves. J. 247, S. C.; 4 Ves. J. 362, Lee v. Brown, *acc.*}

If a legacy be given to a *feme covert*, it must be paid to the husband; also, where a legacy was given to a *feme covert* who lived separate from her husband, and the executor paid it to the wife, and took her receipt for it, yet, on a bill brought by the husband, he was decreed to pay it over with interest.

1 Vern. 261, Palmer v. Trevor.

Also it hath been adjudged, that if husband and wife are divorced *à mensâ et thoro*, and a legacy is left to her, the husband alone may release it.

Roll. Abr. 343; 2 Roll. Abr. 301; Moor, 665; Cro. Eliz. 908; Noy, 45; Roll. Rep. 426; 3 Buls. 264; Moor, 683; Salk. 115, pl. 4; Ld. Raym. 73; 12 Mod. 891; 5 Mod. 69. But a person may by deed or will give any thing in trust for the separate use of a *feme covert*, and this shall be out of the power of her husband. 2 Vern. 659.

|| But if a legacy be given for the separate use of a married woman, she must give a receipt for it.

§ Testator gave 5000*l.* stock to a female infant, to be paid to, or transferred to her, by his executors, by such deed or instrument in writing as they should think most prudent or proper, on her attaining twenty-one; the legatee married in testator's lifetime, and afterwards attained twenty-one. The court ordered the stock to be transferred to her, on her sole receipt.

Laing v. Laing, 10 Sim. 315. §

And if a legacy be given generally to a *feme covert*, executors *may* refuse to pay it, unless the husband will make a reasonable settlement out of it upon the legatee; and this though the wife be living apart from her husband. (a) But if she be an adulteress, it seems the court would, if applied to, order the legacy to be paid into court. (b)

Brown v. Elton, 3 P. Wms. 202. (a) March v. Head, 3 Atk. 720. (b) See Ball v. Montgomery, 4 Br. C. C. 339; 2 Ves. jun. 191, S. C.; Carr v. Eastbrooke, 4 Ves. 1469.

§ Where a testator gave his daughter, a *feme covert*, a legacy of 200*l.*, and directed the interest to be paid to her during the coverture, and the principal afterwards; held, that the husband alone was entitled to receive such interest.

Fitch v. Ayer, 2 Conn. 143. §

“ Where an *absolute* equitable interest is given to the wife, the court will not permit the husband to possess it without making a provision for the wife, or her express consent; and all who claim under the husband must take his interest subject to the same equity. But where an equitable interest is given to the wife, *for her life only*, this court does permit the husband

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to enjoy it without the consent of the wife, and without making any provision for her. It is true, that if the husband desert his wife and fail to perform the obligation of maintaining her, which is the condition upon which the law gives him her property, this court will apply any equitable interest which he retains for the life of the wife, either wholly or in part, for the maintenance of the wife; and if the husband becomes bankrupt, or takes the benefit of an Insolvent Debtors' Act, this court will fasten the same obligation of maintaining the wife out of the property of this description, which devolves, by act of law, upon the general assignee; for when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife; but the same principle does not necessarily apply to a particular assignee for a valuable consideration, who purchased this interest when the husband was maintaining the wife, and before circumstances had raised any present equity in this property for the wife, whatever may be the force of general reasoning upon it."

Verba Sir John Leach, V. C., in *Elliott v. Cordell*, 5 Madd. 156. See *Ball v. Montgomery*, 2 Ves. jun. 196; 4 Br. C. C. 339, S. C.

Legacy to a LUNATIC must be paid to the committee. But if an executor without notice and *bond fide* pay a legacy to a person who is afterwards found to have been a lunatic at or before the time of such payment, the Court of Chancery will not interfere to set aside such payment.

Niell v. Morley, 9 Ves. 478; *Hall v. Warren*, 9 Ves. 605.¶

A legacy of 1000*l.* was given to one, after the death of her mother, when she should attain the age of 21 years; and the defendant was appointed trustee for the raising and payment thereof out of certain lands; the legatee was drawn into an improvident match with one who soon after became a bankrupt, and the commissioners assigned all his effects, and gave him a certificate of his conformity; and the assignees brought a bill against the trustee for this 1000*l.*, who insisted that the assignees could be in no better condition than the husband, and that if he were plaintiff he could not prevail without making a suitable provision on his wife; and that this legacy being liable to a double contingency, viz., the death of the mother, and the legatee's arriving at the age of 21 years, at the time of the bankruptcy, was not such an interest as could be assigned. The court held, that though both contingencies have since happened, yet those being since the assignment of the bankrupt's estate, and since a certificate of his having conformed himself in every thing to the acts, he was now discharged as a bankrupt; and this legacy could not pass without a new assignment, which the commissioners could not make, their commission being determined.

Abbr. Eq. 34, Jacobson v. Peter Williams.

¶ Legacy to a BANKRUPT, before his certificate is allowed and confirmed by the chancellor, must be paid to his assignees.

Tudway v. Bourn, 2 Burr. 717.

A person abroad, and not heard of for a long time, will be presumed to be dead, and a legacy given to him may be paid to those entitled in that event; they giving security to refund, in case the legatee return.

Norris v. Norris, Finch R. 419; *Dixon v. Dixon*, 3 Br. C. C. 510; *Mainwaring v. Baxter*, 5 Ves. 458; *Bailey v. Hammond*, 7 Ves. 590.

BEQUESTS OF ANNUITIES.—Annuities and dividends on stock are not apportionable. But interest, whether the principal is secured by mortgage or bond, may be apportioned, notwithstanding it is expressly made payable

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half-yearly; for it becomes due *de die in diem*, for forbearance of the principal. So, a bequest for the maintenance of an infant, or of married women living separate from their husbands, is apportionable.

Rasleigh v. Master, 3 Br. C. C. 101; and cases cited Swanst. 349 in note.]

2. At what Time a Legacy is to be paid.

By the civil law, executors have a year's time, from the death of the testator, to pay legacies: and in conformity to the civil law, the same rule hath been taken up, and is now followed, in the Court of Chancery.

Godolph. Orph. Leg. 272; 2 Salk. 415, pl. 2; 2 Marsh v. Hague, 1 Edw. 175. g {See 2 Bin. 525, Hassanclever v. Tucker. As to the time of payment of an annuity bequeathed, see 7 Ves. J. 96; 9 Ves. J. 553.}

¶ And the executor is not obliged to pay them sooner, although the testator may have directed them to be discharged within six months after his death.(a) But if the state of the testator's circumstances be such as to enable the executors to discharge the legacies at an earlier period, they have authority to do so; for the legacies are due at the death of the testator, and the year allowed the executors, previous to compulsory payment, is merely for their convenience and safety.(b)

(a) See Benson v. Maude, 6 Madd. 15. (b) 10 Ves. 13.]]

If a legacy is given to a child, payable at twenty-one years, and the child dies before, though his administrators shall have the legacy, yet he must wait for it till such time as the child, if he had lived, would have come to the age of twenty-one.

2 Vern. 31, 199, 283. ¶ Chester v. Painter, 2 P. Wms. 336; Roden v. Smith, Amb. 588.]]

¶ But if interest be given during the minority, the representative of the deceased infant may claim the legacy immediately. If it bear a *less* interest than the *utmost use*, the representative has a right to the money, paying the modified interest.

Green v. Pigot, 1 Br. C. C. 105; Crickett v. Dolby, 3 Ves. 13.]]

But where A by will gave a legacy to B at twenty-one, and if he died before twenty-one, then to the plaintiff; B died before twenty-one; and the only question was, Whether the plaintiff was entitled to the legacy presently, or must wait till B, if he had lived, would have been twenty-one? And on time taken to consider of it, my Lord Chancellor was of opinion, the plaintiff was entitled to the legacy presently; (a) but that where a legacy is given to one to be paid at twenty-one, so as to be an interest vested in him presently, though not payable till twenty-one, if the party dies before that age, his executors or administrators shall not have it till the legatee, if he had lived, would be twenty-one years of age.

Abr. Eq. 299, 300, Laundry and Williams; 2 P. Wms. 478, S. C. So, 1 Atk. 556. (a) For this vide Leon. 277, 278; And. 33; 2 Roll. Rep. 134. [The rule seems to be this—if a legacy be payable at 21, and the child die, his representatives cannot claim till the time when the child would have arrived at 21, if the legacy does not bear interest, Harrison v. Bickle, 1 Str. 238; Roden v. Smith, Amb. 588, but, if it be with interest, they may claim immediately. Green v. Pigot, 1 Br. Ch. Rep. 105; Fonnereau v. Fonnereau, 1 Ves. 118.]

[A testator gave to J S the sum of £. payable at 21, and in the mean time that he should have the yearly sum of £., which did not amount to the interest of the legacy given to him. J S died under 21, and his executors demanded the legacy presently. But it was holden at the council,

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unanimously, that the executors of the legatee should wait for their legacy until such time as their testator should, in case he had lived, have attained 21, it being unreasonable that the executors of J S, standing in his place, should be in a better case than J S himself would have been, had he been living; and it was to be presumed, that the first testator had made a computation of his estate, and considered when it would best bear and allow of the payment of this legacy; and there could be no reason given, why an uncertain accident should accelerate the payment of this legacy before the time which was at first intended for that purpose.

Chester v. Painter, 2 P. Wms. 335.

But where one, having several daughters, *charged his lands* with 1000*l.* to each of them, payable at their respective ages of twenty-two or marriage, which should first happen; and if any of his said daughters should die before her portion became payable, the share of her so dying should go to the survivors. One of the daughters died before twenty-two, or marriage, and another of the daughters attains twenty-two years of age. By the court,—This portion arises out of lands, and it would be a hardship on the heir (whom equity favours) to make it payable before the time it was intended. Now there can be no reason to make the additional portion payable before the original one; wherefore, as the heir is to suffer by the raising of these portions, it may reasonably be presumed in favour of him, that the testator might compute within what time they might be paid, so that this additional portion shall not be paid before such time as the daughter to whom it was given should have come to the age of twenty-two years, if she had lived.

Feltham v. Feltham, 2 P. Wms. 271.]

||A legacy of 3000*l.* was given upon trust to pay interest for the maintenance of A till twenty-eight, and after that time to pay him the whole interest for life; with an authority to the trustees to apply 600*l.* for the advancement of A, at any time before he attained twenty-six; and when he attained that age testator gave him 600*l.* A attained twenty-one, and claimed the 600*l.*, but it was refused. The court, however, referred it to a master to inquire whether the situation of A required any, and what part, of the money to be advanced before he attained twenty-six.

Lewis v. Lewis, 1 Cox, 162; and see Robinson v. Cleator, 15 Ves. 526; || *β* Colhoun v. Thompson, 2 Moll. 281; S. C. 1 Beat. 242; Frost v. Capel, 2 Beav. 184.*g*

A legacy of 500*l.* was given to the eldest son of A to be begotten, to place him out apprentice; A had a son born after the death of the testator; and on a bill brought by him for the legacy, it was decreed to be paid, though before such time as he was fit to be placed out apprentice.

2 Vern. 431, Nevil and Nevil; ||Barton v. Cooke, 5 Ves. 462; and see Hammond v. Neame, 1 Swanst. 35.||

If legacies are given to A, B, and C, being the testator's three coheiresses, to be paid at their respective marriages, and if any of them die, her legacy to go to the survivors, and one of them dies unmarried, the survivors shall not receive her legacy before their respective marriages, for the condition, though not again repeated, shall go to the whole, as well to what accrued by survivorship as to their original devise.

2 Vern. 620, Moor and Godfrey.

||A contingent legacy, payable two years after the event, out of real and
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personal estate, was given to A. By a codicil testator declared his estate could not pay it during the life of A, and therefore he directed it to be paid twelve months after A's death: A died *before* the event. Held, that it should not be paid till two years after the event.

Woodsworth v. Younger, 3 Ves. 73.

If a legacy be given to A, with a bequest over if he succeed to a certain estate, or upon condition that it shall be void in that event, the legacy must be paid to A notwithstanding, and without security.

Griffiths v. Smith, 1 Ves. jun. 97; Fawkes v. Gray, 18 Ves. 131.

If, however, the estate of the testator be subject to outstanding liabilities, as a bond or covenant which may be broken, the executor may require indemnity before paying legacies.

Simmons v. Bolland, 3 Mer. 547.

If a legacy be given in substitution for or in addition to another, it depends upon the construction of the will whether it shall be paid at the same time and in the same manner as the legacy in lieu of or in addition to which it is given.

Leacroft v. Maynard, 1 Ves. jun. 279; Cooper v. Day, 3 Mer. 154; Chatteris v. Young, 2 Russell, 183; 6 Madd. 31.

If an annuity is given to B for life, the first payment is due at the end of the first year after testator's death. But if a sum of money be given, with a direction to pay the interest to B for life, the first payment will not accrue till the end of the second year after testator's death. The tenant for life of a *residue* is, however, entitled from the testator's death.

See Gibson v. Bott, 7 Ves. 96; Houghton v. Franklin, 1 Sim. & Stu. 390. Where an annuity is directed to be paid out of a residue, see Storer v. Prestage, 3 Madd. 167; Angerstein v. Martin, Turn. & Russ. 232.

If testator's assets are in the hands of the Court of Chancery, legacies will not be paid before the master reports that the debts are discharged, unless there be a clear surplus, and all parties consent.

Pearce v. Baron, 12 Ves. 459.]

§The testator by his will emancipated his slave, and devised to him two hundred dollars "to assist him in buying his wife." The specification of the object of the bequest does not qualify it, nor affect the legatee's right to it. The executors cannot compel him to appropriate it to the purchase of his wife, nor withhold it until he shall be willing to make a purchase.

Joe v. Hart's Executors, 2 J. J. Marsh. 351.

Testator devised as follows: "I lend to my wife the plantation whereon I now live, and after her decease I give and bequeath the said land to my child that my wife is now pregnant with, if a boy; and, if it should be a girl, I give the said land to my son H, upon his paying to the said child, if a girl, one hundred pounds." The child proved to be a girl. Held, that the legacy of one hundred pounds was not payable until the death of testator's widow.

Justices of Wayne v. Crawford, 1 Hawks, 241.

A legacy given to a grandchild "when she comes of age," and "if she dies before she comes of lawful age, or marries," then over, is contingent, and vests only upon her arrival of full age or marriage. The payment is postponed until she comes of age, and interest accrues only from that time.

Kent v. Watson, 2 Dev. Eq. 366.g

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3. *Where the Legatee shall have Interest and Maintenance till the Legacy is paid.*

If a legacy be devised generally, it is regularly to carry interest from the expiration of the first year after the death of the testator; but if the legatee, being of full age, neglects to (a) demand it at that time, he cannot have interest but from the time of the demand.

2 Salk. 415, pl. 2; and vide Vern. 251, 262. {Vide 6 Ves. J. 520, 539, Sitwell v. Bernard; 7 Ves. J. 89, Gibson v. Bott. Interest on a pecuniary legacy is allowed only from the end of the year, though there is a direction to pay as soon as possible. 8 Ves. J. 410, Webster v. Hale.} β Hoagland v. Schenck, 1 Har. 370; Sullivan v. Winthrop, 1 Sumner, C. C. R. 1. The exception to this general rule, allowing interest from the testator's death on legacies intended as a maintenance, applies only to infant children, and does not extend to the widow. Dutch Church v. Ackerman, Sax. Ch. R. 40. (α) That a legacy differs from a debt, and must be demanded, otherwise the legatee not entitled to interest. Poph. 104.—So, though a bond was given for the performance of the will. 1 Leon. 17.

But it is said, that if a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant, he shall be paid interest from the expiration of the first year after the testator's death, though no demand be made, because no *laches* shall be imputed to him.

2 Salk. 415, pl. 2.

Also, it is said in Salk. that a legacy left payable at a (b) certain day must (as it seems without demand) be paid with interest from that day, and that the interest allowed is 5*l. per cent.*

Salk. 415, pl. 2, *per* Lord Cowper. (b) But in Prec. Chan. 161, it is held, that though a legacy be devised to be paid at a certain time, yet it shall not carry interest but from a demand made; otherwise, of a debt.

The plaintiff had a legacy devised to him, payable within a year after the death of the testator, who was his half-brother: the plaintiff knew nothing of the legacy, nor of the testator's death, till the executor published it in the Gazette, and then he demanded his legacy of the defendant the executor; and the only contest was, whether the plaintiff should have interest from the time the legacy should have been paid. And the court would not give any interest, not so much as from the time of the bill exhibited, nor would they give costs even out of the assets, but the bare legacy.

Prec. Chan. 11, Knapp and Powell.

{The general rule is, that a legacy payable at a future day does not carry interest before the time of payment; and the rule applies to a legacy to an infant payable at 21, unless in the case of an infant having a right to demand maintenance from the testator, or of the legacy to him being of a {} residue, or there are special circumstances showing clearly an intention to give interest.

4 Ves. J. 1, Tyrrell v. Tyrrell; 3 Ves. J. 10, Crickett v. Dolby. {} 2 P. Wms. 420, Nicholls v. Asborn; 9 Ves. J. 289, Sisson v. Shaw. There is no exception from the general rule in favour of a wife. 12 Ves. J. 461, Stent v. Robinson; see 3 Ves. J. 16, a *dictum* of Lord Alvanley, *contra*.)

[If a father devise legacies or portions to his daughters, or younger children, to be paid or payable at their respective ages of 21 years, or at any other time certain, without making any provision for their maintenance in the mean time, and die, in this case they shall have interest for their portions from his death, till paid, because the father was obliged to have provided for them, if he had lived: but if such portions had been devised to them by a stranger, to be paid or payable at such age, their legacies should not carry

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interest in the mean time, because he, being a stranger, was under no such obligation to provide for them.

Attorney-General v. Thompson, 1 Eq. Ca. Abr. 301. {As to grandchildren, see 3 Ves. J. 12; 6 Ves. J. 546; 12 Ves. J. 23.}

So, where a father, by his will, gave 2000*l.* apiece to his two daughters, payable at 21, and charged on land and personal estate; and the personal estate was exhausted in debts; Lord Chancellor held, they should have a reasonable maintenance out of the real estate until their legacies became payable, and allowed them 80*l.* *per annum* each.

Conway v. Longville, 1 Eq. Ca. Abr. 301.

{Maintenance will be allowed to an infant out of the produce of the residue of personal estate, bequeathed to him by his father, where the will directs the interest to accumulate till he attains 21; and, if he dies before, the whole is given over; and the will is silent as to maintenance.

1 Dick. 310, Mole v. Mole.}

A testator devised his real estate, and a residue of his personal estate, in trust for payment of all his debts, and subject thereto, for raising 5000*l.* for such child or children of his body issuing, as should attain 21, to be paid to such child or children, if but one, but if more than one, equally to be divided between them. Though the 5000*l.* were given to such children of the testator's body as should attain the age of 21, and, consequently, the legacy was not vested, yet, Lord Hardwicke decreed interest. In the case of strangers, he said, whether the legacy be given absolutely, and payable at 21, or not given until 21, the legatees can have no interest in the mean time; but in either of these devises, where they are given to children, the court will direct interest for their portions immediately; and it has been so done frequently.

Incedon v. Northcote, 3 Atk. 438.

A testatrix bequeathed to her daughter 100*l.* a year, until the age of 10 years, and after, the further sum of 50*l.* a year till she attained the age of 21, *the said sums to be applied by her executors for the education and maintenance of her said daughter according to their discretion.* She also bequeathed to her said daughter 8000*l.* to be paid her when she should attain the age of 21 years, but if her said daughter should die before the said age, without issue living at her death, then she bequeathed the said 8000*l.* to, &c. Lord Hardwicke was of opinion, that the daughter was not entitled to the interest of the 8000*l.* The general rule is, he said, where legacies are given payable at a certain time, they carry no interest, for interest is for delay of payment, and, consequently, till the day of payment comes, no interest is demandable. But I admit, where the legacy is given by a father to a child, though the legacy is not payable but at a certain time, yet the court allows interest. But in all these cases, the ground the court goes upon, is giving interest by way of maintenance. Here, the testatrix has allotted maintenance for her daughter from the general fund of her personal estate. There is another thing observable, the contingency in the will of the daughter's dying before 21. I agree it is a condition subsequent, but still it shows the view of the testatrix, and that it might never be her daughter's, and therefore to give her interest would be contrary to the intention of the testatrix. There are several cases where the court has made a great stretch to give children interest on legacies, particularly Acherly v. Vernon, 1 P. Wms. 783, but that

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went upon particular circumstances.- Therefore, I am of opinion, she can have no more interest than the maintenance in the mean time.

Hearle v. Greenbank, 3 Atk. 716.

{By a settlement, portions were provided for younger children, payable at 21 or marriage, with maintenance at the rate of two *per cent.* till payment. The father by his will increased their portions, directing the additional sums to be paid at the same time with the portions by the settlement. The children applied for interest at the rate of four *per cent.* on the additional portions. This was refused by Lord Loughborough, as there was a particular provision for maintenance, in which case {} the rule as to interest does not apply. But he continued the two *per cent.* on the increased portions.

3 Ves. J. 286, n., Long v. Long. {} 3 Ves. J. 283, Mitchell v. Bower, acc.

A testator directed maintenance for his sons during minority, and for his daughter till 21 or marriage; and gave her a legacy, in case she should attain 21, payable at and to carry interest from that time. Having married at 18, she was allowed maintenance for the interval till 21.

11 Ves. J. 1, Chambers v. Goldwin.

R B bequeathed the residue of his personal estate, to a very large amount, in trust for an infant grandson, to be paid at 21; but if he should die under 21, then to two other grandsons equally at 21; but if either should die under that age, to the survivor; and in case of the death of all three, for his granddaughters at 21 or marriage; and if all the grandchildren should die before the time of payment, to their mother absolutely: and he directed the interest to accumulate and be paid with the capital. Their father not being able, though his income was considerable, to maintain and educate the children, according to the fortune which some one of them might have, Lord Bathurst directed maintenance to them, after taking the consent of the mother separate from her husband: holding it quite contingent which child would be entitled, and that it was for the benefit of them all that they all should have an education.

5 Ves. J. 195, n., Cavendish v. Mercer.

So where a residue was bequeathed in favour of infant grandchildren, payable at 21 or marriage, or to the issue of those dying if they left issue, otherwise to the survivors, with a limitation over absolutely in case of the death of all without issue before the time of payment, and a direction that the interest should accumulate till that time; the father being, in consequence of bankruptcy, wholly unable to maintain his children, maintenance was directed by Lord Thurlow, taking the consent of the persons to whom the property was given over.

5 Ves. J. 197, n., Fendall v. Nash.

And upon the authority of those two cases, Lord Loughborough directed maintenance for infant grandchildren, in whose favour a devise was made as follows;—to the grandson at 21, with a direction for accumulation in the mean time, and with similar limitations to his sisters in case of his death under twenty-one.

5 Ves. J. 194, Greenwell v. Greenwell; 12 Ves. J. 25, S. C. cited. And see 9 Ves. J. 470, Collis v. Blackburn.

In Fairman v. Green, maintenance was allowed to infants on legacies bequeathed by their father and grandfather to the eldest at 21, and if he died before that age leaving issue, to that issue but if without issue to the others

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equally, without any limitation over, though accumulation was directed, and there was no express authority for any application during minority, except for younger children surviving the eldest, in the event of his death under 21 without issue.

10 Ves. J. 45. See Lord Eldon's observations on this case. 11 Ves. J. 605, 606.

The circumstances under which, in such cases, maintenance may be allowed though not given by the will, are where there are children, some or one of whom must take the property, and all have an equal chance of surviving and a present interest. But it cannot be done if there is a gift over; or if the children are not all the persons among whom the property is to go, as where future children, then unborn, may be the persons entitled to a part of it.

10 Ves. J. 48; 11 Ves. J. 604.

Therefore it was refused where the legacy was left to the children of the testator's daughter when the youngest should attain the age of 21.

11 Ves. J. 48, *Lomax v. Lomax*.

And also where a residue was bequeathed to infants, with survivorship among them in case of the death of any under 21, and if all should die under that age, the whole was given to their sister; who had no other interest in that residue, but had a distinct legacy, which was given over to them if she died under 21.

11 Ves. J. 604, *Ex parte Kebble*.

So it was not allowed on legacies left to grandchildren at 21, with interest, as the legacies with the interest were given over in the event of death under 21; though the father was not of ability to maintain them.

12 Ves. J. 20, *Errington v. Chapman*.}

A legacy was given to an infant, the testator having a great deal of money in bank stock. The executor was residuary legatee. A bill was brought in the exchequer for the legacy. And the question was, Whether it should bear interest, and from what time? Chief Baron Pengelly and Baron Hale: It is a certain rule, that where a fund is certain, as where charged on land, it shall bear interest, because it plainly appears the rents are received: so, the fund on which it is charged produces a profit here, it is equally certain, and therefore should bear interest, and should be from the testator's death. But this was opposed by Carter and Comyns, Barons, that it should only bear interest from a year after the testator's death; for as legacies are to be paid after debts, the executor has that time to inquire, till which time they are not payable, so not to bear interest: which was agreed. A difference was offered to be made, that as there was a legacy to an infant, it could not be safely paid, and therefore could not bear interest. To which it was answered by the Chief Baron, that it might be safely paid into the hands of an infant, having proper evidence of the payment, as in *Wentworth's Executor*, 313. And by Carter: It may be paid into the hands of the guardian, having evidence; but if he takes security from the guardian which should prove defective, there, as he doth not rely on the security the law gives, he must depend on that taken at his peril.

Bilson v. Sanders, Bunb. 240; Sel. Ca. in Chan. 72.

The grandfather of the plaintiff, by will, after directing his debts and legacies to be paid, gives all the rest and residue of his personal estate to

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his grandson the plaintiff at his age of 21, and if he die before that age, then to the defendant Freeman, whom he makes his executor. The plaintiff brought his bill for the interest of the residue, to be paid to him during his infancy. The defendant Freeman by his answer insisted, that the plaintiff is not entitled to it, unless he attains his age of 21: but that it ought to accumulate: and if the plaintiff dies before 21, that it will belong to the defendant equally with the residue. The father of the plaintiff insisted, that the residue must be confined to what the testator left at the time of his death, and that the interest made after his death ought to be considered as an undisposed part, and to go to him as next of kin to the testator, according to the statute of distribution; or if the court should be against him in this point, that then he is entitled to receive it for the maintenance of the plaintiff. By the Lord Chancellor Hardwicke: I am of opinion, that the plaintiff is not entitled to the interest that arises from this residue; and though the words *rest and residue* must be confined to what shall be found at the death of the testator, after his debts, funeral expenses, and legacies are paid, yet that the interest ought to accumulate till the plaintiff arrives at his age of 21, and as often as it amounts to a competent sum to be placed out by a trustee appointed by the master. I am not quite so clear how the interest would go, if the accident should happen of the plaintiff's dying before 21, whether to the representative of the plaintiff, or to the defendant Freeman; but that is not necessary to be inquired into at this time. As to the father's claim, I am of opinion he has no right to the interest, because the testator has given *all the rest and residue* of his personal estate, so that he cannot be said to have left any part undisposed, and consequently can have no title to it as next of kin under the statute of distribution. For as the devise of the residue is contingent, it not vesting till the grandson's age of 21, the interest is so likewise, and must accumulate in the mean time; nor can the father by the rules of this court entitle himself to it as maintenance for the infant, because it is given by a grandfather to a grandson upon a contingency of attaining his age of 21; and as nothing is said how the produce of it shall be applied, he is not entitled as a grandson to be maintained out of the produce. The law of nature obliges only fathers to maintain their children; and unless the child, from the mean circumstances of the parent, is in danger of perishing for want, the court will not direct the interest that shall be made of a contingent legacy to be applied for that purpose; so that, unless the parent is totally incapable, or under particular circumstances, as having a numerous family of children, and is bordering upon necessity, the law of the land and of nature make it incumbent on the parent to maintain his child. In the case of *Acherly and Vernon*, 1 P. Wms. 783, where the testator Mr. Vernon had left 6000*l.* to the plaintiff his niece, to be paid to her at her age of 21, and she insisted that the interest of this money ought to be allowed for her maintenance; Lord Macclesfield was of opinion, that the interest in that case ought to follow the principal, for it was a vested legacy, and payable at 21. But, there, it was a sum of money separated and detached from the rest of the estate, and a vested legacy; here, it is a contingent one, and not a specific sum, but of the residue of his personal estates, which makes a difference between the cases; and the father likewise in the present case is possessed of a good estate and in considerable circumstances. Therefore his lordship decreed the interest which has arisen upon the residue of the testator's personal estate since his death, or which may arise, to be

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paid into the hands of a trustee, to be laid out in real or government securities as often as it shall amount to a competent sum.

Butler v. Freeman, 3 Atk. 58.

The testator by his will gave 1000*l.* apiece to five brothers and sisters, (but who were no relations to him,) to be paid to them at their respective ages of 21, in case they should respectively attain that age, and not otherwise; and if any of them should happen to die before they attain their respective ages of 21, that then and in such case the legacy or legacies of 1000*l.* so given to them respectively should be void. The legatees brought a bill for interest on their legacies. By Lord Hardwicke: Cases of this kind, how far a legatee, who is not entitled to the payment of the legacy immediately, shall have interest in the mean time, depend upon particular circumstances. Some upon relationship, some upon the necessities of legatees, and most of them upon the particular penning of wills; and there is hardly one case which can be cited that is a precedent for another. Some things are certain in these cases; for if a legacy is given generally at marriage, or at 21, then the vesting and time of payment are the same, and shall not vest till marriage, or 21. To go one step further, where a legacy is actually vested, as if given to an infant payable at 21, yet it shall not carry interest, unless something is said in the will that shows the testator's intention to give interest in the mean time. But all these cases are subject to this exception, if it is in the case of a child; for then let a testator give it how he will, either at 21, or at marriage, or payable at 21, or payable at marriage, and the child has no other provision, the court will give interest by way of maintenance, for they will not presume the father so unnatural as to leave a child destitute. But in the present case, the legatees are mere strangers to the testator; and nothing shall be taken out of the estate for their benefit during their nonage.

Heath v. Perry, 3 Atk. 101.

It hath been resolved, that if one gives a legacy charged upon land which yields rents and profits, and there is no time of payment mentioned in the will, the legacy shall carry interest from the testator's death, because the land yields profit from that time.

2 P. Wms. 26.

But if a legacy be given out of a personal estate, and no time of payment mentioned in the will, this legacy shall carry interest only from the end of the year after the death of the testator.

So, *Loyd v. Williams*, 2 Atk. 108. If a legacy be given generally by a parent to a child, whether by way of portion or not, the court will give interest from the death to create a provision for its maintenance; and if payable at a certain age, and the child not otherwise provided for, the court will give interest in the mean time before that age. 1 Ves. 310.

If a legacy be given charged upon a dry reversion, here it shall carry interest only from a year after the death of the testator, a year being a convenient time for a sale.

If a legacy be given out of a personal estate, consisting of mortgages carrying interest, or of stocks yielding profits half-yearly, it seems, in this case, the legacy shall carry interest from the death of the testator.

If a legacy be brought into court, and the legatee have notice of it, so that it is his fault not to pray to have the money, or that the money should be put out, the legatee, in such case, shall lose the interest from the time the

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money was brought into court; but if the money was put out, the legatee shall have the interest which the money so put out did yield.

As to the *quantum* of interest, the determinations have been various: in the case of Guillam and Holland, Lord Hardwicke said, where a portion is charged upon land, and the will doth not mention interest, the court will not give any more than 4 *per cent.* though the legal interest is 5 *per cent.*; and this rule hath also been extended to the cases of legacies and portions charged upon personal estate.

2 Atk. 343.

In the case of Incledon and Northcote, Lord Hardwicke said at first, as no more had been allowed for many years than 4 *per cent.* interest to children for maintenance, he did not care to break through the rule: but afterwards, in consideration of the interest of money being altered lately, mortgages being then at four and a half, and several at five *per cent.*, he ordered the children should have four and a half *per cent.* interest.

2 Atk. 438.

In Bryant and Speke, Lord Hardwicke said, the general rule is, that legacies out of real estate carry one *per cent.* lower than legal interest; but if out of personal, because of the higher interest of money than land, they shall carry the legal interest, unless particular circumstances induce the court to vary therefrom. And this, he said, was in conformity to the ecclesiastical court, which gives legal interest upon legacies out of personal estate.

1 Ves. 171.

In Beckford and Tobin, it was said by the Lord Chancellor Hardwicke, that in general the court exercises as large a discretion as to the rate of interest upon legacies, where interest is not particularly given, as in any case; and that it is difficult to reduce it to a certain rule. The most general rule hath been, between interest of legacies charged on land, and on personal estate; (a) and where nothing more, the court has said, that land never produces profit equal to the interest of money, and will follow the course of things, and give interest, where charged on land, one *per cent.* lower than the legal interest. So it was when the legal interest was at six; but in general, where a legacy is out of personal estate, the court gives five; and unless that is taken to be a sort of rule, there will be no distinction between them.—Nevertheless, in the present case, the fund out of which the interest was to arise yielding no more than four, the court allowed but four *per cent.*

1 Ves. 308. (a) This distinction is now at an end. Whether the legacies are charged upon real or personal estate, it is now become the established practice to allow only 4 *per cent.*—And note, although pecuniary legacies, not having the addition of the word sterling, are to be paid according to the currency of the country, where the will was made, yet interest thereon is to be computed according to the course of the court at 4 *per cent.*, and not according to the rate of interest in such country. 2 Br. Ch. Rep. 47; 3 Br. Ch. Rep. 53. {Vide 5 Ves. J. 199, Raymond v. Brodbelt; 10 Ves. J. 330, Bourke v. Ricketts.}

The Countess-dowager of Ferrers was, by settlement and will of her late husband Earl Robert, entitled to a jointure estate of 1000*l.* a year, but was kept out of possession by Earl Washington, the son of Earl Robert by a former venter; and insisted upon the arrears, and interest, from the time of her husband's death; comparing it to the case of arrears of an annuity, or rent-charge, which are decreed to be paid with interest. By Talbot, Lord Chancellor—The arrears of an annuity or rent-charge are never decreed to

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be paid with interest, but where the sum is certain and fixed ; and also where there is either a clause of entry, or *nomine pœnæ*, or some penalty upon the grantor which he must undergo, if the grantee sued at law ; and which would oblige him to come into this court for relief, which the court will not grant but upon equal terms, and those can be no other but decreeing the grantor to pay the arrears, with interest for the time during which the payment was withheld ; but interest for the rents and profits of an estate was never decreed yet, the same being entirely uncertain. And though it may be said, that the lady is entitled to an estate of 1000*l.* a year, yet that is not sufficiently certain ; being only a perception of the profits of an estate, which are not to be paid at any one certain time, but only as the tenants of the land bring them in, some at one time, some at another.

Ferrers v. Ferrers, Ca. temp. Talb. 2.

A legacy was made payable at the age of 21 years. The legatee, by his guardian, brought a bill against the executor for maintenance, suggesting that he had none. The executor demurred ; for that the plaintiff was under age, and the legacy was not payable till 21, and therefore no cause of suit. But the demurrer was overruled.

Rennesey v. Parrot, 1 Ch. Ca. 60.

The testator being seised of a real estate, and possessed of a personal estate, and having several children, deviseth all his real and personal estate to his eldest son, charging the same with 1000*l.* apiece to all his younger children, payable at their respective ages of 21 ; but in the will no notice is taken of maintenance for the younger children in the mean time. The younger children bring their bill, in order to recover interest, or some maintenance during their infancy. Upon which the master of the Rolls decreed that the younger children should recover maintenance. He observed, that these being vested legacies, and no devise over, it would be extremely hard that the children should starve, when entitled to so considerable legacies, for the sake of their executors or administrators, who in the case of their deaths would have the said legacies : that in this case the court will do, what in common presumption the father (if living) would and ought to have done, which was, to provide necessaries for his children : that a court of equity would make hard shifts for the provision of children ; as where younger children were left destitute, and the eldest an infant, equity would make such a liberal allowance to the guardian of the eldest as that he might thereout be enabled to maintain all the children ; and for the same reason the court would likewise take a latitude in this case ; that since interest was pretty much in the breast of the court, though the will were silent with regard to that, yet it should be presumed that the father, who gave these legacies, intended they should carry interest, if the estate would bear it ; for every one must suppose it to have been the intention of the father, that his children should not want bread during their infancy : that for this reason it had been held, that though a legacy were devised over in case of the legatee's dying before 21, yet the infant legatee ought to have interest allowed him during his infancy, in order for his maintenance ; with this difference only, that where the estate has appeared to be small, the court, in whose discretion it always lies to determine the quantum of interest, has ordered the lower interest : and it seemeth that if one, not a parent, gives a legacy to an infant, payable at 21, without any devise over, and the infant has nothing else to subsist on ; the court will order part of this legacy, in order to provide bread for the infant, to be paid presently, allowing interest for the

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same to the person paying it, out of the remaining principal ; though this is done very sparingly.

Harvey v. Harvey, 2 P. Wms. 21.

Upon a bill for 100*l.* legacy given to a child, the defendant insisted upon an allowance of 16*l.* a year, for keeping the legatee at school. It was objected, that only the bare interest of the money ought to have been expended in his education, and not to have sunk the principal, as in this case the defendant had done. But the Lord Keeper thought it fit and reasonable to be allowed ; and said, the money laid out in the child's education was most advantageous and beneficial for the infant, and therefore he should make no scruple of breaking into the principal, where so small a sum was devised that the interest thereof would not suffice to give the legatee a competent maintenance and education ; but in case of a legacy of 1000*l.* or the like, there it might be reasonable to restrain the maintenance to the interest of the money

Barlowe v. Grant, 1 Vern. 255.

But if the legacy is devised over, it seemeth to be otherwise ; and that the court in such case will not diminish the principal, but only allow the interest thereof to the first legatee, until the time that the legacy shall become payable.

1 Ch. Ca., *Leech v. Leech*, H. 26 & 27 C. 2, Prec. Ch. 195 ; *Brewin v. Brewin*, E. 1702.

Also a legacy in the hands of the father, given to his children by a relation or other, shall not be diminished by the father ; because he is obliged to maintain his own children ; as in the case of *Darley and Darley*. A bill was brought by the plaintiff for two legacies of 50*l.* each, left to himself and his sister under the will of their grandfather, and for the interest that had been made thereof. The sister's legacy he claims by assignment from her. The defendant, being executor to the father, insists he is not obliged to account to the plaintiff for principal or interest, one hundred and five pounds being expended for putting him out apprentice, and much more than fifty pounds in the maintenance and clothing of the sister. By the Lord Chancellor Hardwicke: Where legacies are given to a child by a relation, a father cannot make use of such legacy in maintenance of the child, but must provide for him out of his own pocket ; nor can he set him out in the world, or put him out an apprentice, or clerk, with the money arising from the legacy ; and if he does, he shall not be allowed it. And he ordered interest to be computed on the legacies given to the plaintiff and his sister, from the time they respectively attained their ages of 21, at 5 *per cent.*, and that what should be found due for principal and interest of these legacies be paid by the defendant to the plaintiff, he having admitted assets of the father for that purpose.

3 Atk. 399.

T C by his will vested his estates in trustees to pay certain annuities, and subject thereto, to pay the rest and residue of the rents and profits, dividends and interests, for and towards the maintenance and education of all and every the child and children of his three daughters, (excepting such of his grandsons as should be in possession of real estates before devised,) share and share alike, until the youngest of his said grandchildren should attain his or her age of 21 years ; and in case of the death of any of his grandchildren (before the youngest should have attained the age of 21 years) who should have married, and have issue, the child or children should be

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entitled to the share of the parent so dying. Upon the hearing of the cause, Lord Chancellor refused to direct the master to consider of a proper allowance for the maintenance of the younger children of the testator's daughters; holding the residue of the rents, &c., to be an accumulating fund for the benefit of the children, and to be paid to them, when the estate became divisible; and that, until it appeared that the parents were incapable of maintaining the children, he could not order any part of the rents, &c., of the estates to be so applied. It was afterwards moved, on the part of the defendants, that the minutes of the decree should be amended by inserting a reference to the master to consider of a proper allowance to the parents for the maintenance of the children. It was stated that J S, the husband of one of the daughters, had by her seven children, whom, though without allowance he might support agreeably to his own rank, he could not in proportion to the additional fortunes derived from the testator. That the rule was, that wherever a maintenance was given by the will, the child should have it, and a case was cited, where the direction was, that a sum for maintenance should be paid to the father; and Lord Thurlow ordered a future maintenance to be allowed, and upon further application, ordered a sum to be paid for the maintenance of the children, prior to the first application. The Lord Chancellor said, the practice was, to refer it to the master to inquire whether the parents were of ability to maintain the children; if not, then to report what would be a proper maintenance; and this practice did not vary where a maintenance was directly given by the will, unless in cases where it was given to the father, under which circumstances it was a legacy to him. His lordship therefore referred it to the master to inquire into the ability of the parents to maintain the children: and afterwards, upon petition, sums were ordered to be allowed for the purpose to J S, who was reported not of ability to maintain his children. But, although the master made the allowance from the date of the decree, the Lord Chancellor ordered it to the date of the report.

Hughes v. Hughes, 1 Br. Ch. Rep. 386.

A grandfather, having given several legacies, bequeathed the residue to his grandchildren at 21, and the produce, in the mean while, to trustees for their maintenance, and appointed four trustees, of whom the father was one. J S, one of the trustees, had expended 400*l.* in the maintenance of the children, previous to any report as to the ability of the parent to maintain them. The question was, whether he should be allowed the sum so advanced, and whether any maintenance should be allowed the children before the report? For the trustees, it was insisted, that the words of the will were imperative upon the trustees to allow a maintenance, and that this had been done in the case of *Fitzgerald v. Carey*, Mich. 1770. Lord Chancellor said, although where there has been a bigoted father, who would not educate the child in the protestant religion, the allowance has been made to the trustees, it was contrary to all rules, that the interest, vested in the children, should be applied to their maintenance in the lifetime of the parent: that this would amount to a gift to the parent of so much as should be necessary for the maintenance, and the father being a trustee can make no difference. He therefore ordered the reference to be only as to the ability of the parent, and what would be necessary for the future maintenance of the children. But afterwards, by consent of the children in England and adult, their proportions were ordered to be paid.

Andrews v. Partington, 3 Br. Ch. Rep. 60.

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Lord Clive devised a specific landed estate to trustees for a term of years, with remainder to his son Robert (his second son) for life, with remainders over. The trusts of the term were, to raise a maintenance till 21, then to pay him an annuity of 1000*l.* till he should attain the age of 25 years, when the estate was to vest in possession, and to apply the savings, to form a personal fund for other purposes. He then gave his personal estate to trustees; he gave to Robert and each of his younger sons 30,000*l.*, and to each of his daughters 20,000*l.*, at 25; in the meanwhile to raise maintenances till 21, and from thence to pay 1200*l.* *per annum* to the boys till 25. Lady Clive filed a bill to have the two allowances for the second son during his minority. Lord Chancellor—There is not sufficient in the will to extract any thing from it, but what is expressed. The trust of the term is to raise maintenances, but there is a further intent to take the profits till 25, and convert them into a personal fund for other purposes, and to provide an annuity till that age. The personal estate is to be laid out in good securities, and out of it he provides 30,000*l.* for Robert, he having then no other younger son: no interest is to be allowed, but a maintenance; so that Robert is, as to that maintenance, in contemplation, as well as the other younger sons. The argument that he shall not have this, because he has another provision, would apply equally to the annuities from 21 till 25, and no one could say he was not to have the two annuities. He has given more by way of maintenance to the son, to whom he has given a larger estate. It must be referred to the master, what allowance should be made, and the rest must accumulate for the use of Robert.

Clive v. Walsh, 1 Br. Ch. Rep. 146.

||**INTEREST.**—*On specific legacies* interest is due from the death of testator, when the legacy given yields interest.

Sleech v. Thorington, 2 Ves. sen. 563; Barrington v. Tristram, 6 Ves. 345; Apreece v. Apreece, 1 Ves. & B. 364.

And where testator made a specific bequest of a mortgage for 1000*l.* to his wife, and desired her to give the sum of 500*l.* to M C, his grandchild, “but for the time and manner of doing it, I leave it freely to herself, and as she shall see it best for her;” and the wife lived twenty years after testator and never paid the 500*l.*, the court decreed payment of it to M C, with interest from the testator’s death.

Churchill v. Speake, 1 Vern. 251; see Raithby’s note.

So, where a specific legacy of stock was given upon a contingency, the dividends were ordered to await the event, and go to the person who should become absolutely entitled to the principal.

Gordon v. Rutherford, Turn. & Russ. 373. It is assumed, that the legacy in this case was a specific bequest, but the report is not clear.

On general legacies:—

1. A gross sum vested, and no time of payment named by testator.

Interest is computed from the year’s end after the testator’s death: and the legatee is entitled to this whether the assets of testator yield interest or not, and though the fund charged with the payment be only a dry reversion.

Pearson v. Pearson, 1 Sch. & Lef. 10; Wood v. Penoyre, 13 Ves. 333. *β*In general, a vested legacy carries interest only from the time when it is payable. Doves, Judge, &c. v. Swan et al., 4 Mass. 215.*g*

This rule is, of course, subject to any inference which may be fairly drawn from the words of testator. Thus, A bequeathed 4000*l.* upon trust

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for the use of a boy named Michael, aged five years, and directed the trustees to pay the expenses of his maintenance and education out of the interest. Held, that the interest began to run from the death of testator.

Beckford v. Tobin, 1 Ves. sen. 308; see also Hill v. Hill, 3 Ves. & B. 183; Pett v. Fellows, 1 Swanst. 561, note.

2. Where a time of payment is named by the testator

In this case, the legatee, unless he be an infant having a right to demand maintenance from the testator, can only claim interest from the time named for payment; and to this he is entitled, whatever be the fund out of which it is to be paid, whether productive or not.

Heath v. Perry, 3 Atk. 101; Crickett v. Dolby, 3 Ves. 10; Tyrrell v. Tyrrell, 4 Ves. 1.

§ Interest will be given on a legacy payable to a child at a particular time, when no provision is made for its maintenance.

Van Bramer v. Executors of Hoffman, 2 Johns. Ca. 200.

When the interest upon a contingent legacy, or a residuary fund given upon a contingency, is not disposed of, it belongs to the residuary legatee or next of kin of the testator.

Wyndham v. Wyndham, 3 Br. C. C. 57; Shawe v. Cunliffe, 4 Br. C. C. 144; Haughton v. Harrison, 2 Atk. 329; Harris v. Lloyd, Turn. & Russ. 310.

Thus, where testator bequeathed the residue of his estate upon a contingency, Lord Hardwicke declared, that the interest from the death of the testator till the contingency happened should fall into the residue and accumulate, and be paid to residuary legatee when he was entitled to receive the capital.

Bullock v. Stones, 2 Ves. sen. 521; Studholme v. Hodgson, 3 P. Wms. 299; Trevanion v. Vivian, 2 Ves. sen. 430.

But where a sum of stock was given to trustees upon trust for D G until he attained twenty-five, with a direction that they should transfer the said sum unto D G for his own use and benefit when and so soon as they should in their discretion think proper, and upon D G's death without lawful issue before receiving the bequest, it was given over, Lord Gifford, M. R., held, that the vesting of the legacy was suspended until the transfer; and that in the mean time the dividends should accumulate for the benefit of the person who should become absolutely entitled to the principal.

Gordon v. Rutherford, Turn. & Russ. 373. The gift of the stock was specific, *semble*; see the Report.

If a legacy or a residue be given which vests and is payable, but which is subject to be divested by a condition subsequent, the first legatee is entitled to the whole interest till the condition is performed.

Tissen v. Tissen, 1 P. Wms. 500; Taylor v. Johnson, 2 P. Wms. 504; Mills v. Norris, 5 Ves. 335; Montgomerie v. Woodley, 5 Ves. 522.

Thus, if a residue be given to the children of A, who has no children, the first child born is entitled to the whole interest till the birth of the second; and the first and second to the whole till the birth of the third, &c.

Shepherd v. Ingram, Amb. 448.

So, also, where a residue is given which vests, but is not payable till the legatee attains twenty-one, or upon some other event, and is given over upon the death of the legatee before the happening of such event, the legatee is entitled to the interest which accrues from the death of testator.

Skey v. Barnes, 3 Mer. 335, and cases there cited.

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"The directing payment to be made at twenty-one does not postpone vesting, even in the case of a common legacy, still less in the case of a *residue*. There is, indeed, a clause authorizing the executors to apply the interest and dividends of the children's portions for their education, maintenance, or other benefit or advantage; but there is nothing that can exclude their right to the surplus of income that might not be so employed; nor is there any thing that could entitle those who are to take in the event of all the children's dying without issue under twenty-one, to claim the surplus interest and produce of the residue during the lives of those children."

Verba Sir W. Grant, M. R., in *Skey v. Barnes*, 3 Mer. 335.

Where the residue of personal estate is given *generally* to one for life, with remainders over, and no direction is given in the will respecting the interest, the tenant for life is entitled to the *interest* from the death of testator.

Angerstein v. Martin, and *Hewitt v. Morris*, Turn. & Russ. 232.

Testator bequeathed the residue of his property to A for life, with remainders over, and directed it should be converted as soon as conveniently might be. The effects of testator were converted into money within a year after his death; among these effects were cattle, which had improved much between the death of testator and the sale. Some leasehold estates could not be sold on account of defects in the title. "The best decree in this cause will be to declare that the property to be converted has been converted in a reasonable time; that the persons entitled for life should have interest *from that conversion*; and as to the leasehold premises, that it being for the interest of all parties that they should not be sold, a value shall be set upon them, and the persons entitled for life shall have interest at 4*l. per cent.* upon that value from the death of testator."

Gibson v. Bott, 7 Ves. 89. *Verba* Lord Eldon in *Gibson v. Bott*, 7 Ves. 89.

But when a residue is directed to be invested in land, or other security, as soon as conveniently may be, and the interest is to accumulate till that period, the tenant for life of residue is entitled to the interest from the end of one year after testator's death.

Sitwell v. Bernard, 6 Ves. 543; *Kilvington v. Gray*, 2 Sim. & Stu. 396; 6 Madd. 155.

Generally speaking, interest is not given upon the *arrears of an annuity*; yet, if the person charged with the payment of it has at law incurred a forfeiture by non-payment, against which he seeks relief in equity, the court will not assist him unless he consents to pay interest upon the arrears.

Ferrers v. Ferrers, Forr. 2; *Batten v. Earnley*, 2 P. Wms. 163; *Tew v. Winterton*, 1 Ves. jun. 451; *Mellish v. Mellish*, 14 Ves. 516.

The rate of interest given by the Court of Chancery is, unless under special circumstances, 4*l. per cent.*

Guillam v. Holland, 2 Atk. 343; *Beckford v. Tobin*, 1 Ves. sen. 311; *Sitwell v. Bernard*, 6 Ves. 543.

The same rate only is given, though the testator be resident in the colonies.

Malcolm v. Martin, 3 Br. C. C. 50; *Bourke v. Ricketts*, 10 Ves. 330.

If an executor neglects to accumulate interest, according to the directions in the will, he may be compelled to account for compound interest.

Raphael v. Boehm, 11 Ves. 92.

§ When no time of payment is mentioned, a legacy is not in general payable till the end of the year, after the death of the testator, and does not

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carry interest. When it is payable to a child not otherwise provided for, interest is allowed from the testator's death.

Eyre v. Golding, 5 Binn. 475; *Bitzer v. Hahn*, 14 S. & R. 238. See *Huston's appeal*, 9 Watts, 473; *Smith's Executors v. Field*, 6 Dana, 364; *Smith v. Lampton*, 8 Dana, 73; *Williamson v. Williamson*, 6 Paige, 298; *Leslie v. Leslie, Lloyd & G. Temp. Sugd.* 1; *Thomas v. Attorney-General*, 2 Y. & Coll. 525; *Stephenson v. Axson*, 1 Bail. Eq. 274.

A legacy of a sum of money to the use of A B, to be applied to his education after he arrives at the age of eighteen years, bears interest only from the time of the legatee's attaining that age.

Smith's Executors v. Field, 6 Dana, 364.

When the legacy is payable when it suits the convenience of the executor, or within three years if it should suit his convenience; the legatees are not entitled to interest before the expiration of three years.

Thomas v. Attorney-General, 2 Yo. & Coll. 379.

A legacy carries interest from the time it becomes payable.

Birdsall v. Hewlett, 1 Paige, 39; *Glen v. Fisher*, 6 Johns. Ch. 33; *Lupton v. Lupton*, 2 Johns. Ch. 623.

The time when interest shall be allowed on a legacy does not depend on the time when it is received, but when in law it may be received.

Ingraham v. Postill's Executor, 1 M'Cord, Ch. 98.

A legacy to A, payable to her as soon as she attains the age of twenty-one, with interest, is contingent, and no interest is payable until the legatee attains twenty-one, and then it must be computed from the end of the testator's death.

Knight v. Knight, 2 Sim. & Stu. 490.

Interest upon interest will not be allowed on a legacy, unless the testator plainly requires it.

Colloway v. Langhorne, 4 Rand. 181.*g*

MAINTENANCE.—If a legacy be given to an infant, a child of the testator, or one towards whom he has placed himself *in loco parentis*, and this legacy be payable at a future time though vested; or if it be contingent, and maintenance is not given, it is allowed from the death of testator; and the court determines the *quantum* of the allowance, either the whole of the usual interest allowed by the court, or less, according to circumstances.

Harvey v. Harvey, 2 P. Wms. 21; *Conway v. Longville*, 1 Eq. Ca. Abr. 301, pl. 3; *Inledon v. Northcote*, (a case of a *contingent* legacy,) 3 Atk. 432. *g* When a legacy is bequeathed to a minor, whom the testator is under a moral obligation to support, and for whom no support is provided until the legacy is payable, it will carry interest from the death of the testator. *Dawes, Judge, &c. v. Swan et al.*, 4 Mass. 215; *Eyre v. Golding*, 5 Binn. 475; *Miles v. Wister*, 5 Binn. 479; *Bitzer v. Hahn*, 14 S. & R. 232; *Magoffin v. Patton*, 4 Rawle, 119; *Dowling v. Tyrell*, 2 Russ. & My. 343; *Baddy v. Dawes*, 1 Keen, 362; *Rogers v. Scutten*, 2 Keen, 598; *Pickwick v. Gibbs*, 1 Beav. 271; *Leslie v. Leslie, Lloyd & G. Temp. Sug.* 1; *Swearingham v. Stull*, 4 Har. & M'H. 38; *Gillon v. Turnbull*, 1 M'Cord's Ch. 148; *Shobe's Executor v. Carr*, 3 Munf. 10.*g*

Thus, where there was a bequest of a residue to a child upon his attaining twenty-one, with a bequest over if he died under that age, with a direction that the interest should accumulate, yet maintenance was decreed.

Mole v. Mole, 1 Dick. 310; *g* *Mills v. Robarts*, Tam. 476; *M'Durmott v. Kealy*, 3 Russ. 264; *Foley v. Parry*, 5 Sim. 138; *Ewing v. Ewing*, 2 Desaus. 451; *Executors of Quarles v. Quarles*, 2 Munf. 321; *Chesnut v. Strong*, 1 Hill's Ch. 123.*g*

Testator provided for the maintenance of his daughter till twenty-one or

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marriage, and gave her a legacy upon her attaining twenty-one; the daughter married under twenty-one, and she was held entitled to maintenance during the interval for which the testator had not provided.

Chambers v. Goldwin, 11 Ves. 1.

If testator bequeaths legacies to his children living at his decease, and at his decease there is a child *en ventre sa mère*, such child is entitled to maintenance from its birth.

Rawlins v. Rawlins, 2 Cox, 425.

If a testator makes a certain allowance for maintenance out of his general estate, it will not be increased by giving interest upon a legacy by way of maintenance, unless the amount named by the testator be insufficient for the purpose, and then it will be given though the legacy is contingent.

Hearle v. Greenbank, 3 Atk. 697; *Aynsworth v. Pratchett*, 13 Ves. 321; but see *Ellis v. Ellis*, 1 Sch. & Lef. 5.

If the allowance for maintenance be not a certain sum, but given generally, then the court will increase it if not sufficient, having regard to the amount of the interest of the legacy provided for the infant.

Wynch v. Wynch, 1 Cox, 433. See 3 Ves. 17.

If testator gives part of the interest of the legacy by way of maintenance, and it is not sufficient, the court will give more if the legacy be vested, though not payable till a future day.

Long v. Long, 3 Ves. 286, note; *Stretch v. Watkins*, 1 Madd. 253. β When a future time is fixed for the payment of the principal, and the testator gives interest in the mean time, he gives the property in the principal, unless there be something on the face of the will to prevent its having such an operation. *Lemoniere v. Godfroid's administrators*, 6 Harr. & Johns. 474.*g*

Testator gave 2000*l.* to be divided between his two girls; and gave the interest to his wife till Mrs. M.'s death, and then for the education of his children. There was a daughter born after the date of the will, and Mrs. M. died, and the wife married again; held that the *three* daughters were entitled to an allowance for maintenance.

Freemantle v. Taylor, 15 Ves. 363.

Testator gave legacies to his children payable at a future day, and directed his trustees to give maintenance if they thought fit. Trustees refused to give maintenance, but the court directed them to do so, though the widow had a provision from the testator, and an estate of her own, but had married again, and maintenance was only given from the time of such second marriage.

Billingsley v. Critchet, 1 Br. C. C. 267; *Haley v. Banister*, 4 Madd. 275.

Whether a testator shall be deemed to be *in loco parentis* to an infant, must be decided from the circumstances of the case.

Acherley v. Vernon, 1 P. Wms. 783; *Beckford v. Tobin*, 1 Ves. sen. 308; *Hill v. Hill*, 3 Ves. & B. 183; *Ellis v. Ellis*, 1 Sch. & Lef. 5, 6.

A provision for maintenance is only made for *infants*, and not for *adults*.

Lowndes v. Lowndes, 15 Ves. 301; *Raven v. Waite*, 1 Swanst. 553.

Thus a wife is not entitled to an allowance of interest by way of maintenance.

Stent v. Robinson, 12 Ves. 461.

Nor are *natural* children, for they are considered as strangers to the testator; nor grandchildren, merely on the ground of their relationship

Lowndes v. Lowndes, 15 Ves. 301; *Haughton v. Harrison*, 2 Atk. 329; *Butler v. Freeman*, 3 Atk. 58.

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But if legacies, or a fund directed to carry interest, be given to infants, either individually or as a class, though they are strangers to the testator, if their father be not of ability to maintain them, and there is no limitation in the will giving an ulterior, contingent, or executory interest to other persons in such legacies or fund, such infants will be entitled to an allowance for maintenance out of the interest, though expressly directed to accumulate.

Greenwell v. Greenwell, 5 Ves. 194; *Collis v. Blackburn*, 9 Ves. 470; *Errat v. Barlow*, 14 Ves. 202; *Haley v. Banister*, 4 Madd. 275.

But infant stranger-legatees cannot have maintenance if the will give other persons a contingent interest in the fund bequeathed; for that might in effect be to give for the maintenance of one person the property of another.

Marshall v. Holloway, 2 Swanst. 436, and cases cited in note; and *Ex parte Whitehead*, 2 You. & Jer. 243.

If, however, the persons to whom the fund is given over, in the event of the infant's not attaining an absolute interest, are competent and will consent, the court will grant maintenance.

Cavendish v. Mercer, 5 Ves. 195; S. C. cited in *Errat v. Barlow*, 14 Ves. 202. See 2 Swanst. 436.

Where, however, a legacy given to an infant stranger-legatee is not directed to carry interest, and is contingent or payable *in futuro*, maintenance cannot be given, unless there is sufficient on the face of the will to show that such was the testator's intention.

Pett v. Fellows, 1 Swanst. 561, note.

Thus, testator gave his daughter an annuity of 200*l.* during her life for the maintenance of herself and children, and gave the children 5000*l.*, to be paid on attaining twenty-one; held, that the children after the death of their mother were entitled to maintenance during their minorities. "The strong argument in support of maintenance is, that the testator has expressly given it during the mother's life; and it is extremely improbable, therefore, that he intended the children should be without any provision in case she died leaving them under age."

Lambert v. Parker, Coop. 143. But see *Hume v. Rundell, on a deed*, 2 Sim. & Stu. 174.

Notwithstanding testator expressly provide maintenance for an infant-legatee, yet if the father be of ability to maintain his children, it is a rule of the Court of Chancery not to allow such maintenance to be paid, but it is accumulated for the infant's benefit.

Hughes v. Hughes, 1 Br. C. C. 386; *Andrews v. Partington*, 3 Br. C. C. 60.

But this rule is not allowed to operate,—

1. Where the interest is given to the father himself.

Brown v. Casamajor, 4 Ves. 498.

2. Where it would indirectly work injustice to children of the father of the legatees who do not take any benefit under the will.

Hoste v. Pratt, 3 Ves. 730.

Neither does the rule apply where the maintenance is provided by a marriage settlement.

Mundy v. Earl Howe, 4 Br. C. C. 223.

When the court grants an allowance for maintenance there is no fixed period at which it shall commence, the circumstances of each case must

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determine the time; it is, however, settled that it may be made for time part.

Sisson v. Shaw, 9 Ves. 285; *Ex parte* Penleaze, 1 Br. C. C. 387, Belt's ed. note; Maberly v. Turton, 14 Ves. 499.]

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[See Com. Dig. tit. Administration, (C. 5).]

ALTHOUGH the testator disposes of goods and chattels, and sums of money, to legatees, yet they all pass to the executor, and he has them in nature of a trustee, and he alone has a (a) title in law to them, and nothing passes to the legatee, nor can any legatee take any thing to him devised without the executor's assent; for were it otherwise, it might be in the power of a legatee to subject an executor to a *devastavit*, which would discourage all persons from taking upon them the office of an executor.

Godolph. Orph. Leg. 148; Off. Ex. 27. || 1 Saund. 279 d, note 5. || The reason why the legatee cannot take the legacy without the consent of the executor is, that the personal estate is liable in the hands of the executor for the payment of debts. Tole v. Hardy, 6 Cowen, 339. See Wilson v. Rine, 1 Har. & J. 138. g (a) And therefore, if a legatee takes possession of the thing devised, without the assent of the executor, he may have an action of trespass against him. Dyer, 254; Keilw. 128.

But this matter of assent is only (b) a perfecting act for the security of the executor, for it is the will of the testator which gives the interest to the legatee, (c) and therefore the law does not require any exact form in which it is to be made. Hence any expression or act done by the executor, which shows his concurrence or agreement to the thing devised, will amount to an assent.

Off. Ex. 29; Godolph. 148; Plow. 525. (b) And is like an attornment of a tenant to the grant of a reversion. March, 137. And therefore a small matter will amount to an assent. Vern. 90, 460; 2 Vent. 358. And which the legatee may compel the executor to do in the spiritual court. March, 127. || (c) If testator devise his term to another, appoint executors, and die; and the executors commit waste, and afterwards assent to the bequest, although between the executors and the devisee it has *relation*, and the latter is in by the deviser, yet an action of waste shall be maintained against the executors in the *tenuit*. Foster v. Spencer, cited in Saunderson's case, 5 Rep. 126. ||

As, if the executor says to the legatee, *I wish you joy of the thing devised to you*, or *I am content that you have it according to the will*; or, if one offers the executor money, or seems willing to purchase a horse, &c., devised to J S, and the executor directs him to the legatee; or, if the executor himself offers the legatee money for the horse, &c., these and the like acts amount to an assent.

Plow. 53; 5 Co. 29; 4 Co. 18; March, 138; || Touchst. 456; Cowp. 293. ||

|| So, if an executor *request* the legatee to dispose of his legacy, his assent is implied.

Lampet's Case, 10 Rep. 47 a, 52 b; Off. Ex. 322.

Or, if the rents or interest of a bequest be directed for the maintenance of the legatee during minority, and the executor commence so to apply them, his consent to the principal is presumed.

Leon. 129, Paramour v. Yardley, Plow. 539.

So, if a legacy be subject to a charge which is paid by the executor.

1 Strange, 70, Young v. Holmes.

The assent of the executor is required to a *specific* as well as to a general legacy.

Bank of England v. Lunn, 15 Ves. 569. ||

(L) Of the Executor's Assent to a Legacy.

Hence it hath been held, that if a specific legacy be devised, as three gowns, &c., and the legatee take money in satisfaction of them, that this amounts, first, to a consent of the executor to the legacy, or devise of them, and that it is a sale of them by the legatee or devisee to the executor for the money *eo instanti*.

Hil. 5 Ann. Beckett and Ball.

||It seems that an assent will be presumed in the absence of evidence, when executors die after debts are paid, but before the legacies are satisfied.

See 2 P. Wms. 532.||

And as an assent is but a perfecting act, the executor cannot, after he has once given it, revoke the same; neither can it be given on (a) condition, or on any limitation or restriction whatsoever.

March, 136; Cro. Ja. 614, 615; 2 Vent. 360. (a) If the executor deliver to the legatee the goods bequeathed to him, to re-deliver them to him again at such a day, this is a good assent, and the words of re-delivery are void. Leon. 130, 131. ||Where assent has been followed by payment or delivery, it cannot be retracted. But if assent be not so perfected, and its recall is not attended with injury to a third person, as to a *bona fide* purchaser from the legatee on the faith of such assent, it seems only reasonable that the executor should have an opportunity to retract it under particular circumstances. 1 Roper on Legacies, 743.||

If A devise a term to B for life, remainder to C, and the executor assent to the devise to B, this will amount to an assent to the devise over to C, and vest the interest in him accordingly.

March, 136; 8 Co. 96.

If one is himself both executor and devisee, and he enters generally, without claim or demonstration of election, he shall have the thing devised as executor, which is the first and general authority, unless he elects to take it as devisee.

10 Co. 47; Plow. 520; Dyer, 367; Cro. Eliz. 223; 2 Co. 37.

As, where a man, possessed of a long term for years, devised it to his wife for life, remainder to trustees for his son's life, &c., and made his wife executrix; it was held, that the wife took the term wholly as executrix, in the first place, till she agreed to the devise; but it being proved that she said, *she would take the term according to the will*, it was held by the court to be a sufficient assent.

Lev. 25, Garret and Lister.

So in a like case, where the wife said, *that the son was to have the estate after her*, and this was resolved to be a sufficient assent.

Lev. 25. β The executor's assent to the first taker is an assent to all subsequent takers of a legacy, limited over by way of remainder or executory devise. *Dunwoodie's Executors v. Carrington*, 2 Car. L. R. 469; *Alston v. Foster*, 1 Dev. Eq. 337; *Saunders v. Gatlin*, 1 Dev. & Bat. Eq. 86; *Ingrams v. Ferry*, 2 Hawks, 122; *Adie v. Cornwell*, 3 Monr. 282. But this rule does not prevail when, after the death of the first taker, the executor has a trust to perform arising out of the property. *Allen's Executor v. Watson*, 1 Murph. 189.g

β If a legatee is also executor, and he elects to take as legatee, his power over the property, in his capacity of executor, ceases; his assent operates for the benefit of the ulterior remainder-man, and converts the equitable into a legal estate.

Jones v. Zollickoffer, 2 Tayl. R. 212.

When there is a legacy for life or years, and no remainder, the assent of the executor inures only for the benefit of the particular tenant, and the

(L) Of the Executor's Assent to a Legacy.

executor is entitled to the possession of the chattel again to perform the other trusts of his office.

James' Executors v. Masters, 3 Murph. 110; *Anon.*, 2 Hayw. 161; *Black v. Ray*, 1 Dev. & Bat. 334. See 1 Dev. & Bat. Eq. 94.

Testator bequeathed to A, a negro woman; and her issue, if she should have any, to B. Held, that the assent of the executor to the legacy of A, is an assent to the legacy of B also, and vests in him the legal title.

Ingram v. Terry, 2 Hawks, 122.

When an executor assented to a specific legacy, and afterwards an execution issued against the goods of the testator in his hands, a purchaser of that particular legacy, at sheriff's sale under that execution, acquires no title.

Alston v. Foster, 1 Dev. Eq. 337.

||But where one, who was a co-executor and a devisee for life of a term of years, entered and was wholly possessed of the premises, and demised them for forty years, reserving the rent to himself, his executors, administrators, and assigns; held, that neither his entry, nor his sole lease, which was alike inconsistent with his life-interest and his duty as executor, should be deemed an assent.

Doe on the demise of *Hayes v. Sturges*, 7 Taunt. 217, and cases cited.

"It is clearly settled, that where an executor takes an interest in a leasehold estate *for his life*, he must do something more than enter, in order to assent to his legacy; but where his interest is *absolute*, his entry does assent to the legacy."

Verba Gibbs, C. J., in *Doe v. Sturges*, *supra*.||

Testator bequeathed to Elizabeth Baker a share of the residue, and appointed George Hall an executor. George Hall proved the will, and entered into possession of the estate of the testator, and disposed of part, and married Elizabeth Baker. Held, that the possession of George Hall should be referred to his character of executor, and that it was not such a reduction into possession of the share of his wife so as to prevent it surviving to her, she having survived her husband.

Baker v. Hall, 12 Ves. 497.||

An executor may assent before probate of the will, and if there be two or more executors, the assent of any one of them will be sufficient; also, it is said, that an infant executor may assent, especially if he be above the age of seventeen years.

5 Co. 29; *Cro. Eliz.* 602; *March*, 136, &c., and vide tit. *Executors and Administrators*.

||But now, by 38 Geo. 3, c. 89, where an infant is sole executor, administration shall be granted to the guardian, or such other person as the spiritual court shall think fit, during the minority of the infant, at which period, and not before, probate of the will shall be granted to him. Such administrator has the same power as an executor. The husband of an executrix may assent to a legacy; (a) but a *feme covert*, an executrix, cannot alone assent. (b)

(a) 1 Leon. 216; Off. Ex. 321. (b) *Cooks v. Bellamy*, Sid. 188.||

If a man devise a term to a child *en ventre sa mère*, provided it be a son, and if not a son, to J S, and the child happen to be a daughter, though the executor assents, yet the daughter cannot take, because here is a condition precedent that never happened, and the executor's assent is not material where there is no devise.

Comb. 437, 438; *Estwart v. Warry*, adjudged on a special verdict.

(M) Legacies, in what Court, and how properly recoverable.'

It is clearly agreed, that the ecclesiastical court having jurisdiction over all testamentary matters, they have, as incident thereto, conusance of legacies, and that it is the only proper court where legacies are to be sued for and recovered, except in those cases where the courts of equity claim a concurrent jurisdiction with them.

Vide tit. *Jurisdiction of the Courts Ecclesiastical*, and tit. *Executors and Administrators*.

But this jurisdiction is confined to gifts of goods and chattels; and therefore if a man, by will, gives lands to be sold for payment of debts or legacies, these legacies cannot be sued for in the ecclesiastical courts, but only in a court of equity; because it is not a legacy merely of goods and chattels, but arises originally out of lands and tenements.

Dyer, 151; Palm. 120; Cro. Ja. 279, 364; Cro. Car. 16; 2 Roll. Abr. 285; 2 Show. 50, pl. 36.

But if a rent be devised out of a term for years, the ecclesiastical courts may hold plea thereof; for the term for years being only a chattel, is testamentary, and consequently the rent devised thereout.

Cro. Ja. 279; Brown, 34; Bulst. 153; Sid. 279; Lev. 179; 2 Keb. 8.

¶Suits for legacies, however, are now rarely instituted in the ecclesiastical courts, on account of their not possessing adequate jurisdiction to afford complete relief in many cases.

5 Madd. 357. Recent instances, however, may be found in *Clarke v. Douce*, 2 Phill. Rep. 335, and *Grignion v. Grignion*, 1 Hagg. E. R. 535.

Cases of bequests to married women and infants, and which involve the execution of any trust, are subject to the exclusive cognisance of the Court of Chancery.

2 Roper on Legacies, 693; *Grignion v. Grignion*, 1 Hagg. E. R. 535.¶

If the legatee takes a bond from the executor for payment of the legacy, and afterwards sues him in the spiritual court for the legacy, a prohibition will be granted; for, by taking the obligation, the nature of the demand is changed, and it becomes a debt or (a) a duty recoverable in the temporal courts.

Yelv. 38, *Goodwyn and Goodwyn*, and a prohibition granted accordingly. (a) That by giving a bond for payment of a legacy at a certain day, it thereby becomes a duty, and is not to be considered as a legacy. 2 Vern. 31.—But by Justice Dodderidge, an obligation given for payment of a legacy does not totally destroy the nature thereof, but the legatee has it still in his election either to sue for it in the temporal or ecclesiastical court. 2 Roll. Rep. 160; ¶but see *Cuband v. Dewsbury*, 8 Mod. 327, where this is denied to be law.¶

Also, though the temporal courts do not directly take conusance of legacies, so as to allow of an action for the recovery of them, yet may the executor make himself liable to an action at common law, as by his promise of payment; in which case an *assumpsit* will lie.

Sid. 45; Raym. 23. [That *assumpsit* will lie for a legacy upon a promise by an executor in consideration of assets, was determined in *Atkins v. Hill*, Cowp. 284. *Hawkes v. Saunders*, Ibid. 289. But these cases seem to be quite overturned by a subsequent case of *Deeks v. Strutt*, 5 Term Rep. 690. It is true, that in this last case it was stated that the executor made no express promise to pay, whereas in the two former cases an *actual* promise was admitted; yet the arguments of two of the three judges who decided the last case proceed upon general grounds, and deny the jurisdiction of the common law courts over the subject of legacy, as well where there has been an express as where only an implied promise. ¶*Deeks v. Strutt* has always been considered an unqualified decision, that an action at law cannot be maintained for a legacy. *Verba* Littledale, J., 7 Barn. & C. 544; and see 2 Saund. 137 b, note.]

(M) Legacies, in what Court, and how recoverable.

As where in *assumpsit* the plaintiff declared that J S devised a legacy to him, and made the defendant executor, and the plaintiff intending to sue him for the legacy, the defendant, in consideration of forbearance, promised to pay him; the defendant pleaded divers bonds and judgments, and *nul assets ultra*; upon which the plaintiff demurred, and had judgment without argument; for it is not material whether he had assets or no, for he is charged upon his own promise, in consideration of forbearance, and a forbearance of suit for a legacy is a sufficient consideration.

2 Lev. 3; Vent. 120, S. C.; Davie and Reyner, Sel. Cas. Ev. 59; 11 Mod. 91, pl. 15. See 2 Burn's Eccles. Law, 690. *β* If an executor promise to pay a legacy as soon as he can sell certain property, an action at law will lie upon such promise. M'Neil et ux. v. Quince's adm'r, 2 Hayw. 153.*g*

β Assumpsit, founded on an implied promise, will lie for a legacy against an executor who has assets.

Goodwin v. Chaffee, administrator, 4 Conn. 163.*g*

{ An action at law will lie against an executor, to recover a specific chattel bequeathed, after he has assented to the bequest.

4 Esp. Rep. 154, Doe v. Guy; 3 East, 120, S. C.}

|| But by a bequest of a specific chattel, whether personal or real, upon the assent of the executor, the interest in it vests in the legatee, so as to enable him to recover it by an action at law.

Doe v. Guy, 3 East, 120, and cases cited; Williams v. Lee, 3 Atk. 223.}]

And although the spiritual court, having jurisdiction of wills and testaments, have, as incident thereto, jurisdiction of legacies, yet, if a temporal matter be pleaded in bar of an ecclesiastical demand, they must proceed in the ecclesiastical court according to the common law, otherwise they will be prohibited.

Roll. Abr. 298, 299; Hob. 12; 12 Co. 65; Hetley, 87; 2 Inst. 608; Sid. 161.

Therefore, if payment be pleaded in bar of a legacy, and there be but one witness, which the ecclesiastical court will not admit, because their law requires two witnesses; there the temporal courts will prohibit them, because it is a matter temporal that bars the ecclesiastical demand.

Cro. Eliz. 88, 666; Show. 158, 173; Vent. 291, Richardson and Desborough, adjudged; 3 Mod. 283; Ld. Raym. 220, 346; 2 Ld. Raym. 1161, 1172, 1211; 2 Salk. 547, pl. 1; Shotton and Friend, adjudged; Carth. 142, S. C. adjudged.—But it is not sufficient ground for a prohibition to suggest that the spiritual court objected to the credibility of a witness, nor to suggest that the plaintiff had only one witness to prove the fact, unless the party allege that he offered such proof, and it was refused for insufficiency. Carth. 143, 144.

It is holden by my Lord Chief Justice Holt, that a devisee may maintain an action at common law against a tertenant for a legacy devised out of land; for where a statute, as the statute of wills, gives a right, the party, by consequence, shall have an action at law to recover it.

2 Salk. 415, pl. 1; 6 Mod. 26, S. P. *per* Holt, and 279, S. P. *per* Twisden, J.; 2 Ld. Raym. 937; || 2 Saund. 137 b, note, [a] 5th ed. || {Vide 2 Johns. Rep. 243, Dewitt v. Schoonmaker; 3 Johns. Rep. 189, Livingston v. Livingston's Ex'rs.}

[But the usual remedy in such like cases is in equity.

3 Salk. 223.

It is said, that where the ecclesiastical court and a court of equity have a concurrent jurisdiction, whichever is first possessed of the cause has a right to proceed; and the same of all other courts. However, where the husband hath sued in the spiritual court for a legacy given to the wife, the Court of

(M) Legacies, in what Court, and how recoverable.

Chancery hath granted an injunction to stay proceedings; because the spiritual court cannot compel him to make a settlement upon her.

Toth. 114; Prec. Chan. 548; 2 Atk. 420.

So, where a personal legacy was given to an infant, it was holden, that the same is more properly cognisable in Chancery than in the ecclesiastical court; and if the matter had proceeded to sentence in the ecclesiastical court, yet it was proper to come into Chancery for the executor's indemnity; for, in the Chancery, legatees are to give security for the money, but not in the spiritual court; and the Chancery will see the money put out for the children.

1 Vern. 26; [Horrel v. Waldron, Prec. Chan. 546, Nicholas v. Nicholas.]

So, where there is a trust, or any thing in the nature of a trust, notwithstanding the ecclesiastical court hath an original jurisdiction in legacies, yet the Chancery will grant an injunction to stay the proceedings in the ecclesiastical court, trusts being properly cognisable only in equity. And an executor being in equity considered as a trustee for the legatee, with respect to his legacy, and as trustee, in certain cases for the next of kin, as to the undisposed surplus; hence the true ground of equitable jurisdiction in these cases.

1 Atk. 491, 516; 1 P. Wms. 575, 544.

So, where a will is suppressed or destroyed, the suit for a personal legacy may be in equity in the first instance, without resorting to the spiritual court; otherwise it would put the plaintiff upon great difficulties: for, in the spiritual court, the plaintiff must prove it a will in writing, and must likewise prove the contents in the very words; and must also prove the whole will, though the remainder of it doth not at all belong to or regard his legacy; which the temporal courts do not put a person upon doing. Much more, when the legacy is charged both upon personal and real estate; for, as to the real estate, there is no occasion to resort to the ecclesiastical court at all.

3 Atk. 361.

Legacies may be recovered in the spiritual court against *an administrator with the will annexed*, or against *an executor of his own wrong*.

1 Roll. Abr. 919.

An executor may, in some cases, be compelled to give security to pay a legacy; as, where 1000*l.* was devised to a person, to be paid at the age of twenty-one years; upon a bill exhibited against the executors, suggesting a *devastavit*, and praying that he might give security to pay the legacy when due, it was decreed accordingly.

1 Ch. Ca. 121.

A testator devised 800*l.* to an infant, to be paid by the executor when the infant should attain the age of twenty-one years. The infant, by his guardian, exhibited a bill, that the executor might give security for the payment of the money. It was decreed accordingly.

Swinb. a, 40, Law of Ex. 187.

A testator bequeaths his personal estate to his wife for life, and what she should leave at her death to be equally distributed between her kindred and his own. If the estate be so small that she cannot live upon it without spending the stock, it seems, she shall not be obliged to give security; otherwise, she shall.

Prec. Chan. 71.

Libel.

If a person, possessed of a lease for years, devise that his executor out of the profits thereof shall pay to every one of his daughters 20*l.* at their full age, the executor may be sued in the spiritual court to put in surety to pay the legacies, and no prohibition shall be granted; for this is to issue out of a chattel.

2 Roll. Abr. 285.

But where 500*l.* were given to the granddaughter to be paid at twenty-one, or marriage; and if she died before either of those contingencies happened, then to go over to another; it was said by Lord Hardwicke, as the legacy was devised over, nothing vested in the granddaughter till one of the contingencies should happen; and, therefore, she was not entitled to have the legacy secured.

1 Atk. 505.

{A legacy was left to a father, the better to enable him to provide for his younger children; he was directed, with his consent, to secure the capital for their benefit when of age; but the Lord Chancellor said he rather thought he was entitled to receive the interest.

4 Ves. J. 498, *Brown v. Casamajor*.}

The Court of Chancery will now, immediately upon the coming in of the executor's answer, order so much as he admits to have in his hands of the testator's property to be paid into the bank. It was formerly thought necessary for the plaintiff to show that the executor had abused his trust, or that the fund was in danger from the insolvent circumstances of the executor.

Strange v. Harris, 3 Br. Ch. Rep. 365;] [*Freeman v. Fairlie*, 3 Mer. 39.]

LIBEL.

A LIBEL is (a) defined a malicious defamation, expressed either in printing or writing, or by signs, pictures, &c., tending either to blacken the memory of one who is dead, (b) or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, or ridicule.

Hawk. P. C. c. 73, § 1; 5 Mod. 165; 12 Mod. 291; Ld. Raym. 418; 4 Read. Stat. 149, 155; 2 People v. Crosswell, 3 Johns. Ca. 354; Steele v. Southwick, 9 Johns. 214; Root v. King, 7 Cowen, 613; Villers v. Mensley, 2 Wils. 493; Wood's Inst. 444; 2 Chit. Cr. Law. 867; Holt on Lib. 73; Salk. 418; M'Corkle v. Binns, 5 Binn. 349. (a) It is termed *Libellus famosus seu infamatoria scriptura*, and from its pernicious tendency has been held a public offence at the common law; for men not being able to bear the having their errors exposed to public view, were found by experience to revenge themselves on those who made sport with their reputations; from whence arose duels and breaches of the peace; and hence written scandal has been held in the greatest detestation, and has received the utmost discouragement in the courts of justice. Lamb. Sax. Law, 64; Bract. lib. 3, c. 36; 3 Inst. 174; 5 Co. 125. [2 Stra. 791. (b) But an indictment for a libel reflecting on the memory of a deceased person cannot be supported, unless it state that it was done with a design to bring contempt on his family, or to stir up the hatred of the king's subjects against his relations, and to induce them to break the peace in vindicating the honour of the family. *Rex v. Topham*, 4 Term Rep. 126.] [See the *Queen v. Taylor*, 3 Salk. 198; and see *Rex v. Critchley*, and *Rex v. Horne*, cited 2 ed. Holt on Libel, 230, in note.]

(A) What shall be said a Libel.

But for the better understanding the nature of this offence, I shall consider,

(A) What shall be said a Libel: And herein,

1. *How far it is necessary that it should be in Writing.*
2. *What Degree of Defamation will amount to a Libel, ¶and herein of privileged Communications.¶*
3. *What Certainty in the Matter and Application will make it a Libel.*
4. *Whether any Proceedings in a Court of Justice will amount to a Libel.*
5. *Whether any Thing of this Kind can be justified, ¶and herein of pleading the Truth of the Libel.¶*

(B) Who shall be said a Libeller: And herein,

1. *Who shall be said the Author or Composer of a Libel.*
2. *Who the Publisher, ¶and herein of Proof of Publication in Case of Libels in Newspapers.¶*

(C) The Offenders how punished.

¶(D) Of the Pleadings, and Evidence.¶

(A) What shall be said a Libel: And herein,

1. *How far it is necessary that it should be in Writing.*

This species of defamation is usually termed *written scandal*, and hereby receives an aggravation, in that it is presumed to have been entered upon with coolness and deliberation, and to continue longer, and propagate wider and farther than any other scandal.

5 Co. 125; Ld. Raym. 416; 12 Mod. 2193.

But it is clearly agreed, that not only written or printed scandal comes within the notion of a libel, but it may be also applied to any defamation whatsoever, expressed either by signs or pictures; as, by fixing up a gallows at a man's door, or elsewhere; or by painting him in a shameful and ignominious manner; as, by exposing a man and his wife by a skimmington or riding, though a special custom is alleged for such practice.

5 Co. 125; Skin. 123, pl. 2; Raym. 431; 3 Keb. 378. ¶As to libel by a picture, see *Du Bost v. Beresford*, 2 Camp. 511. Where the proprietor of a periodical work, describing the failure of a bound bailiff, of the name of Levi, in making an arrest headed his doggerel lines by a woodcut descriptive of the scene, and styled the bailiff throughout "Levi the Bum;" the publication was held a libel. *Levi v. Milne*, 4 Bing. 195. So, it is a libel to place a lamp before a man's house and keep it burning there all day, thereby intending to mark it as a bawdy-house. *Jefferies v. Duncombe*, 11 East, 226.¶

And since the chief cause for which the law so severely punishes all offences of this nature is the direct tendency of them to a breach of the public peace, by provoking the parties injured, and their friends and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which, of all others, are most sensibly felt; and since the plain meaning of such scandal, as is expressed by signs or pictures, is as obvious to common sense, and as easily understood by every common capacity, and altogether as provoking as that which is expressed by writing or printing, why should it not be equally criminal?

Hawk. P. C. See 73, sect. 3.

2. *What Degree of Defamation will amount to a Libel, ¶and herein of privileged Communications.¶*

As every person desires to appear agreeable in life, and must be highly

(A) What shall be said a Libel.

provoked by such ridiculous representations of him as tend to lessen him in the esteem of the world, and take away his reputation, which, to some men, is more dear than life itself: hence, it hath been held, that not only charges of a flagrant nature, and which reflect a moral turpitude on the party, (a) are libellous, but also such as set him in a scurrilous, ignominious light; (b) for these equally create ill blood, and provoke the parties to acts of revenge, and breaches of the peace.

5 Co. 125; Keb. 293; Moor, 627; Roll. Abr. 37. [(a) See *Churchill v. Hunt*, 2 Barn. & A. 685, 1 Chit. 480. To print of any person that he is a *swindler* is a libel. *J'Anson v. Stewart*, 1 T. R. 748. So, a letter written to a third person, calling plaintiff a "villain," has been held actionable, without proof of special damage. *Bell v. Stone*, 1 Bos. & Pul. 331; and see *Craft v. Boite*, 1 Saund. Rep. 248, note. But words expressing that certain parties, not being such persons as the proprietors and subscribers thought it proper to associate with, were excluded from a subscription room, published by posting a paper, purporting to be the regulation of a particular society, have been held not libellous. *Robinson v. Jermyn*, 1 Price, 11; and see *Rex v. Hart*, 1 W. Bl. 386.] [(b) As, that he hath the itch, and stinks of brimstone. *Villers v. Mansley*, 2 Wils. 403. So, where the mayor of Northampton sent the Lord Halifax a license for keeping a public-house. 1 Str. 422.]

[[It is not, however, libellous to ridicule a literary composition, or the author of it, so far as he has imbodyed himself with his work.(c) And a fair criticism on an artist's paintings, or the works of an architect, is not libellous, however mistaken or severe may be the censure.(d) And the editor of a newspaper may fairly comment on any place of theatrical entertainment: (e) if, however, his comment be unjust, malevolent, and exceeding the bounds of fair opinion, it will be a libel.(g) So, a paragraph in one newspaper, charging another with vulgarity or scurrility, is not actionable; (h) but if, as addressed to persons who are disposed to advertise in it, it asserts that the other newspaper is low in circulation, it will be libellous.(i) And the editor of a newspaper is not justified in calumnious attacks on the private character of the writer of another.(k)]

(c) *Carr v. Hood*, 1 Camp. 355, note. *Tabbart v. Tipper*, 1 Camp. 352. In *Dunne v. Anderson*, 3 Bing. 88, S. C. 1 Ry. & Moo. 287, it was discussed whether a petition to parliament on matters of general importance is such a publication as renders the petitioner an object of fair criticism, as in case of a literary work. If the petition be published, it seems it is so. (d) *Thomson v. Shackell*, 1 Moo. & Malk. 187; *Soane v. Knight*, *ibid.* 74. (e) *Diddin v. Swan*, 1 Esp. 28. (g) *Ibid.* (h) *Heriot v. Stuart*, 1 Esp. 437. (i) S. C. (k) *Stuart v. Lovell*, 2 Stark. 93.]

Words, though not slanderous in themselves, yet if published in writing, and tending in any degree to the discredit of a man, are libellous, whether such words defame private persons only, or persons employed in a public capacity; in which latter case they are said to receive an aggravation, as they tend to scandalize the government, by reflecting on those who are intrusted with the administration of public affairs, which doth not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also hath a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition. [[But it is not libellous for a writer to express regret that the king has taken an erroneous view of any question of foreign or domestic policy.(l)]]

Hard. 470; *Skin.* 123, pl. 2, [2 Wils. 403.] {As calling a man a *villain* in a letter to a third person. 1 Bos. & Pul. 331, *Bell v. Stone.*} [[*Lord Leicester v. Walter*, 3 Camp. 214, n.; S. C. 2 Camp. 251; *Thorley v. Lord Kerry*, 4 Taunt. 335; 5 Co. 125; 2 Roll. Rep. 86; *Hawk. P. C. c.* 73, § 7. (l) *Rex v. Lambert*, 2 Camp. 398; and see *Rex v. Woodfall*, *Lofft*, 776.

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Where a person delivered a ticket up to the minister after sermon, wherein he desired him to take notice, that offences passed now, without control from the civil magistrate, and to quicken the civil magistrate to do his duty, &c. ; this was held to be a libel, though no magistrates in particular were mentioned, and though it was not averred that the magistrates suffered those vices knowingly.

Sid. 219, pl. 4 ; Keb. 773, pl. 8, *The King v. Py.*

A, a gunsmith, published an advertisement in a common newspaper, that he had invented a short kind of gun, that shot as far as others of a longer size, and that he was made gunsmith to the Prince of Wales ; and B, another gunsmith, counter-advertised, *That whereas, &c.*, reciting the former paragraph, *he desired all gentlemen to be cautious, for that the said A durst not engage with any artist in town, nor ever did make such an experiment, except out of a leather gun, as any gentleman might be satisfied at the Cross Guns in Long Acre, the said B's house.* And the court held, that though B or any other of the trade might counter-advertise what was published of A, yet that that should have been done without any general reflections on him in the way of his business ; that the advice to *all gentlemen to be cautious*, was a reflection on his honesty, as if he would deceive the world by a fictitious advertisement, and the allegation that he would not engage with an artist, was setting him below the rest of his trade, and calling him a bungler in general terms, and not relative to the precedent matter ; and that the words, *except out of a leather gun*, was charging him with a lie, the word *gun* being vulgarly used for a lie, and *gunner* for a liar ; and that therefore these words were libellous, and gave judgment accordingly ; and herein the court held, that words, though not scandalous in themselves, yet being published in writing, and tending any way to the party's discredit, were actionable ; and that all words were to be construed *secundum subjectam materiam*, and to be understood by the court in the same sense that others do.

Pasch. 4 Geo. 2, in *B. R. Harman v. Delaney*, Barnard, K. B. 289 ; Fitzgib. 121 ; 2 Stra. 898, S. C.

[An order was made by a corporation, and entered in their books, stating that A B (against whom a jury had found a verdict with large damages, in an action for a malicious prosecution for perjury, which verdict had been confirmed in C. B.) was actuated by motives of public justice, &c. in preferring the indictment. This was adjudged to be a libel reflecting on the administration of justice, for which an information was granted against the members who made the order.

Rex v. Watson, 2 Term Rep. 199.] || And see *Rex v. White*, 1 Camp. 359, n. ; *Rex v. Evans*, 3 Stark. Ca. 35.]

But though every species and degree of calumny and detraction of this kind are deemed odious in the eye of the law, and punishable either by civil action or criminal prosecution, in most cases, at the election of the party injured ; yet the Court of King's Bench, whose jurisdiction herein is founded upon the necessity of preventing quarrels and ill blood, and which deals with this offence as of dangerous consequence to, and destructive of, the peace of the nation, always exercises a discretionary power in granting an information for an offence of this nature, and will, in many cases, leave the party to his ordinary remedy ; as, where the application is made (a) after a great length of time ; so, (b) where the matter complained of as a libel happens to be true ; so, (c) where the granting the information would be a dis-

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couragement to learned inquiries; or (*d*) where the matter complained of was intended for reformation, not defamation.

(*a*) As, in the case of the *King v. Knight*, Trin. 9 G. 2, in B. R., where the party, after two terms, three sessions, and one assizes, applied to the court, it refused to grant an information; though it was agreed, had the application been recent, an information would have been granted. (*b*) As, in the case of an apothecary who personated Dr. Crow, wrote in his name, and took a fee, which being published in a public advertisement, a motion was made for an information against the publisher; but the truth of what was advertised being made out, the court left the prosecutor to his ordinary remedy. Hil. 1 G. 1. *The King v. Bickerston*, Str. 498; Andr. 290; Barnard, K. B. 13. [Where the libel contains pointed charges, which, if false, may be denied by the party complaining, an information will not be granted, unless the party complaining denies such pointed charges on oath. *Rex v. Miles*, Dougl. 284; *Rex v. Haswell*, Ibid. 387. But an exculpatory affidavit is not necessary, where the party libelled is abroad at a great distance, or the subject-matter of the charge is general imputation, or an accusation of criminal language holden in parliament. See the last case.] (*c*) As, for the publishing in a newspaper that Ward's pill and drop had done great mischief in twelve different cases, and that they were a compound of poison and antimony, &c. 8 G. 2, *The King v. Roberts*. (*d*) As, where a person in a private letter to the party expostulates with him about some vices, of which he apprehends him guilty, and desires him to refrain from them; or where a person sends such a letter to a father, in relation to some faults of his children; which are said to be not at all libellous, being acts of friendship, not designed for defamation, but reformation. 2 Brownl. 151, 152; 2 Burn's Eccles. Law, 779. But such matters published in a newspaper, though the pretence be reformation, are, it seems, libellous, as was agreed. 9 G. 2, *The King v. Knight*.

So, where a man advertised in a public newspaper, that his wife had eloped from him, and cautioned all persons from trusting her; an information for a libel being moved for, it was denied, because it was the only way the husband could take to secure himself.

The King v. Enes, 5 Geo. 2, in B. R.; Andr. 229. [*Rex v. Masters*, Say. Rep. 122, S. P.]

So, where it was advertised in one of the daily papers, that Lady Mordington kept an assembly in Moorfields, and it being counter-advertised by my lord's order, that the person calling herself Lady Mordington was an imposter, and that there was no such person, except his wife, who always lived with him, the court refused to grant an information; for though she be called an imposter, yet that relates to her as assuming the title of Lady Mordington, which she is alleged not to have any right to; and therefore, in this respect, she may well be called an imposter.

The King v. Jenneaur, Pasch. 8 Geo. 2, in B. R.

A writing was directed to General Wills, and the four principal officers of the guards, to be presented to his majesty for redress: the paper contained the defendant's case, that he furnished the guard at Whitehall with fire and candle, for which the government owed him 350*l.*; that he obtained a warrant for his money, and Captain Carr (the prosecutor) told him, that if he would assign the warrant, he would procure him the money: the warrant was assigned, and the money paid to Carr, who refused paying it to the defendant: and the question was, If an information should be granted? And the court held it no libel, but a representation of an injury, drawn up in a proper way for redress, without any intention to asperse the prosecutor; and though there be a suggestion of a fraud, yet that is no more than what is in every bill in Chancery, which was never held libellous, if relative to the subject-matter.

The King v. Bayley, Hil. 8 Geo. 2, in B. R.; Andr. 229.

Here it may be proper to insert the remarkable case of *Parson Prick*, who

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in a sermon recited a story out of Fox's Martyrology, that one Greenwood, being a perjured person, and a great persecutor, had great plagues inflicted on him, and was killed by the hand of God; whereas in truth he was never so plagued, and was himself present at that sermon; and he thereupon brought his action upon the case, for calling him a perjured person; and the defendant pleaded not guilty. And this matter being disclosed upon the evidence, Wray, Chief Justice, delivered the law to the jury, that it being delivered but as a story, and not with any malice or intention to slander any person, he was not guilty of the words maliciously, and so was found not guilty. (a)

Cro. Ja. 91. (a) Qu. If the story was not in the book?

||It is a libel to publish of a Protestant archbishop, that he attempts to convert Catholic priests by offers of money and preferment.

Archbishop of Tuam v. Robeson, 5 Bing. 17.

So, to publish of a man that he has been guilty of gross misconduct, and insulted females in a barefaced manner.

Clement v. Chivis, 9 Barn. & C. 172.

An action of libel does not lie for any thing written against a party, touching his conduct in an illegal transaction; but for misconduct imputed to him in any matter, independent of the illegal transaction, though arising out of it, an action lies.

Yrisarrie v. Clement, 3 Bing. 432; see also Hunt v. Bell, 7 Moore, 212; S. C. 1 Bing. 1.

Any publication, the tendency of which is to degrade or injure another person, or to bring him into hatred, contempt, or ridicule, or which accuses him of a crime punishable by law, or of an act odious and disgraceful in society, is a libel.

Dexter v. Spear, 4 Mason, 115.

An action lies for these words: "I did observe A B put in a vote for lieutenant-governor soon after the poll opened, and when not more than ten or twelve votes had been put in; and a few minutes before the votes were all taken, I saw A B put in a second vote for lieutenant-governor."

Walker v. Winn, 8 Mass. 248.

It is actionable to publish of one who was a member of a convention who formed the constitution of the state, that "he openly avowed the opinion that government had no more right to provide by law for the support of the worship of the Supreme Being than for the support of the worship of the devil."

Stow v. Converse, 3 Conn. 325.

To charge a counsellor with offering himself as a witness in order to divulge the secrets of his clients is libellous.

Riggs v. Denniston, 3 Johns. Ca. 198.

It is libellous to charge a commissioner of bankruptcy with being a misanthrope, a partisan, stripping the unfortunate debtors of every cent, and then depriving them of the benefit of the act.

Riggs v. Denniston, 3 Johns. Ca. 198.

To publish of a member of Congress that "he is a fawning sycophant, a misrepresentative in Congress, and a grovelling office-seeker, he has abandoned his post in Congress, in pursuit of office," is libellous.

Thomas v. Crosswell, 7 Johns. 264.

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It is libellous to charge another with smuggling goods into the country.

Stillwell v. Barter, 19 Wend. 487.

A charge against a malster with using filthy and disgusting water in the malting of grain for brewing, is libellous.

White v. Delavan, 17 Wend. 49.

It is libellous to charge an officer authorized to administer oaths, with fixing a jurat to an affidavit, and certifying that the person who signed it was duly sworn, accompanied with remarks imputing to the officer a gross violation of duty; and it is not justified by the mere proof that the jurat was affixed without administering an oath.

Turrill v. Dollaway, 17 Wend. 426. See 26 Wend. 383.

A charge that the plaintiff is insane, is libellous.

Southwick v. Stevens, 10 Johns. 443.

When a libel affects a class of persons, no individual of that class can sustain an action for its publication.

White v. Delavan, 17 Wend. 49.

A charge or imputation against a person of corrupt conduct in his character as a member of the legislature is libellous, although published after the expiration of such person's services in the legislature, and an action may be maintained on it.

Cramer v. Riggs, 17 Wend. 209. See *Powers v. Dubois*, 17 Wend. 63.

A false and malicious writing containing an insinuation that the plaintiff has been guilty of perjury, is libellous.

Dunning v. Hillhouse, 6 Conn. 391.

It is libellous to write a letter and address it to the wife of another, containing words importing that she had acted libidiously towards the writer, and invited him to an adulterous intercourse with her, and had sought opportunities to effect it; which writing was composed and sent to her, with intent to insult and abuse her, to debauch her affections, and alienate them from her husband, to entice her to commit adultery, and to bring her into disgrace and contempt.

The State v. Avery, 7 Conn. 267.

To publish of a judge that he lacked capacity as a judge; that he had abandoned the common principles of truth, and that he had made the office of clerk a subject of private negotiation between men to whom he was under obligations, and endeavoured to cancel those debts by barter of office, is actionable.

Robbins v. Treadway, 2 J. J. Marsh. 540.

Libel against a ship-owner, alleging that his vessel was not sea-worthy, was hired by Jews, and was intended to take in convicts; held to entitle the plaintiff to recover damages, without proof of malice, or allegation of special damages.

Ingram v. Lawson, 6 Bing. N. S. 212; S. C. 5 Bing. N. S. 66.

It is libellous to print and publish of an individual that "he has been deprived of the chief ordinances of the church to which he belongs, by reason of his infamous and groundless assertions."

M'Corkle v. Binns, 5 Binn. 349.

PRIVILEGED COMMUNICATIONS.—There are also some communications

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which, though they would be libels, if heedlessly or maliciously published, are held not to be libellous, on account of their being communicated confidentially, and under circumstances which negative a malicious motive.

As where B wrote confidentially to persons who employed A as their solicitor, conveying charges injurious to his *professional* character, in the management of certain concerns which they had intrusted to him, and in which B, the writer of the letter, was likewise interested, his letter was held not to be libellous.

M'Dougall v. Claridge, 1 Camp. 267. And see *Dunman v. Bigg*, in note to same case. But see *Godson v. Howe*, 1 Brod. & Bing. 7; S. C. 3 Moore, 223, where the communication was held to exceed the line of confidential advice.

§ A memorial presented to the board of excise, remonstrating against the granting of a license to a particular individual to keep a tavern, charging him with stirring up justice's suits, with a view of having them tried at his tavern, is a privileged communication, and no action on it lies, unless express malice be proved.

Vanderzee v. McGregor, 12 Wend. 545; *Thorn v. Blanchard*, 5 Johns. 508; *King and Verplanck v. Root*, 4 Wend. 113. *g*

And an action will not lie by a servant against his former master, for a letter written by him in giving a character of the servant, unless the latter prove the malice as well as falsehood of the charge, even though the master make specific charges of fraud. The question whether the communication is made by the master *bonâ fide*, or with intent to injure the servant, is a question of fact for the jury.

Edmonson v. Stephenson, Bull. N. P. 8; *Weatherston v. Hawkins*, 1 T. R. 110; *Rogers v. Clifton*, 3 Bos. & Pul. 587; *Pattison v. Jones*, 8 Barn. & C. 578.

And a petition addressed by the creditor of an officer in the army to the secretary at war, *bonâ fide*, and with a view of obtaining through his interference the payment of a debt due to him, and containing a statement of facts which, though derogatory to the officer's character, the creditor believed to be true, is not a malicious libel, for which an action is maintainable.

Fairman v. Ives, 5 Barn. & A. 642; S. C. 1 Dow. & Ry. 252; § *Thorn v. Blanchard*, 5 Johns. 508. *g*

So, where a court-martial, after stating in their sentence the acquittal of an officer against whom a charge had been preferred, subjoined thereto a declaration of their opinion, that the charge was malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused was highly injurious to the service; the president of the court-martial was held not to be liable to an action for a libel, for having delivered such sentence and declaration to the judge-advocate.

Jekyll v. Sir John Moore, 2 New R. 341; S. C. 6 Esp. 63; and see *Warden v. Bailey*, 4 Taunt. 67; *Home v. Lord F. C. Bentinck*, 2 Brod. & Bing. 130; *Oliver v. Lord W. Bentinck*, 2 New R. 341.

But if a person officiously interfere to inform any of the constituted authorities of alleged abuses, the communication is not privileged, and if untrue, may be considered malicious.

Robinson v. May, 2 Smith, 3; § *Howard v. Thompson*, 21 Wend. 319. *g*

And, if a member of parliament publish in the newspaper his speech as delivered in parliament, and it contains charges of a slanderous nature against an individual, an information will lie for a libel; though had the words been merely delivered in parliament, they would be punishable in

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the courts at Westminster; and the circumstance of the speech having been published for the purpose of correcting a misrepresentation will not render the author less amenable to the law in respect of the publication.

The King v. Ld. Abingdon, 2 Esp. N. P. C. 226; and see Rex v. Salisbury, 1 Ld. Raym. 341; Rex v. Creevey, 1 Maul. & S. 273, S. P.

And though no action will lie against a counsel for slander spoken by him in the course of a judicial proceeding, if the words be pertinent to the matter in issue, (a) yet a subsequent publication of them may be libellous. (b)

(a) Hodgson v. Scarlett, 1 Barn. & A. 232. (b) Flint v. Pike, 4 Barn. & C. 473; Dow. & Ry. 528, S. C.]

§ No action can be maintained for a libel in a petition to the general assembly respecting the conduct of a public officer, although the statements in such petition be false.

Harris v. Huntingdon, 2 Tyl. 129; Gray v. Pentland, 2 Serg. & R. 23.

But if it appears that the petition was false and malicious, it seems an action may be maintained.

Thorn v. Blanchard, 5 Johns. 508; 4 Wend. 113, 2 S. & R. 23.

When reports containing matter highly slanderous on individuals were ordered by the House of Commons to be printed, and they were sold by their appointed agent; held not a privileged communication.

Stockdale v. Hansard, 7 C. & P. 731.

When the defence to an action for a libel is that the publication is a privileged communication, this matter need not be specially pleaded.

Lelia v. Price, 1 Nev. & P. 16; 5 Dowl. 432.

A son-in-law addressed a letter to his mother-in-law, who was about to marry the plaintiff, containing slanderous imputations against the latter. Held, that the occasion justified the writing, and that the jury were to say whether the defendant acted *bond fide*, and under a belief of the truth, although the imputations were false; and that such communications were to be regarded liberally, unless a clearly malicious intention were manifest.

Todd v. Hawkins, 8 C. & P. 88; 2 M. & Rob. 20. *g*

3 *What Certainly in the Matter and Application will make it a Libel.*

It seems to be now agreed, that not only scandal expressed in an open and direct manner, but also such as is expressed in allegory and (c) irony amounts to a libel; and that the judges are to understand it in the same manner as others do, without any strained endeavours to find out loop-holes, or to palliate the offence, which in some measure would be to encourage scandal; as where a writing, in a taunting manner, reckoning up several acts of public charity done by one, says, You will not play the Jew, nor the hypocrite, and so goes on, in a strain of ridicule, to insinuate that what he did was owing to his vainglory; or where a writing, pretending to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are generally esteemed famous for, pitched on such qualities as their enemies charge them with the want of; as by proposing such a one to be imitated for his courage, who is known to be a great statesman, but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar, &c., which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so. (d)

(c) 11 Mod. 86, pl. 5. See 4 Read. Stat. Law, 151, Barnard, K. B. 305; 2 Ses. VOL. VI.—44

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Cas. 30; 5 Co. 125. That a libel may be as well by descriptions and circumlocutions as in express terms. *Poph. 252; Hob. 215; Hawk. P. C. c. 73, § 4.* *β* Where the terms of the libel are equivocal, subsequent words of the same import may be given in evidence. *Pearce v. Ormsby, 1 M. & Rob. 455; Simmons v. Blake, 1 M. & Rob. 477.* *g* *[(d)]* The rule which at one time prevailed, that words are to be understood *in mitiori sensu*, has been long ago superseded, and words are now construed by courts as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understand them. Per Lord Ellenborough, C. J., in *9 East, 95, Roberts v. Camden.* *β* *1 Nott & M'Cord, 217; 2 Nott & M'Cord, 511; 8 Mass. 248; 1 Wash. R. 152; Kirby, 12; 7 S. & R. 451; 2 Binn. 34; 3 Binn. 515.* *g* And upon the point of intention it was unanimously agreed by the judges, in the case of *The King v. Sir Francis Burdett, Bart., 4 Barn. & A. 95*, that where a libel is charged to be written with a particular intent, the defendant must be presumed to have intended that which his act was likely to produce. *||*

And from the same foundation it hath also been resolved, that a defamatory writing expressing only one or two letters of a name, in such a manner that from what goes before, and follows after, it must needs be understood to (a) signify such a person in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say, that a writing which is understood by every the meanest capacity, cannot possibly be understood by a judge and jury.

Hawk. P. C. c. 73, § 5, Hurst's case. *||* And see *Bourke v. Warren, 2 Carr. & P. 307.* *||* (a) And on application for an information, some friend to the party complaining should, by affidavit, state the having read the libel, and understanding and believing it to mean the party.

But it is said, that no writing whatsoever is to be esteemed a libel, unless it reflect upon some particular person; and that a writing full of obscene ribaldry, (b) without any kind of reflection on any one, is not punishable at all by any prosecution at common law; but the author may be bound to his good behaviour, as a scandalous person of evil fame.

Hawk. P. C. c. 73, § 9. *[(b)]* But this is not law: obscene books are punishable as libels. *Rex v. Curl, 2 Str. 788. Rex v. Wilkes, 4 Burr. 2527.* So, books reflecting upon Christianity. *Rex v. Woolston, 2 Str. 834; Fitzg. 64.* So, a treatise on hereditary right was holden to be a libel, though it contained no reflection on any part of the then government. *Reg. v. Bedford, Gilb. Rep. K. B. 297; 11 St. Tr. 121.* *||* [So a publication suggesting that the Revolution was an unjust and unconstitutional proceeding, and representing the limitation established by the act of settlement as illegal, has been held libellous. See *Dr. Shebbeare's case*, and *Rex v. Paine, Holt on Libel, 88, 89*, and *Starkie on Libel, 508.* So, a publication stating Jesus Christ to be an impostor, and a murderer in principle, has been held a libel at common law. *Rex v. Waddington, 1 Barn. & C. 26.* And see *Butt v. Conant, 4 Moore, 194.* And a false statement in a newspaper that his majesty was insane, has been held a libel. *Rex v. Harvey, 2 Barn. & C. 257; S. C. 3 Dow. & Ry. 464.* *||*

A scandal published of three or four, or any one or two of them, is punishable at the complaint of one or more, or all of them. (c)

Poph. 252, 254; [Rex v. Benfield, 2 Burr. 984.] *β* When the publication is the joint act of two or more persons, they may be joined in the same action. But if separate suits are brought against each, the plaintiff can have but one satisfaction, and, in such case, he may elect *de melioribus damnis.* *Thomas v. Rumsey, 6 Johns. 26.* *g* *[(c)]* Where the proprietor of a place for public amusement brought an action against a man for a libel on one of his performers, by reason whereof she was deterred from appearing on the stage, it was held not to be sustainable, the injury being too remote. *Astley v. Harrison, Peake, C. 194.* *||*

|| And persons in partnership may, without showing the proportion of

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their respective shares, join in an action for a libel against them in respect of their business.

Foster v. Lawson, 3 Bing. 452; and see *Cooke v. Batchelor*, 3 Bos. & Pul. 150, and 2 Will. Saunders, 116 a.]]

¶ When a publication treats of the manner in which a particular business is conducted by two individuals carrying on business in the name of a firm, and one of the members brings suit alleging the publication to be a libel concerning him in his trade and business, and that its object is to impoverish and ruin him, a plea of justification is an admission that the plaintiff is one of the firm mentioned in the publication.

Fidler v. Delavan, 20 Wend. 57.g

The defendant was charged in an information with writing a libel against the Protestant religion and bishops, *innuendo* the bishops of England; he was found guilty; and in arrest of judgment it was offered, that the bishops libelled were not English bishops, nor could the *innuendo* support such construction; but the court took upon them to understand the libel in that sense, and overruled the exception.

3 Mod. 69; *The King v. Baxter*, 12 Mod. 139; Ld. Raym. 879.

An information was prayed for publishing a paper containing an account of a murder on a Jewish woman and her child, by certain Jews lately arrived from Portugal; and living near Broad street, because the child was begotten by a Christian; and the affidavit set forth, that several persons mentioned therein, who were recently arrived from Portugal, and lived in Broad street, were attacked by multitudes in several parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more: it was objected, that no information could be granted in this case, because it did not appear who in particular the persons reflected on were: (a) and for this was cited *The King v. Orme*, (b) Trin. 11 W. 3, where an indictment was exhibited for a libel, called *The Ladies' Invention*, and alleged to be to the scandal of several ladies unknown; and after verdict for the king, judgment was arrested, because it did not appear who the persons reflected on were. *Sed per Cur.*: Admitting that an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanor, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible; and in this case was cited the case of *The King and Franklin*, where, though only the word *ministers* was used in the libel, yet, by suitable averments (c) in the information, and proof made of them to the jury, they found those ministers to be ministers of state to his present majesty, and the defendant guilty.

The King v. Osborne, Trin. 5 G. 2, in B. R.; Ses. Cas. 260; 2 Barnard. K. B. 138, 166; Kel. 230, pl. 183; [S. C. 2 Swanst. 503, in note. (a) So an information has been granted for a libel, reflecting on the clergy of a particular diocese, and generally upon the clergy of the Church of England, though no individual prosecutor was named. *Rex v. Williams*, 5 Barn. & A. 595; S. C. 1 D. & R. 197.] (b) 3 Salk. 224, pl. 5; Ld. Raym. 486. Libel spelt badly, yet held well, 2 Sess. Cas. 29, pl. 33. [(c) As to the manner of making the averments, see *Rex v. Horne*, Cowp. 672.] [And see S. C. in error, 4 Bro. P. C. 368; *Rex v. Marsden*, 4 Maul. & S. 164; *Rex v. Burdett*, 4 Barn. & A. 314.]]

¶ Whether the libel was published of or concerning the plaintiff, or

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whether, by the person mentioned in the libel, the plaintiff was intended, is a question of fact for the jury.

Van Vechten v. Hopkins, 5 Johns. 211.

4. *Whether any Proceedings in a Court of Justice will amount to a Libel.*

It seems to be clearly agreed, that no proceeding in a regular course of justice will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to public prosecutions, in respect of their applications to a court of justice; and the chief intention of the law in prohibiting persons to revenge themselves by libels, or any other private manner, is to restrain them from endeavouring to make themselves their own judges, and to oblige them to refer the decision of their grievances to those whom the law has appointed to determine them.

Dyer, 285; 2 *Inst.* 228; *Yelv.* 117; 2 *Buls.* 269; *Godb.* 340; *Palm.* 145, 188; *Vent.* 23; *Hawk. P. C. c.* 73, § 8.

Therefore it hath been resolved, that no false or scandalous matter contained in (a) a petition to a committee of parliament, or in (b) articles of the peace exhibited to justices of peace, are libellous.

(a) 1 *Lev.* 240; *Sid.* 414; 2 *Keb.* 832. {*Vide* 5 *Johns. Rep.* 508, *Thorn v. Blanchard*.}
(b) 4 *Co.* 14; 1 *Hawk. P. C. c.* 73, § 8.

[So, where a charge was, that the defendant in a certain affidavit before the court had said that the plaintiff in a former affidavit against the defendant had sworn falsely; the court held, that this was not libellous; for in every dispute in a court of justice, where one by affidavit charges a thing, and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood; this therefore being necessary in the course of legal proceeding, no action will lie for it.

Astley v. Younge, 2 *Burr.* 817.]

{If a court-martial, after stating in their sentence the acquittal of an officer against whom a charge has been preferred, subjoin thereto a declaration of their opinion that the charge is malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused is highly injurious to the service, the president of the court-martial is not liable to an action for a libel for having delivered such sentence and declaration to the judge-advocate.

5 *Bos. & Pul.* 341, *Jekyll v. Sir John Moore*.}

Also, it is held, that no presentment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also because it would be of the utmost ill consequence any way to discourage them from making their inquiries with that freedom and readiness which the public good requires.

Moor, 627; *Hawk. P. C. c.* 73, § 8.

Also, it is holden by some, that no want of jurisdiction in the court to which such a complaint shall be exhibited will make it a libel; because the mistake of the court is not imputable to the party, but his counsel. But herein it is said by *Hawkins*, that if it shall manifestly appear from the whole circumstances of the case, that a prosecution is entirely false, malicious, and groundless, and commenced not with a design to go through with it, but only to expose the defendant's character, under the show of a legal proceeding, there can be no reason why such mockery of public justice should not

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rather aggravate the offence than make it cease to be one, and make such scandal a good ground of an indictment at the suit of the king, as it makes the malice of their proceeding a good foundation of an action on the case at the suit of the party, whether the court had a jurisdiction of the cause or not.

2 Keb. 832; 4 Co. 14; Hawk. P. C. c. 73, § 8. ||And see M'Gregor v. Thwaites, 3 Barn. & C. 24; S. C. 4 Dow. & Ry. 695.||

{A *bonâ fide* report of the proceedings of a court of justice in any cause is not a libel, though the publication may be injurious to the character of an individual.

1 Esp. Rep. 456, Curry v. Waller; 1 Bos. & Pul. 525, S. C. So of the publication of a report of a committee of the House of Commons, 8 Term, 293, The King v. Wright. Vide 7 East, 493, Stiles v. Nokes; 5 Esp. Rep. 123, Rex v. Lee.}

||A fair, plain, unvarnished account of the proceedings of a court of justice is generally not a libel,(a) but a coloured account of such proceedings, mixed up with insinuations of perjury against individuals, cannot be justified.(b) Nor is it lawful to publish even a correct account of the proceedings of a court of justice, if such account contain matter of a scandalous, blasphemous, or indecent nature;(c) and the publication of preliminary and *ex parte* proceedings has been considered illegal.(d) It seems, however, that it is lawful to publish the result of what a magistrate may think fit to do upon a matter of criminal charge, previous to trial, if the publication contains no statement of the evidence, nor any comments upon the case.(e) But it is not lawful to publish a correct account of the proceedings on a coroner's inquest, accompanied with comments, although it be not maliciously done; "for the inquest before a coroner leads to a second inquiry, in which the conduct of the accused is to be considered by persons who ought to have formed no previous judgment of the case."(g)

(a) Curry v. Walter, 1 Bos. & Pul. 525; β Stockdale v. Tarte, 4 Ad. & Ell. 1016; Delegal v. Highley, 8 C. & P. 444.γ (b) Stiles v. Nokes, 7 East, 493; S. C. *nom.* Carr v. Jones, 3 Smith, 491, 503; Rex v. Fisher, 2 Camp. 570; Rex v. Fleet, 1 Barn. & A. 379; Rex v. Lee, 5 Esp. 123. And where a true account of proceedings in a court of law was given, in the defendant's newspaper, under the head of "Shameful conduct of an attorney," it was held a libel, because these words formed no part of the proceedings in the court of law. Lewis v. Clement, 3 Barn. & A. 703; S. C. in error, 3 Brod. & Bing. 297. And a question was made in this case as to the legality of publishing proceedings of a court of law, containing matter defamatory of a person, neither a party to the suit nor present at the time of inquiry. (c) Rex v. Mary Carlile, 3 Barn. & A. 167. (d) *Per* Lord Tenterden in Duncan v. Thwaites, 3 Barn. & C. 583. *Per* Heath, J., in The King v. Lee, 5 Esp. 123; and see M'Gregor v. Thwaites, 3 Barn. & C. 24; 4 Dow. & Ry. 695; Flint v. Pike, 4 Barn. & C. 473; S. C. 6 Dow. & Ry. 458; Rex v. Fisher, 2 Camp. 570. (e) Duncan v. Thwaites, 3 Barn. & C. 556. (g) *Per* Bayley, J., in The King v. Fleet, 1 Barn. & A. 379.||

5. *Whether any Thing of this Kind can be justified, ||and herein of pleading the Truth of the Libel.||*

It seems to be clearly agreed, that in an indictment or criminal prosecution for a libel the party cannot justify that the contents thereof are true, or that the person upon whom it is made had a bad reputation,(h) since the greater appearance there is of truth in any malicious invective, so much the more provoking it is; for, as my Lord Coke observes, in a settled state of government the party grieved ought to complain for every injury done him in

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the ordinary course of law, and not by any means to revenge himself by the odious course of libelling or otherwise.

5 Co. 125; Hob. 253; Moor, 627; Hawk. P. C. c. 73, § 6. ¶(h) But although the truth of a publication is no justification, yet, if the court see that it is true, or probably may be true, it is a good cause why they should not interfere, by granting a criminal information. *Rex v. Draper*, 3 Smith, 391. ¶(i) When the words are libellous, and the publication is knowingly made, the law presumes it malicious, unless it is proved to have been published on an innocent or justifiable occasion. *Dexter v. Spear*, 4 Mason, 115. See *King et al. v. Root*, 4 Wend. 113.g

¶ The defendant, in an indictment for a libel, cannot justify himself by proving the truth of the matter charged to be libellous.

Commonwealth v. Clap, 4 Mass. 163. See *Bouv. L. D. Truth*; *People v. Crosswell*, 3 Johns. Ca. 337; *Territory v. Nugent*, 1 Mart. (Lo.) R. 103; *United States v. Duane et al.*, 3 Wash. C. C. R. 246.

When the defendant justifies, his justification must be as broad as the libel.

Stillwell v. Barter, 19 Wend. 487; *Brooks v. Bemis*, 8 Johns. 455; *Stow v. Converse*, 4 Conn. 17; *Mix v. Woodward*, 12 Conn. 262; *Nall v. Hill*, Peck's R. 325; *Wilson v. Nations*, 5 Yerg. 111.g

Also, it seems now settled, that no scandal in writing is any more justifiable in a civil action brought by the party to vindicate the injury done him, than in an indictment or information at the suit of the crown; for though in actions for words, the law, through compassion, admits the truth of the charge to be pleaded as a justification, yet this tenderness of the law is not to be extended to written scandal, in which the author acts with more coolness; and deliberation gives the scandal a more durable stamp, and propagates it wider and farther: whereas in words men often in a heat and passion say things which they are afterwards ashamed of, and though they seem to act with deliberation, yet the scandal sooner dies away, and is forgotten; and therefore from the greater degree of mischief and malice attending the one than the other, though the law allows the party to justify in an action for words, yet it doth not for written scandal; from whence it follows, that the only favour truth affords in such a case is, that it may be shown in mitigation of damages in an action,(a) and of the fine upon an indictment or an information.

The King v. Roberts, Mich. 8 Geo. 2, in B. R. agreed, *per Cur.* in a case for publishing a libel on Mr. Branley, recorder of Warwick; Str. 493, S. P. ¶(a) On the general issue, "not guilty," the truth of the words is not allowed to be given in evidence, in mitigation of damages. *Underwood v. Parks*, 2 Str. 1200; *Smith v. Richardson*, Willes' Rep. 20; *The King v. J. Wright*, 8 T. R. 298; and see *Rex v. Sir F. Burdett*, 4 Barn. & A. 95. And the defendant cannot prove facts to negative the presumption of malice. *Waithman v. Weaver*, *per Lord Tenterden*, C. J., 1 Dow. & Ry. N. P. C. 10. But he may prove, that the substance of the libel had been published in a newspaper, without producing the newspaper. *Wyatt v. Gore*, Holt's N. P. C. 299. ¶ It is no justification nor excuse for a libel printed in a newspaper, that the printer of the paper did not personally know the person libelled. *Dexter v. Spear*, 4 Mason, 115. See *King et al. v. Root*, 4 Wend. 113.g If, however, there be a justification on the record, as well as the general issue, the defendant is not at liberty to give such evidence as above in mitigation of damages. *Snowden v. Smith*, 1 Maul. & S. 286, note. And it has lately been decided, that evidence of the plaintiff's general bad character is not admissible in mitigation of damages, under the general issue. *Jones v. Stevens*, 11 Price, 235, overruling the cases of — *v. Moor*, 1 Maul. & S. 284, and *Lord Leicester v. Walter*, 2 Camp. 251; and see *Waithman v. Weaver*, 11 Price, 257, n. Nor can the defendant give in evidence under the general issue that the slander was communicated to him by a third person. *Mills v. Spencer*, Holt's N. P. C. 534; or that the plaintiff had been in the habit of libelling the defendant. *Wakley v. Johnson*, 1 Ry. & Moo. 442, S. P. *Finnerty v. Tipper*, 2 Camp. 76. But in an action for a libel, in

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a report of a coroner's inquest, the defendant may, on the general issue, show in mitigation of damages the correctness of the report, though not the truth of the facts stated. *East v. Chapman*, 1 Moo. & Malk. 46, and see *Rex v. Burdett*, 4 Barn. & A. 322. And after conviction of libel the defendant may in mitigation produce affidavits that he believed the charge to be true, but not that it is true. *Rex v. Halpin*, 9 Barn. & C. 65.]

[However, it is advanced in a very useful compilation,^(a) and is now settled, that the defendant may justify in an action for a libel, as in a common action of slander. And with respect to libels charging a man with an indictable offence, it is now the prevailing doctrine, that the defendant may plead in bar the truth of the defamatory paper: such a plea was allowed on demurrer ^(b) in the Common Pleas; and the cause being removed into the King's Bench, that court reversed, indeed, the former judgment, on account of the pleas being too general and indiscriminate; but no notice appears to have been taken of the question at large, except that one of the learned judges remarked, that "if the plaintiff had been a common swindler, (as alleged,) the defendant ought to have indicted him; but he had no right to libel him in that way;" which may be thought to give some countenance to what now, perhaps, may be called the old opinion. Still a libel may be very scandalous, and very pernicious in its effects, without charging the party libelled with an indictable offence. In that case, saith a very sensible writer, as I know of no determination that the truth of the libel may be pleaded in justification, I am at liberty to observe, the prevalence of such an opinion would not be very seasonable, nor very conducive to the peace and welfare of society.^(c)

3 Wooddes. 180. (a) Bull. N. P. 8, where 1 Saund. 120, and 2 Burr. 807, are cited; but those were justifications rather than the occasion than the truth of the supposed libels, the one being a parliamentary, and the other a judicial proceeding. So, in the case, 4 Co. 12 b, &c., which was an action of *scandalum magnatum* on the statute, the plea was a relation of circumstances to extenuate and explain the scandal, which is considered as a very distinct defence from alleging the truth of it. Poph. 67, 69; 2 Mod. 166; 1 Freem. 223. (b) *J'Anson v. Stuart*, 1 Term Rep. 748; ¶ and see Selw. N. P. 6th ed. 1039, note 6, and *Craft v. Boite*, 1 Saund. Rep. 243 c, note 6, 5th ed. (c) There is no reason to doubt that a libel may be justified in a civil action, by pleading its truth, although it do not impute an indictable offence. Such justifications are frequent in practice, and some are found in the books; see *Holmes v. Catesby*, 1 Taunt. 543; *Weaver v. Lloyd*, 2 Barn. & C. 678; *Edwards v. Bell*, 1 Bing. 403. Where a libel consists of mere vituperation or ridicule, in many instances, from its nature, it may be impossible to allege and prove its truth; but wherever it conveys a distinct imputation of illegal or immoral conduct, or of any thing as to which truth or falsehood can be predicated, there seems no reason to doubt that the truth of the imputation may be pleaded in bar. How far it may be politic in the law to allow such latitude of publishing truth, may be doubtful. Though this doctrine is now established, yet Lord Hardwicke, in 1735, in *The King v. Roberts*, is said to have stated:—"I never heard a justification in an action of libel hinted at; all the favour that I know truth affords in such a case is, that it may be shown in mitigation of damages in an action, and of the fine on an indictment or information." Selw. N. P. 986; Holt on Libel, 273. But Lord Holt, in 11 Mod. 99, 3 Salk. 225, had, nearly thirty years before, laid it down, that the defendant might justify in an action, though not in an indictment; and Lord Hardwicke's second position, that truth might be shown in mitigation, (though according to the practice then,) was overruled by the resolution of the judges two years afterwards, in *Smith v. Richardson*, Willes' Rep. 20, and see *Underwood v. Parkes*, 2 Stra. 1200; *Bishop of Sarum v. Nash*, B. N. P. 9. Since which resolution the point has been settled. The law of Scotland differs from the English law on this subject, and the rule, *veritas convicti non excusat*, applies equally to civil and criminal proceedings. In cases, however, where the publication takes place under circumstances favourable to the defendant,—such as the cases of characters of servants, friendly cautions, literary criticisms, reports of trials, &c.—here the truth is allowed to be shown as a defence, along with the other circumstances, as tending to negative malice. In cases of publications wanting these extenuating circumstances, the truth can only be shown in miti-

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gation of damages, and not even then if express malice is clear. Borthwick, Law of Libel, ch. 5, sect. 3. The courts of Scotland in many cases award a "Palinode," or formal recantation by the libeller, with a reduction of the damages conditional on the recantation being made. Ibid. p. 180. A *compensatio injuriarum*, or set-off of one libel or slander against another, is also allowed and encouraged by the Scotch law. Ibid. 279.¶

¶If a defendant justify, his plea must state the facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life.

Holmes v. Catesby, 1 Taunt. 543; Oliver v. Lord Wm. Bentinck, 3 Taunt. 456; Croft v. Boite, 1 Saund. 244 b, note, 5th ed.; J'Anson v. Stuart, 1 Term Rep. 748. ¶A plea of justification to a declaration for a libel must justify the publication according to the sense given to it by the plaintiff. Fiddler v. Delavan, 20 Wend. 57. And the proof ought to be as strong as on an indictment for the offence charged. Wilmot v. Harmer, 8 C. & P. 695.¶

Whether the publishing of slanderous words can be justified, on the ground that the utterer named at the time the person from whom he heard them, does not yet appear to be entirely settled; though it would seem, that such a justification is good, provided the utterer name the author at the time, and not merely in his plea; and provided he give the very words used, and express malice do not appear.

Lord Northampton's case, 12 Rep. 133; Davis v. Lewis, 7 Term R. 17; Woolnorth v. Meadows, 5 East, 463; Maitland v. Goldney, 2 East, 426; and see judgment of Holroyd, J., Lewis v. Walter, 4 Barn. & A. 614. ¶The publisher of a libel is responsible to the party libelled, although the libel is accompanied with the name of the author. Doll v. Lyon, 10 Johns. 447. Sed vide M'Corkle v. Binns, 2 P. A. Bro. 90. But he may give evidence to show whence he received it, in mitigation of damages. Romayne v. Duane, 3 Wash. C. C. R. 246; Runkle v. Meyer, 3 Yeates, 518; Morris v. Duane, 1 Binn. 90, n.¶

But it is now settled, that, at all events, this justification does not apply to cases of written libel.

De Crespigny v. Wellesley, 5 Bing. 392; and see Lewis v. Walter, *ubi sup.* and Macgregor v. Thwaites, 3 Barn. & C. 24. The law of Scotland seems to agree with these decisions, and it seems doubtful whether the plea of previous report is even a justification of oral slander. Borthwick, Libel, p. 291.¶

¶It is no justification that the libel consisted of resolutions adopted by the citizens at a public meeting convened for the purpose of deciding on a proper candidate for the office of governor, at an approaching election, and that the defendant signed the libellous matter as chairman of such meeting, and that it was published by order of such meeting.

Lewis v. Few, 5 Johns. 1.

Evidence that the charge was taken from the journals of Congress, and thus showing that the publishers are not the authors of the scandal, may be given in mitigation of damages.

United States v. Duane et al., 3 Wash. C. C. 246.

Where the libel was contained in an advertisement, stating the issuing of process against the plaintiff, and that he could not be found, and offering a reward for such information as should enable him to be taken; plea, that a *capias* had been issued and delivered to the sheriff, and that the now plaintiff kept out of the way, and that the advertisement had been inserted at the request of the party who had sued out the *capias*, to enable the sheriff to make the arrest. Held a sufficient defence.

Lay v. Lawson, 4 Ad. & Ell. 795.¶

[In an indictment or information for a libel, where issue is joined on not

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guilty, the statute of 32 G. 3, c. 60, declares and enacts, that the jurors may give a general verdict on the whole matter, and the judge shall not require them to find the defendant guilty merely on the proof of publishing, and on the sense ascribed to the supposed libel in such complaint or information. (a) But the statute does not express that the truth of the scandal shall be a defence, and is wholly silent as to actions of *scandalum magnatum*, or for a libel.]

[(a) Where, in an information for a libel, the judge told the jury, in summing up, that the intention was to be collected from the paper itself, unless explained by the mode of publication, or other circumstances; and that if its contents were likely to excite sedition, the defendant must be presumed to intend that which his act was likely to produce, and that if they found such to be the intent, he was of opinion that it was a libel, and that they were to take the law from him, unless they were satisfied that he was wrong; the Court of King's Bench held it to be a correct mode of leaving the question to the jury under this act. *Rex v. Sir F. Burdett*, 4 Barn. & A. 95.]

(B) Who shall be said a Libeller: And herein,

1. Who shall be said the Author or Composer of a Libel.

It has been already observed, that a libel may be expressed not only by printing or writing, but also by signs or pictures; but it seems that some of those ways are essentially necessary; and it is laid down in *Lamb's case*, that every person convicted of a libel must be the contriver, procurer, or publisher thereof.

9 Co. 59; *Moor*, 813, *Lamb's case*.

[If a defendant has owned himself to be the author of a book, *errors of the press and small variations excepted*, it is sufficient to entitle the prosecutor to have the book read, and the defendant shall be put to show, that there were material variances.

Rex v. Hall, 1 Str. 416.]

It has been strongly urged, that he who writes a libel, dictated by another, is not guilty of the composing and making thereof, because it appears that another is the author or contriver; but herein the court held, that the writing being the essential part of a libel, the reducing it into writing, in the first instance, was a making, and differed from a transcribing; and, according to the report of this case in 5 Mod., it was held, that if (b) one dictates, and another writes, both are guilty of making it, for he shows his approbation of what he writes. So, if one repeats, another writes a libel, and a third approves what is written, they are all makers of it, as all who concur and assent to the doing of an unlawful act are guilty; and murdering a man's reputation by a libel may be compared to murdering a man's person, in which all who are present and encourage the act are guilty, though the wound was given by one only.

Carth. 405; 5 Mod. 163—167; *Ld. Raym.* 729; *Salk.* 281, pl. 8; *Comb.* 359. *The King v. Paine.* (b) But in *Carth.* 406, it is said that he who dictated cannot be indicted for this libel, because he did not write it, and that therefore, if the writer could not, the crime would go unpunished. [But an action for a libel may, it seems, be maintained against a person who procured it to be written by a third party, if it be shown that the libellous part was in consonance with the defendant's instructions, or that he saw the letter in which it was contained after it was written. See *Harding v. Greening*, 1 *Moor*, 477; *S. C.* 8 *Taunt.* 42.] [The manuscript of the libel, printed and published, being proved to be in the defendant's handwriting, held to be evidence of publication by him. *Reg. v. Lovett*, 9 C. & P. 462. See *Bond v. Douglass*, 7 C. & P. 626.]

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Also it hath been held, that transcribing and collecting libellous matter is highly criminal, though it be not found that the party composed or published it; for his having it in readiness for that purpose when occasion served, or its falling into such hands after his death as may publish it, might be injurious to the government.(a)

Carth. 407; 2 Salk. 417, 646, pl. 13; Ld. Raym. 414; 12 Mod. 218; The King v. Bear. (a) It will not be a publication of a libel if he takes a copy of it, if he never publishes it. Com. Dig. tit. *Libel*, (B. 2.) Though he takes a copy, or reads it by command of his father or master. R. Mu. 813. So, if a man delivers, by mistake, a paper out of his study, it is not a publication, though it be a libel. 5 Mod. 167. ¶ In Rex v. Burdett, 4 Barn. & A. 95, it was discussed whether the writing and composing of a libel, with intent to publish, but not followed by publication, be an offence, but no decision was given on the point.¶

It is said by Holt, Chief Justice, that when a libel appears under a man's handwriting, and no other author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man.

2 Salk. 419; Ld. Raym. 417; 12 Mod. 220, 221. ¶ Other libels written by the same person, and concerning the same subject, may be received in evidence to prove the authorship. Rex v. Pearce, Peake, 75.¶

And it is said to have been resolved by the court, that in libels, *making* is the *genus*, composing or contriving is one *species*, writing a second *species*, and procuring to be written a third *species*; and finding a man guilty of writing only, is finding him guilty of one *species* of making.

2 Salk. 419; Ld. Raym. 418; 12 Mod. 220. ¶ A defendant may be acquitted of printing, and found guilty of composing and publishing a libel. See Rex v. Williams, 2 Camp. 646; Rex v. Hunt, Ibid. 583.¶

But yet in some cases the writing of a libel may be a lawful or innocent act, as by the clerk that draws the indictment, or by a student who takes notes of it, because it is not done *ad infamiam* of the party; but, abstractly considered, the writing a copy of a libel is writing a libel, because such copy contains all things necessary to the constitution of a libel; viz. the scandalous matter, and the writing; and it has the same pernicious consequence, for it perpetuates the memory of the thing, and some time or other comes to be published.

2 Salk. 418; Ld. Raym. 416, 417; 12 Mod. 220; Comb. 359.

2. *Who the Publisher, ¶ and herein of Proof of Publication in case of Libels in Newspapers.*¶

It seems to be agreed, that not only he who publishes a libel himself, but also he who procures another to do it, is guilty of the publication; and it is held not to be material, whether he who disperses a libel knew any thing of the contents or effects of it or not, for that nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them.

9 Co. 59; Moor, 627; Hawk. P. C. c. 73, § 10; Fitz. 47. ¶ The publisher is equally responsible with the author of the libel. Dexter v. Spear, 4 Mason, 115. And it is no justification to him, that the name of the author accompanies the libel. Dole v. Lyon, 10 Johns. 447.¶

¶ Thus, the delivery of a pamphlet by the governor of a distant province to his attorney-general, not for any public purpose, but in order that he might peruse it, is such a publication as will make him responsible in an action, if the pamphlet be a libel.

Wyatt v. Gore, Holt, 299.

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So, where A sent a manuscript to the printer of a periodical publication, and did not restrain the printing and publishing of it, and he printed and published it in his publication, A was held the publisher, and liable to an action.

Burdett v. Cobbett, 5 Dow. 301. § In case, for a libel in a newspaper, of which the defendants were editors; held that evidence that the libel was the production of a correspondent was not admissible; nor, *semble*, that it was copied from another newspaper. *Talbot v. Clark*, 2 Moo. & R. 312. *g*

And on this foundation it hath been constantly ruled of late, that the buying of a book or paper, containing libellous matter, in a bookseller's shop, is sufficient evidence to charge the master with the publication, although it does not appear that he knew of any such book being there, or what the contents thereof were; and it will not be presumed, that it was brought and sold there by a stranger, but the master must, if he suggests any thing of this kind in his excuse, prove it.

13 Vin. Abr. 229, pl. 5; *The King v. Nutt*, Hil. 2 G. 2, so ruled on evidence at Guildhall *per* Raymond, C. J.; *Fitzgib. Barnard*. K. B. 306; 2 Ses. Cas. 33, pl. 38. [*Rex v. Almon*, 5 Burr. 2687. Proof that the defendant gave a bond to the stamp-office for the duties on the advertisements in a newspaper, under the stat. 29 G. 3, c. 50, § 10, and had occasionally applied to the stamp-office respecting the duties, was holden to be sufficient evidence of his being the publisher. 4 Term Rep. 126.] § And every copy of a libel sold by a defendant is a separate publication, and subjects him to a distinct prosecution. *Rex v. Carlile*, 1 Chit. R. 451. § Proof that the paper in which a libel was published was deposited in a hole behind the door of a public library, and that the defendant's clerk received payment for it, is sufficient to let the paper go to the jury. *Respublica v. Davies*, 3 Yeates, 128. *g*

§ An action for a libel lies against the proprietor of a gazette, edited by another, though the publication have been made without the knowledge of such proprietor.

Andres v. Wells, 7 Johns. 260.

But a person to whom the press and newspaper establishment were assigned as collateral security for a debt, and the possession and management of it remained with the assignor, such assignee was not considered as the proprietor.

Andres v. Wells, 7 Johns. 260. *g*

§ The proceedings against the printers, publishers, and proprietors of newspapers, either civilly or criminally, (a) for libels in their papers, are much facilitated by the stat. 38 G. 3, c. 78, by which it is enacted, (b) that no person shall print or publish any newspaper, until an affidavit (or affirmation, in case of a Quaker) shall have been delivered at the stamp-office, setting forth (c) the real and true names, additions, descriptions, and places of abode of the printer, publisher, and of all the proprietors, if they do not exceed two, exclusively of the printer and publisher; if they do, then of two of such proprietors, exclusively of the printer and publisher, specifying the amount of shares, the true description of the building wherein such paper is intended to be printed, and the title of such paper. If the proprietors exceed two, (d) then two whose proportional shares in the property shall not be less than the proportional share of any other proprietor, exclusively of the printer and publisher, shall be named and described in the affidavit or affirmation. This affidavit or affirmation must be renewed as often as the printer, &c., shall change their abode or printing-office, or as often as the commissioners for stamp-duties shall require. (e) It must be

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signed by the parties making it,(g) and be taken by a commissioner, or other person specially appointed by the commissioners. It must be sworn by all the parties (h) if they do not exceed four; if they do, then by four, who shall give notice to the other parties not swearing, under a penalty of 50*l*. Such affidavits or affirmations shall be filed,(i) and the same, or certified copies thereof, shall in all proceedings, civil and criminal, touching any newspaper therein mentioned, be received as conclusive evidence of the truth of the matters contained in such affidavit, against the persons swearing, and against the proprietors named but not sworn, unless such persons shall have delivered to the commissioners, previously to the date of the newspaper in question, an affidavit or affirmation of their having ceased to be printers, &c., of such paper; and by the 11th section it is enacted, that after such affidavit shall be produced in evidence against the persons signing the same, &c., and after a newspaper shall be produced in evidence, intitled in the same manner as the newspaper mentioned in such affidavit, and wherein the name of the printer and publisher, and place of printing, shall be the same, it shall not be necessary for the plaintiff, informant, or prosecutor, or person seeking to recover any of the penalties given by this act, to prove that the newspaper to which such trial relates was purchased at any house, &c., belonging to or occupied by the defendants or their servants, &c., or where they usually carry on the business of printing or publishing such paper, or where the same is usually sold.

(a) The proprietor of a newspaper is answerable, criminally as well as civilly, for the acts of his servants in the publication of a libel, although it can be shown that such publication was without the privity of the proprietor. *Rex v. Walter*, 3 Esp. N. P. C. 21. (b) § 1. (c) § 2. (d) § 3. (e) § 4. (g) § 5. (h) § 6. (i) § 9.

The affidavit, together with the production of a newspaper corresponding in every respect with the description of it in the affidavit,(a) is not only evidence of the publication of such paper by the parties named, but is also evidence of its publication in *the county* where the printing of it is described to be. By the 13th section, certified copies of such affidavits, &c., shall be delivered by the commissioners, or proper officer, on payment of 1*s*. A copy of such affidavit, &c., certified to be a true copy under the hands of the commissioners or proper officer, shall, on the proof of handwriting only, without proving the person signing to be a commissioner or officer, be proof of the swearing or affirmation and contents, and that it has been sworn or affirmed according to the statute. Every printer or publisher must,(b) within six days after publication, deliver a copy of his paper, signed by himself or his publisher, with his name and place of abode, to the commissioner or other officer;(c) and any person may apply for and shall obtain the same at any time within two years from the day of publication, (on giving surety to return it,) for the purpose of producing it in evidence in any proceeding, civil or criminal.

(a) *Rex v. Hart*, 10 East, 94. See also *Rex v. White*, 3 Campb. 100. *Evidence* was admitted to prove that the defendant had a printing-office, and the paper in which the libel appeared was printed there, and that the paper produced was printed with the types of that office, and that it was printed in the name of the defendant. *Southwick v. Stevens*, 10 Johns. 444. (b) See s. 17, but see *Rex v. White*, 3 Campb. 100. (c) And the delivery of a newspaper at the stamp-office is a sufficient publication to sustain an indictment for a libel in that paper. *Rex v. Amphlet*, 4 Barn. & C. 35.]

The reading of a libel in the presence of another without knowing it before to be a libel, or the laughing at a libel read by another, or the saying

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that such a libel is made of J S, whether spoken with or without malice, amounts not to a publication of it.

9 Co. 59; Moor, 813; Hawk. P. C. c. 73, § 13. ¶ In an action for a libel, the plaintiff may prove that, subsequent to the publication, the libel was read in a public assemblage by a third person, and that comments were made on it in the presence of the defendant. *Rice v. Withers*, 9 Wend. 138.¶

¶ And a person who, having a copy of a libellous caricature, shows it to another, on being requested so to do, is not thereby liable to an action for maliciously publishing.

Smith v. Wood, 3 Camp. 323.¶ ¶ Malice is the gist of the action in suits for libel or verbal slander; by malice is not meant ill-will towards the individual affected, in the ordinary sense of the word; in common cases of slander, the term maliciously means intentionally and wrongfully, without legal excuse. *King et al. v. Root*, 4 Wend. 113.¶

Also, it is held, that he who repeats part of a libel in merriment, without any malice or purpose of defamation, is no way punishable: but of this *Hawkins* makes a doubt, for that jests of this kind are not to be endured, and the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it.(a)

Moor, 627; *Hawk. P. C. c. 73, § 14*. ¶(a) Malice in common acceptance means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse. *Per Bayley, J.*, in *Bromage v. Prosser*, 4 Barn. & C. 255. And "the man who publishes slanderous matter calculated to defame another, must be presumed to have intended to do that which the publication is calculated to bring about, unless he can show the contrary; and it is for him to show the contrary." *Per Lord Tenterden, C. J.*, in *Rex v. Harvey*, 2 Barn. & C. 257.¶

But it seems to be agreed, if he who hath either read a libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any part of it in the presence of others, or lend or show it to another, he is guilty of an unlawful publication of it.

Moor, 813; 9 Co. 59; *Hawk. P. C. c. 73, § 10*.

¶ In action for libel for matters alleged of the practice of Catholic priests; held that if the matters were libellous, the occasion of their being promulgated at a public meeting, called to oppose the grant of public money for the support of a Catholic college, did not negative the malice.

Hearne v. Stowell, 12 Ad. & Ell. 719.¶

It is said by my Lord Coke, in the case *de libellis famosis*, to have been resolved, that if one finds a libel, (and would keep himself out of danger,) if it be composed against a private man, the finder may either burn it, or presently (b) deliver it to a magistrate; but if it concern a magistrate, or other public person, the finder ought presently to deliver it to a magistrate, to the intent that by examination and industry the author may be found out and punished.

5 Co. 125; 15 Vin. Abr. 88, pl. 3. (b) But it has been since said, that the not delivering it to a magistrate was only punishable in the Star-chamber, and that the bare having a libel in one's custody was no offence. 1 Vent. 31.—But vide 2 Salk. 418; Carth. 409, 410; 12 Mod. 220; *Ld. Raym.* 417, where it is said to be evidence of his being the author or publisher.

It seems to be a matter of doubt, whether the sending an abusive letter, filled with provoking language, to another, will bear an action as for a libel, because here is no publication.(c) But it seems to be clearly agreed, that the sending such letter, without other publication, is an offence of a public nature, and punishable as such, inasmuch as it tends to create ill blood, and causes a disturbance of the public peace; and if the bare making of a libel be an offence, whether it be published or not, as it seem-

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eth to be holden, (d) surely the sending of it to the party reflected on must be a much greater crime.

4 Inst. 180; 3 Inst. 174; Hob. 62, 215; 12 Co. 34; Poph. 136; Raym. 201; Mod. 58; Sid. 444; Lev. 139, 240; Keb. 931; Skin. 123, pl. 2. {In *Lyle v. Clason*, 1 Cain. 581, the Supreme Court of New York decided that sending a sealed libellous letter to the plaintiff himself was no ground of action; as the basis of the action is damages for the injury to character in the opinion of others, which cannot arise but from publication. *Aliter* as to a criminal prosecution, which is not founded on publication, but on the inducement which it produceth to a breach of the peace.} ||(c) But decided by Lord Kenyon, C. J., in *Phillips v. Jansen*, 2 Esp. 625, not to be a sufficient publication to ground an action; and see *Rex v. Wegener*, 2 Stark. 245. β *Lyle v. Clason*, 1 Caines, Rep. 581.γ It might be otherwise if the defendant knew that the letter would be opened by a third person. *Delacroix v. Thevenot*, 2 Stark. 63. (d) In *The King v. Burdett*, 3 Barn. & A. 717, and 4 Barn. & A. 95, it was mooted, but any decision on the point became unnecessary, Whether the composing and writing a libel with intent to publish, but not followed by publication, be an offence. So that the point made in the text still remains open; and see *Rex v. Rosenstein*, 2 Carr. & P. 416.]]

And on this foundation the Court of King's Bench granted an information against a person for sending an abusive letter to Mr. Barnardiston, therein calling him rascal and fool; although he swore that he wrote this to the party himself, and never made it public, being only a piece of private resentment. But the court held, that this method provoked persons to duelling; that the writing and sending was a good publication, and that the intent of the party shall not be explained by himself.

The King v. Pillborough, Mich. 5 G. 2, in B. R.; 2 Barnard. K. B. 102; 2 Kel. 58, pl. 2. ||And see *Phillips v. Jansen*, 2 Esp. 624. But an allegation that a letter was written with intent to injure the prosecutor in his *profession* cannot be supported if the letter were sent only to the prosecutor. *Rex v. Wegener*, 1 Stark. 543.]]

If one deliver a paper full of reflections on any person, in nature of a petition to a committee of parliament, to any other persons except the members of parliament, he may be punished as the publisher of a libel, in respect of such dispersing thereof among those who have nothing to do with it.

Sand. 133; Lev. 240; Sid. 414; Keb. 832.

But it hath been held, that the bare printing of a petition to a committee of parliament, (which would be a libel against the party complained of, if it were made for any other purpose than as a complaint in a court of justice,) and delivering copies thereof to the members of the committee, shall not be looked upon as the publication of a libel, inasmuch as it is justified by the order and course of proceedings in parliament, whereof the king's courts will take judicial notice.

Hawk. P. C. 73, § 15, and the authorities *suprà*. Vide Hardr. 470. ||And see *Rex v. Wright*, 8 T. R. 293.]]

||But a member of parliament is answerable civilly and criminally for a libel, if he publish a speech delivered in parliament containing libellous matter, though the publication be a correct report of the speech.

Rex v. Creevey, 1 Maul. & S. 273; *Rex v. Lord Abingdon*, 1 Esp. Ca. 226.]]

[If a man sends a libel to London to be published, it is his act in London, if the publication be there.

Rex v. Middleton, 1 Str. 77;] {7 East, 65, *The King v. Johnson*.}

||In the recent case of *The King v. Burdett*, (a) in which the question of what shall amount to a publication was fully discussed, the court (*dub.* Bayley, J.) held, 1st, That a defendant writing and composing a libel in one county with intent to publish and afterwards publishing it in another, may

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be indicted in either; and 2d, That a delivery of a sealed letter containing a libel at the post-office is a publication there.

(a) 3 Barn. & A. 717; and 4 Barn. & A. 95. See also 2 Stark. on Ev. tit. *Libel*, 855.]

(C) The Offenders how punished.

THERE can be no doubt but that a person who writes or publishes a libel is subject to the action (a) of the party injured, in which damages shall be recovered; and that being convicted on an indictment or information, he shall pay such fine, and also suffer such corporal punishment, as to the court in discretion shall seem proper, according to the heinousness of the crime, and the circumstances of the offender. (b)

Cro. Car. 175.—(a) In an action for a libel, it must be laid to be of and concerning the plaintiff. *Lowfield v. Bancroft*, P. 5 Geo. 2, Stra. 934. (b) A libeller may be fined and bound to his good behaviour, on his confession in court. *Rex v. Middleton*, 9 Geo. Fort. 201. At common law, on conviction upon indictment, he may be fined and imprisoned, according to the nature of the offence. 5 Co. 125, 3 Inst. 174; Cro. Car. 175, 504, or may be put in the pillory. 5 Co. 125 b. [The punishment of the pillory is now in the case of libel taken away, by 56 Geo. 3, c. 138.]

¶ And by 60 G. 3, c. 8, sect. 4, passed for the more effectual prevention and punishment of blasphemous and seditious libels, a person offending a second time after the passing of this act, and thereof lawfully convicted before any commission of *oyer* and *terminer* or jail delivery, or in the Court of King's Bench, may on such second conviction be adjudged, at the discretion of the court, either to suffer such punishment as might at the passing of the act be inflicted in cases of high misdemeanor, or to be banished from the united kingdom, and all other parts of his majesty's dominions, for such term of years as the court in which such conviction shall take place shall order.

Sect. 5, and in case he shall not depart the kingdom within thirty days after the pronouncing of sentence against him, for the purpose of going into banishment in pursuance of it, the king may, by and with the advice of his privy council, convey him to parts out of his dominions, (sect. 6;) and if after the end of forty days from the time that sentence was pronounced against him he be at large within any part of the united kingdom, or any other part of his majesty's dominions, without some lawful cause, before the expiration of the term for which he shall have been banished, and be thereof lawfully convicted, he shall be transported to such place as shall be appointed by his majesty, for any term not exceeding fourteen years, and he may for such offence be either tried before any justices of assize, &c. for the county, city, borough, or place where he shall be apprehended, or in the county, &c. in which he was sentenced to banishment.

Sect. 10. This act does not extend to Scotland.¶

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IN declaring on a libel no unnecessary averment should be introduced, and regard must be paid to the libel itself, which is admissible as proof of all that is positively averred or stated therein: (c) if separate passages of it are to be set out in one count of the declaration, they should be described as separate and distinct parts; (d) and if it be written in a foreign language, it must be so set forth; a translation of it will not be sufficient; (e) for, independently of the different meanings which different translators might give to particular words, the law requires the very words of the libel to be set out in the declaration, in order that the court before whom it is brought may see whether it be a libel or not. Therefore to state that a defendant pub-

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lished a libel containing false and scandalous matter of and concerning the plaintiff, "in substance as follows:" and then proceeding to set out the libellous matter with innuendoes, would be bad.(g) The word "tenor" binds the party to set out the very words.(h)

(c) Jones v. Stevens, 11 Price, 235; Buckingham v. Murray, 2 Carr. & P. 46. (d) Tabart v. Tipper, 1 Camp. 352. (e) Zenobio v. Axtel, 6 T. R. 162. (g) Wright v. Clements, 3 Barn. & A. 503. See also Lord Ellenborough's judgment in Cook v. Cox, 9 Maul. & S. 116; Maitland v. Goldney, 2 East, 426; Wood v. Brown, 6 Taunt. 169; S. C. 1 Marsh, 522; Bell v. Byrne, 13 East, 554; Cartwright v. Wright, 5 Barn. & A. 615; Craft v. Boite, 1 Saund. 242, note (a). And see Rex v. Burdett, 4 Barn. & A. 314; β Dexter v. Spear, 4 Mason, 115. γ (h) 1 Saund. 121, 3 Barn. & A. 503.

The office of an innuendo is to explain the natural meaning of the words of a libel, and not to extend what has gone before; (a) and where the words are not necessarily actionable in themselves, but the inducement makes them so by stating facts to which the libel alludes, the libel as stated must be connected with that inducement.(b)

(a) See judgment of De Grey, C. J., Rex v. Horne, Cowp. 684; Hawkes v. Hawkey, 8 East, 427; Goldstein v. Foss, 6 Barn. & C. 159; Rex v. Burdett, 4 Barn. & A. 314; β M'Claughry v. Wetmore, 6 Johns. 83; Lindsey v. Smith, 7 Johns. 359; Vaughan v. Havens, 8 Johns. 109; Gompertz v. Levy, 1 Perr. & Dav. 214. γ (b) See Holt v. Scholesfield, 6 T. R. 691, and Goldstein v. Foss, *ut suprad.* Clement v. Fisher, 7 Barn. & C. 459. β See Miller v. Maxwell, 16 Wend. 9; State v. Neece, N. C. Term Rep. 270. γ

A declaration must show a malicious intent in the defendant, though it is not necessary to use the word *maliciously*, for the word *falsely* alone has been held to be sufficiently expressive of a malicious intent.(c)

(c) See Craft v. Boite, 1 Saund. 242 a, note (2). β Harris v. Lawrence, 1 Tyl. 156. γ

But an indictment or information for a libel need not allege that the libellous matter is false, nor charge the offence to have been committed *vi et armis*.(d)

(d) Rex v. Burke, 7 T. R. 4. The charge in an information should be of an intention to excite the prosecutor to a breach of the peace. Rex v. Wegener, 1 Stark. 543.

β The publication of the libel must be distinctly averred in the declaration.

Waistel v. Holman, 2 Hall, 172. γ

In an action for a libel imputing misconduct, if the defendant seeks to justify, he must in his pleas state the particular instances of misconduct,(e) and show a sufficient justification for publishing the libellous matter;(g) but, however insufficient his plea may be, the plaintiff cannot *at the trial* object to its insufficiency, for he ought to have demurred to it, and if the plea be proved, the defendant will be entitled to a verdict upon it.(h)

(e) J'Anson v. Stuart, 1 T. R. 748; Holmes v. Catesby, 1 Taunt. 543; Lane v. Howman, 1 Price, 76; Carr v. Jones, 3 Smith, 491; and see Jones v. Stevens, 11 Price, 325; Duncan v. Thwaites, 3 Barn. & C. 556; S. C. 5 Dow. & Ry. 447. (g) Oliver v. Bentinck, 3 Taunt. 456. (h) Edmonds v. Walter, 3 Stark. 7.

Before a libel can be read in evidence, proof must be given that it was published by the defendant;(i) and formerly, on the trial of an indictment for a libel, the only questions for the jury were the fact of publishing, and the truth of the innuendoes;(k) but now, by the statute 32 Geo. 3, c. 60, the jury are empowered in indictments on informations for libel to give a general verdict on the whole matter, and the judge shall not require them to find the defendant guilty merely on the proof of publishing, and on the sense ascribed to the supposed libel in such complaint or information.(l)

(i) What is a publication, see *ante*, (B) 2, and 2 Stark. on Ev. tit. *Libel*. (k) Rex

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v. St. Asaph, (Dean,) 3 T. R. 428, n.; S. P. Rex v. Withers, 3 T. R. 428. (I) See Rex v. Burdett, 4 Barn. & A. 95, as to what is a correct mode of leaving the question to the jury under this statute.

If the libel be contained in a newspaper, the defendant has a right to have read in evidence any extract from the same paper connected with the subject of the passage charged as libellous, although disjoined from it by extraneous matter and printed in a different character.

Rex v. Lambert, 2 Camp. 398; and see Cook v. Hughes, 1 Ry. & Moo. 112; Mullet v. Hulton, 4 Esp. 248; Weaver v. Lloyd, 1 Carr. & P. 296; *β* Hotchkiss v. Lathrop, 1 Johns. 286; Gould v. Weed, 12 Wend. 2; Maynard v. Beardale, 7 Wend. 560; Mix v. Woodward, 12 Conn. 262; Thornton v. Stephen, 2 M. & Rob. 45.*g*

β A libel published subsequently to the one on which the action is brought may be rightly admitted in evidence to the jury, to show the intention of the defendant in the publication.

Barwell v. Adkins, 2 Scott, N. S. 11.*g*

As a defendant cannot on the general issue give evidence of the truth of the libellous matter in mitigation of damages; (*a*) so neither can the plaintiff go into evidence to show that the allegations in the libel are false. (*b*)

(*a*) See *ante*, (A) s. 5. (*b*) Stuart v. Lovell, 2 Stark. 93. See further on the subject of evidence Mr. Starkie's 2d volume on the Law of Evidence, p. 844, tit. *Libel*; and see *ante*, (A) s. 5.

β An interlocutory judgment is evidence of the fact of publication, and of the truth of the *innuendoes*.

Tillotson v. Cheetham, 3 Johns. 56.*g*

In an action for libel where the general issue and also justifications are pleaded, the defendant may either give at the outset all his evidence to rebut the justifications, or he may give it in reply after the defendant's evidence in justification; but he cannot give part at first, and reserve the remainder till after the defendant's case.

Browne v. Murray, 1 Ry. & Moo. 254. *β* The truth of the words spoken cannot be given in evidence under the general issue, in an action of slander. Chipman v. Cook, 1 Tyl. 17.*g*

β A plea to a declaration for a libel justified as to part of the libel charged, but it did not profess to answer the whole, though it prayed judgment of the action generally. Held that the plaintiff might demur to such defective plea.

Sterling v. Sherwood, 20 Johns. 204.

At the trial of an action for a libel, the plaintiff may abandon any part of the libellous matter in any one count in his declaration, and the part so abandoned may nevertheless be used in connection with the part retained, to show its meaning, and he will be entitled to recover if the part retained be sufficient to sustain the action.

Genet v. Mitchell, 7 Johns. 120.*g*

LIMITATION OF ACTIONS.

¶ By limitation of actions is understood a bar to the alleged right of a plaintiff to recover in an action, caused by the lapse of a certain length of time appointed by law.

In general, the government is untrammelled by the provisions of the acts of limitation, unless expressly restricted, or by necessary implication it is included.

2 Mason, R. 314; 4 Mass. 528; 2 Overt. 352; 1 Const. R. 125; 4 Henn. & Munf. 53; 3 S. & R. 291; 1 Bay, 26; Bagley v. Wallace, 16 S. & R. 245; Stoughton v. Baker, 4 Mass. 529; Hau v. Getting's Lessee, 2 Har. & J. 112; Stewart's Lessee v. Mason, 3 Har. & J. 507; Commonwealth v. McGowan, 4 Bibb, 62; Weatherhead v. Bledsoe, 2 Tenn. R. 352; United States v. Hoar, 2 Mason, 311; Lindsey v. Miller, 6 Pet. 666; Birch v. Alexander, 1 Wash. R. 34; Nimmo's Executor v. The Commonwealth, 4 H. & M. 57.

But when the debt due is barred before the instrument, which is the evidence of it, is assigned to the United States, the statute of limitation will be a bar.

The United States v. Buford, 3 Pet. R. 29.g

- (A) Of the Limitation of Actions at Common Law, and before the Statute 32 H. 8, c. 2.
- (B) Of the Limitation of Real Actions, pursuant to 32 H. 8, c. 2, and 21 Jac. 1, c. 16.
- (C) Of the Limitation of Time in regard to Actions on Penal Statutes.
- (D) Of the Limitation of Time in regard to Personal Actions, pursuant to the 21 Jac. 1, c. 16: And herein,
 - 1. *Of Actions of Assault and Battery.*
 - 2. *Of Actions of Slander.*
 - 3. *Of Actions arising upon Contract and founded in Maleficio: And herein,*
 - 1. Of what Nature or Degree the Action must be, so as to be barred by the Statute.
 - 2. Whether a Trust or Equitable Demand be within the Statute.
 - 3. At what Time the Right of Action shall be said to have accrued, before which the Statute can be no Bar.
 - 4. In what Court the Demand must be made, or what Courts are bound by the Statute.
- (E) Of the Exceptions in the Statute 21 Jac. 1, c. 16, and what will save a Bar thereof: And herein,
 - 1. *What Actions are within the Savings of the Statutes.*
 - 2. *Of the Exception in relation to Infants, &c.*
 - 3. *Of the Exception in relation to Accounts between Merchants.*
 - 4. *Of the Exception with relation to Persons beyond Sea.*
 - 5. *Where no Executor or Administrator to sue or be sued.*
 - 6. *Where no Jurisdiction to sue in, or where hindered by some Authority.*
 - 7. *Where the suing out a Writ will save the Bar of the Statute.*
 - 8. *Where a Debt barred by the Statute shall be said to be revived.*
- (F) Of the Manner of pleading, and taking Advantage of the Statute of Limitations.
- β (G) Miscellaneous Cases.g

(A) Of the Limitation of Actions at Common Law, and before the Statute 32 H. 8, c. 2.

It seems that by the common law there was no stated or fixed time as to the bringing of actions; for though it be said by (a) Bracton, that *omnes actiones in mundo infra certa tempora limitationem habent*; yet my Lord Coke (b) says, that the limitation of actions was by force of divers acts of parliament; also, says he, this general position of Bracton's admitted of several exceptions.

(a) Bract. lib. 2, fol. 298. (b) 2 Inst. 95; Co. Lit. 115; 4 Co. 10, 11.

But we find that by the ancient law there was a stated time for the heir of the tenant to claim after the death of his ancestor, else he lost his land, according to the feudal text, *Præterea si quis infeudatus major quatuordecim annis, sua incuria, vel negligentia, per ann. et diem steterit, quod feudi investituram a proprio domino non petierit, transacto hoc spatio, feudum amittat et ad dominum redeat.*

Spelm. Gloss. 32.

The fixing upon this period of a year and a day, upon several other occasions, seems to have been deduced from this ancient rule, and on this occasion was pitched upon because the services appointed seem to be annually computed; and therefore the feud was ordered to be taken up within such time as such annual services became due, else it was lost and returned to the lord. The same time that was appointed to the tenant to claim from the lord, was also appointed to make his claim upon any disseisor; and if no such claim was made, the disseisor, dying seised, cast the right of possession upon the heir. And this was to keep the same uniformity of time through the law; as also that the lord might be at a certainty who he might take for his tenant, and admit upon every descent; and since the heir of the tenant anciently lost the whole land, in case he did not take it up within time, it was fit the tenant should lose the right of possession in case he did not claim within the same time upon the disseisor, that the heir of such disseisor might be in peace, in case the person that had right did not make his claim upon him, and that from thenceforth the lord might receive him into his feud; and, as upon the ancient plan of the feudal constitution, if the heir did not take up the feud within a year and a day, a desertion and dereliction was presumed; so also, if the disseisee did not claim within the same time, the right of possession was relinquished.

Spelm. Gloss. *annus et dies*, 32, 33.

Before the 32 H. 8, c. 2, certain remarkable periods were fixed upon within which the titles upon which men designed to be relieved must have accrued: thus in the time of H. 3, by the statute of Merton, c. 8, the limitation in a writ of right, which was then from the time of King Henry 1, by that statute is reduced to the time of King Henry 2; and as to assizes of *mortdauncestor*, they were thereby reduced from the last return of King John out of Ireland, which was 12 *Johannis*; and assizes of *novel disseisin*, a *prima transfrelatione regis in Normaniam*, which was 5 Hen. 3, and which before that had been *post ultimum reditum Henric. 3 de Britannia*; and this limitation was also afterwards, by the statutes Westm. 1, c. 39, and Westm. 2, c. 46, reduced to a narrower compass, the writ of right being limited to the first coronation of Rich. 1.

But for the ancient limitations, vide Co. Lit. 114 b, 115 a; 1 Inst. 94, 95; 2 Roll. Abr. 111; Hale's Hist. of the Law, 122; 2 Keb. 45. For a general view of the laws of the different states on the subject of limitation of actions, the reader is referred to Bouv. L. D. h. v.

(B) Of the Limitation of Real Actions, pursuant to 32 H. 8, c. 2, and 21 Jac. 1, c. 16.

THE limitations above mentioned being, as hath been remarked, set periods, in process of time of necessity grew too large, whereby, as my Lord Coke observes, many suits, troubles, and inconveniences did arise; and therefore a more direct and commodious course was taken, which was to endure for ever, and calculated so to impose diligence on and vigilancy in him that was to bring his action, so that by one constant law certain limitations might serve both for the time present and for all times to come.

2 Inst. 95.

And this was effected by 32 H. 8, c. 2, by which it is enacted, "That no person shall from henceforth sue, have, or maintain any writ of right, or make any *prescription*, *title*, or *claim* to or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor, which hath been, or now is, or shall be seised of the said manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments, within *threescore* years next before the *teste* of the same writ, or next before the said *prescription*, *title*, or *claim*, so hereafter to be sued, commenced, brought, made, or had."

And it is further enacted by the said statute, § 2, "That no manner of person shall sue, have, or maintain any *assize* of *mortdauncestor*, *cosenage*, *ayle*, writ of entry upon disseisin done to any of his ancestors or predecessors, or any other *action possessory* upon the possession of any of his ancestors or predecessors, for any manors, lands, tenements, or other hereditaments, of any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his or their ancestor or predecessor which was or hereafter shall be seised of the same manors, lands, tenements, or other hereditaments, within *fifty* years next before the *teste* of the original of the same writ hereafter to be brought."

And it is further enacted, by § 3 of the said statute, "That no person shall sue, have, or maintain any *action* for any manors, lands, tenements, or other hereditaments, of or upon his or their *own seisin or possession* therein, above *thirty* years next before the *teste* of the original of the same writ hereafter to be brought."

And further, by § 4, "That no person shall hereafter make any *avowry* or *cognizance* for any rent, suit, or service, and allege any seisin of any rent, suit, or service in the same avowry or cognizance in the possession of any other, whose estate he shall pretend or claim to have, above *fifty* years next before the making of the said avowry or cognizance."

And it is further enacted by the said statute, § 5, "That all *formedons* in *reverter*, *formedons* in *remainder*, and *scire facias* upon *fines* of any manors, lands, tenements, or other hereditaments, at any time hereafter to be sued, shall be sued and taken within *fifty* years next after the title and cause of action fallen, and at no time after the fifty years passed."

Also by the said statute, § 6, it is enacted, "That if any person do sue any of the said actions or writs for any manors, lands, tenements, or other hereditaments, or make any avowry, cognizance, prescription, title, or claim of or for any rent, suit, service, or other hereditaments, and cannot prove that he or they, or his or their ancestors or predecessors, were in actual possession or seisin of and in the same manors, lands, tenements, rents, suits,

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services, annuities, commons, pensions, portions, corodies, or other hereditaments, at any time or times (a) within the years before limited and appointed in this present act, and in manner and form as is aforesaid, if the same be traversed or denied by the party, plaintiff, demandant, or avowant, or by the party, tenant, or defendant; that then, and after such trial therein had, all and every such person and persons, and their heirs, shall from thenceforth be utterly barred for ever of all and every the said writs, actions, avowries, cognisance, prescription, title, or claim hereafter to be sued, had, or made, of and for the same manors, lands, tenements, hereditaments, or other the premises, or any part of the same, for the which the same action, writ, avowry, cognisance, prescription, title, or claim hereafter shall be at any time had, sued, or made."

(a) In 8 Co. 65, the statute is recited thus: That no person or persons shall hereafter make any avowry or consuance for any rent, suit, or service in the same avowry or consuance, in the possession of his or their ancestor or predecessor, &c., above *forty* years next before the making of the said avowry or consuance. [And so it is in Comyn's Digest, tit. *Temps*, (G. 3.) But Mr. Reeves states it to be *fifty* years. 4 Vol. 268.] ¶ And *fifty* years is the only period mentioned in Mr. Ruffhead's edition of the Statutes, and so in Runnington's edition, where it is said to be *fifty* in the record.¶

Note.—This statute hath the usual savings for infants, *femes covert*, persons in prison and beyond sea.

In the construction of this statute it hath been holden,

That in a (b) *formedon in reverter* or *remainder*, or on a *scire facias* on a fine of such nature, the demandant need not mention the statute in order to make out his title, but the tenant, if he would take advantage of it, must plead it.

Dyer, 315 b, pl. 101. (b) So in *avowry* for rent. Moor, 31, pl. 102. Roll. Rep. 50.

It hath been held, that this statute, being in restraint of the common law, ought to be construed strictly; and that therefore it does not extend to a *formedon in descender*, (c) * *cessavit*, nor *rescous*.

4 Co. 8; And. 16; Lit. Rep. 342. (c) Not to a *cessavit* for two reasons: 1. Because this writ is not comprised within the statute; 2. Because the seisin of services is not material nor traversable in this writ. Moor, 44, pl. 135. Whether it extends to a pension in the spiritual court, vide 3 Keb. 366, 392; Vent. 265. * See *infra*, the statute of 21 Jac. 1, c. 16.

¶ Nor does it extend to dignities, for as a dignity cannot be aliened, surrendered, or extinguished by the person possessed of it, neither can it be lost by the negligence of any person entitled thereto in not claiming it within a particular time.

Lords' Journ. vol. xxxi. 530; Cru. Dig. tit. 26, c. 2.

But offices with fees and profits are within its intent and meaning

Lords' Journ. vol. xxxvi. 225.

So, this statute does not extend to a corporation aggregate, as mayor and commonalty, nor to a dean and chapter, for they do not count upon a seisin of any ancestor or predecessor, but upon their own possession. But it is otherwise with a corporation sole; for if a bishop or other sole corporation sue upon a seisin of his predecessor, he shall be barred if the seisin was not within sixty years.

Bro. Stat. Lim. 33.¶

If A by deed indented make a feoffment in fee to B and his heirs, rendering 10s. *per annum* to A and his heirs, of which rent A or his heirs have

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not been seised within forty years, yet the heirs of A may distrain, &c., for the statute must be intended in such cases (a) only where before the statute the avowant was obliged to allege a seisin; and that was where the seisin was so material, and of such force, that though it was by encroachment, yet it could not be avoided in an avowry.

8 Co. 64, Copper and Foster, adjudged; Brownl. 169, S. C.; [Mo. 31, S. P. According to Sir W. Jones, this exemption of rent should be understood with this qualification: that the *certainly* of the rent should appear in the deed; because otherwise the *quantum* or *quality* of the rent is no more ascertained by the deed than if there was not one existing. Therefore if the rent is created by reference to something out of the deed, as by reserving such rent as the person reserving pays over, without expressing what that is, and the latter rent not having commenced by deed is one of which seisin is the proper proof; in such a case, seisin, as Sir W. Jones thought, is equally requisite to both rents, and, consequently, both ought to be equally deemed within the limitation of this statute. Sir W. Jon. 238.] (a) So, this statute extends not to a new rent created by act of parliament. Cro. Car. 80, 81, 214; Lit. Rep. 42; Hutt. 28, 36; Jon. 233. ¶ But quit-rents, and other customary and prescriptive rights, are comprised within it. 1 Inst. 115 a.¶

To a bill in Chancery, to be relieved touching a rent charged upon lands by a will, the defendant pleaded the statute of limitations, and that there had been no demand or payment in forty years; and it was held, that this statute concerns only customary rents between lord and tenant, and not any rent that commences by grant, or whereof the commencement may be shown.

2 Vern. 255, Collins and Goodall.

The statute does not extend to the services of (b) escuage, homage, and fealty; for a man may live above the time limited by the act: neither doth it extend to any other service which by common possibility may not happen or become due within sixty years; as, to cover the hall of the lord, or to attend the lord in the war, &c. *

Co. Lit. 115 a; 2 Inst. 95; 4 Co. 10, Bevil's case; 8 Co. 65; 9 Co. 36; ¶ Bennet v. King, 3 Lev. 21.¶ (b) But although homage, fealty, and escuage be out of the statute 32 H. 8, c. 2, yet are they within the ancient statute. 2 Inst. 96.

And where the tenure is by homage, fealty, and escuage incertain, and by suit of court or rent, or any other annual service, the seisin of the suit or rent, or any other annual service, is a (c) good seisin of the homage, fealty, or escuage, or other accidental services, as was wardship, heriot service, or the like.

2 Inst. 96; 4 Co. 8 b; Winch. 32; Hutt. 59; 2 Roll. Rep. 392. (c) That seisin of a superior service is a seisin of all inferior services which are incident thereto. 4 Co. 8 b. So, seisin of fealty is a sufficient seisin of homage and escuage; for when the tenant does fealty, he swears to do all other services. 4 Co. 8 a. So, seisin of homage is a seisin of all other services, as well inferior as superior, because in the doing thereof the tenant takes upon himself to do all services. 4 Co. 8. But seisin of one annual service is no seisin of another annual service; for in that case it is the folly of the lord if he hath not an actual seisin of the other service itself, when it becomes due yearly. 4 Co. 9 a.

¶ So this statute does not extend to actions in which seisin need not be alleged, as waste, for the land is not directly in demand, and the plaintiff does not declare of any seisin in it.

Bro. Stat. Lim. 20, 21.

Neither does it extend to annuity, for the plaintiff does not declare upon a seisin, but upon his grant.

Bro. Stat. Lim. 26.

By the 1 Mar. sess. 2, c. 5, § 4, it is enacted, "That the 32 H. 8, c. 2, shall not extend to any writ of right of advowson, *quare impedit*, or assize

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of *darrein presentment*, nor *jure patronatus*, nor to any writ of right of ward, writ of ravishment of ward for the wardship of the body, or for the wardship of any castles, honours, manors, lands, tenements, or hereditaments holden by knight's service, but that such suits may be brought as before the making the said act."

[This statute, so far as regards *advowsons*, is no longer of any use; it being enacted by 7th Ann. c. 18, that no usurpation shall displace the estate of the patron, and that he may present on the next avoidance, as if there had not been any usurpation; which provision, in effect, takes away all limitations of suits about the right of patronage.]

By the 21 Jac. 1, c. 16, for quieting men's estates, and avoiding suits, it is enacted, "That all writs of *formedon in descender*, *formedon in remainder*, and *formedon in reverter*, at any time hereafter to be sued or brought of or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have any title, or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session of parliament; and after the said twenty years expired, no person or persons, or any of their heirs, shall have or maintain any such writ of or for any of the said manors, lands, tenements, or hereditaments; and that all writs of *formedon in descender*, *formedon in remainder*, *formedon in reverter*, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title, or cause hereafter happening, shall be sued and taken within *twenty* years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; and that no person or persons that now hath any *right or title of entry* into any manors, lands, tenements, or hereditaments, now held from him or them, shall thereinto enter, but within *twenty* years next after the end of this present session of parliament, or within *twenty* years next after any other title of entry accrued; and that no person or persons shall at any time hereafter make any entry into any lands, tenements, or hereditaments, but within *twenty* years next after his or their right or title, which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law, &c.

{For the statute to bar, there must be an adverse and uninterrupted possession. 8 East, 248, *Keene v. Deardon*; 2 Bos. & Pul. 542, *Roe v. Ferrars*. See 1 Dall. 67, *Morris's Lessee v. Vanderen*; 1 Cain. 394, *Brandt v. Marshall*; 1 Johns. Rep. 156, *Brandt v. Ogden*; 2 Johns. Rep. 230, *Jackson v. Schoonmaker*; 1 Wash. 37, *Birch v. Alexander*; 4 Cranch. 367, *Shearman v. Irvine's Lessee*; *Ibid.* 415, *Higginson v. Mein*.}

"Provided, That if any person or persons that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be, at the time of the said right or title first {} descended, accrued, come, or fallen, within the age of one-and-twenty years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas; that then such person and persons, and his, her, and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his or her action, or make his or her entry, as he or she might have done before this act, so as such person and persons, or his, her, or their heir and heirs, shall within *ten* years next after his, her, and their full age, discoverture, coming of sound mind,

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enlargement out of prison, or coming into this realm, or death,^{1} take benefit of and sue forth the same, and at no time after the said ten years."

^{1} When the statute once begins to run it continues notwithstanding any subsequent infancy, coverture, or other disability. 4 Term, 300, *Doe v. Jones*; Willes, 28, 2 Hen. & Mun. 289, *Fitzhugh v. Anderson*; 2 Day, 523, *Eaton v. Sanford*. ^{2} Where the ancestor died seised, leaving a son and daughter infants, and on the death of the ancestor a stranger entered, and the son soon after went to sea and died abroad *within age*: while the daughter was also *within age*, it was held that she was not entitled to twenty years to make her entry after the death of her brother, but only to ten years from his death, and not from her coming to age; more than twenty years having elapsed in the whole since the death of the ancestor; the construction of this clause of the statute being that it gives to the party to whom a right of entry accrues, and who is under a disability at the time, ten years after the disability removed, notwithstanding the twenty years should have elapsed after his title first accrued; and to his heir the statute gives ten years after the death of such party dying under the disability. 6 East, 80, *Doe v. Jesson*.} || Where no account can be given of a person within the exceptions in this clause, he will be presumed to be dead at the expiration of seven years from the last account of him. *Per* Lord Ellenborough in *Doe dem. George v. Jesson*, 6 East, 84. ||

|| In the construction of this saving clause it has been said, (a) that if before one disability cease another commence in a *different* person,—as if a right of entry accrue to a *feme covert*, and she die, leaving her heir *within age*, or the like,—the statute does not begin to run until after the latter disability ceases; a contrary opinion, however, now prevails, (b) and it seems settled that a person upon whom the right *first* descends, being under disability at the time of the right or title of entry descending upon him, has the benefit of successive disabilities in *his own person*, and may enter within the time given by the statute after the removal of his last disability; but that where the disabilities are in *different* persons, as where, like the above case, the right of entry descends upon a *feme covert*, and she die under coverture, leaving a son under age, the latter has not the time allowed by the saving clause after the removal of his own disability, but must enter within ten years from the death of his mother; for she was the person upon whom the right *first* descended, and her death terminated her coverture.

(a) *Cotterell v. Dutton*, 4 Taunt. 826; and see *Tolson v. Kaye*, 3 Bro. & B. 217; 6 B. Moo. 542, S. C. (b) 2 Prest. Ab. of Tit. 341; *Shep. Touchst.* 31; 3 Co. Lit. by Thomas, p. 18, note (L); *Dillon v. Leman*, 2 H. Black. 584; *Doe d. George v. Jesson*, 6 East, 80; and see *Blanshard on Lim.* 19, *et seq.* †

In the construction of this statute it hath been holden,

That the possession of one joint-tenant is the possession of the other, so far as to prevent this statute.

Salk. 285, pl. 19; || *Ford v. Gray*, 6 Mod. 44; *Fisher v. Prosser*, Cowp. 218; *Fairelaim d. Empson v. Shackleton*, 2 W. Bl. 690. ||

|| But although joint-tenants and coparceners have a seisin *per my et per tout*; yet if there be a disseisin of both, one of them may be barred by the statute, although it shall not have effect as a bar to the other.

Roe v. Rowiston, 2 Taunt. 441. ||

That a (c) claim or entry to prevent the statute of limitations must be upon the land, unless there be some special reason to the contrary.

Salk. 285, pl. 19. (c) And by 4 & 5 Ann. c. 16, upon such claim or entry an action must be commenced within one year next after the making of such entry and claim, and prosecuted with effect, otherwise of no force to avoid the statute.

|| But an actual entry upon the lands claimed is not required to prevent the operation of the statute and support an ejectment, (d) unless the claimant

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proceeds by ejectment or on a vacant possession,(e) or where he is desirous of trying his title in a court of limited jurisdiction.(g)

(d) *Clarke v. Pywell*, 1 Saund. 319 e, note; and see *Runn. Ejectm.* 2d edit. p. 231. (e) *Savage v. Dent*, Stra. 1064; *Jones v. Marsh*, 4 T. R. 464; and *Tidd's Pract.* 8th edit. 519. (g) *Rex v. Mayor of Bristow*, 1 Keb. 690; *Sherman v. Cooke*, 1 Keb. 795.¶

That if a person be barred of his *formedon*, he is not thereby hindered to pursue his right of entry which afterwards accrues to him, no more than a person who has several remedies, and discharges one of them, is excluded thereby from pursuing the others.

Lutw. 781; *Hunt and Bourn*. Salk. 339, pl. 5; 2 Salk. 422, pl. 7, S. C.; ¶and see *Plowd.* 368.¶

If A has had possession of lands for twenty years without interruption, and then B gets possession, upon which A is put to his ejectment; though A is plaintiff, yet the possession of twenty years shall be a good title in him, as if he had still been in possession; because a possession for twenty years is like a descent which tolls entry, and gives a right of possession, which is sufficient to maintain an ejectment.

2 Salk. 421, pl. 5, said to have been twice so ruled by Holt. β *Pederick v. Searle*, 5 S. & R. 240.γ

That if one tenant in common receives the whole profits for twenty years or more, yet this does not bar his companion; for the statute of limitations never runs against a man but where he is actually ousted or disseised.

Salk. 423, pl. 10.

¶It has, however, been ruled, that the possession of one tenant in common claiming the *whole*, and denying possession to the other, is evidence of an actual ouster of his companion.

Fisher v. Prosser, Cowp. 218; *Doe dem. Hellings v. Bird*, 11 East, 50.¶

β A and B were tenants in common by agreement and payment of equal parts of the price; B was in possession of the land and died; his children entered and occupied it as their own, without any knowledge of the title of A. Held, that twenty-one years' possession barred the claim of A.

Brown v. M'Coy, 2 Rawle, 305. See 2 Watts & Serg. 307, n.

When one tenant in common enters on the whole, takes the profits and claims the whole exclusively for twenty-one years, the jury ought to presume an actual ouster though none be proved.

Frederick v. Gray, 10 S. & R. 182; see *Cullen v. Motzer*, 13 S. & R. 356; *Lodge v. Patterson*, 3 Watts, 77; *Galbraith v. Galbraith*, 5 Watts, 146; *Mehaffy v. Dobbs*, 9 Watts, 363; *Law v. Patterson*, 1 Watts & Serg. 184; *Watson v. Gregg*, 10 Watts, 296; *Bolton v. Hamilton*, 2 Watts & Serg. 299; *Gregg v. Blackmore*, 10 Watts, 192.γ

It has been ruled that copyholds are within the statute of limitations, because an act made for the preservation of the public quiet, and no ways tending to the prejudice of the lord or tenant.

Moor, 410; ¶*Creach v. Wilmot*, 2 Taunt. 160; *Lyford v. Coward*, 1 Vern. 195; *Knight v. Adamson*, 2 Freem. 106; *Widdowson v. Harrison*, 1 Jac. & Walk. 532.¶

β A defendant in ejectment, who sets up the statute of limitations, must stand on his own possession, and cannot call to his assistance the possession of one whose title the plaintiff has purchased.

Clugge v. Duncan, 1 S. & R. 111.

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To enable the defendant to plead the statute successfully, he must have had adverse possession for twenty-one years.

Potts v. Gilbert, 3 Wash. C. C. 475; *Gray v. M'Cleary*, 4 Yeates, 196; *Overfield v. Christie*, 7 S. & R. 177; *Wallace v. Duffield*, 2 S. & R. 527; *Hawk v. Senseman*, 6 S. & R. 21.

If a trespasser after being in possession sell his right to another, and the latter continue in possession for the remainder of twenty-one years, that is if the two possessions joined together make twenty-one years, they will form a bar to the plaintiff's recovery.

Overfield v. Christie, 7 S. & R. 177. *Sed vide contra*, *Potts v. Gilbert*, 3 Wash. C. C. R. 475.

An adverse possession must continue the same in point of locality, during the prescribed period of time to make it a bar.

Potts v. Gilbert, 3 Wash. C. C. R. 475.

Where one claiming by improvement enters on the land of another, and has not his possessions marked out by lines and a survey, he is protected by the act of limitations only so far as his buildings and improvements extend.

Hall v. Powell, 4 S. & R. 456; *Potts v. Gilbert*, 3 Wash. C. C. R. 475. See *Burns v. Swift*, 2 S. & R. 439; *Cluggage v. Duncan*, 1 S. & R. 111; *Miller v. Shaw*, 7 S. & R. 129; *Lenox v. Farley*, 8 S. & R. 392; *Royer v. Benlow*, 10 S. & R. 303; *Heiser v. Reiley*, 7 Watts, 35; *Johnson v. Irwin*, 3 S. & R. 291; *M'Call v. Neely*, 3 Watts, 70.

To avoid the bar of the statute by entry, the party must prove that he made the entry with intent to claim the possession.

Holtzapple v. Phillibaum, 4 Wash. C. C. 356; *Altemus v. Campbell*, 9 Watts, 28. See *Carothers v. Dunning*, 3 S. & R. 380; *Miller v. Shaw*, 7 S. & R. 129.

When a person out of possession gives notice of his title to one who holds adversely to such title, such notice does not prevent the running of the act of limitations.

Walker v. Walker, 16 S. & R. 379.

To avoid the statute it is not necessary to bring an action: the making an entry on the land is sufficient.

Altemus v. Campbell, 9 Watts, 28; *Criswell v. Altemus*, 7 Watts, 580, 581.

An acknowledgment in writing of the title of the claimant, will prevent the defendant from afterwards setting up the statute of limitations as a bar on the ground of adverse possession.

Miller v. Keene, 5 Watts, 348. See as to the nature of the acknowledgment required to remove the bar in actions of ejectment, *Sailor v. Hertzog*, 4 Wharton, 259; *Farmers' and Mechanics' Bank v. Wilson*, 10 Watts, 262.

But ecclesiastical persons are not bound by any of the statutes of limitations, because it would be a side-wind to evade the statutes made to prohibit their alienations. (a)

Comp. Incumb. 429; ||Magdalen Col. Ca. 11 Rep. 78 b; 1 Roll. Rep. 151; Cru. Dig. tit. 31, c. 2, s. 46. (a) This position must be understood with this qualification: that though ecclesiastical persons cannot bar their successors by a neglect to bring actions for the recovery of their possessions within the times prescribed by these statutes, yet, by submitting to an adverse possession, they may themselves individually be barred. *Croft v. Howel*, Plowd. 358; *Runcorn v. Cooper*, 5 Barn. & C. 696.

[In the year 1772, an attempt was made to limit the claims of the church; but happily failed.

Neither was the crown bound by any of these statutes, the ancient doctrine being *nullum tempus occurrit regi*. But by a late statute, the crown

(C) Of the Limitation of Actions on Penal Statutes.

is barred from recovering any estate or hereditaments, (other than liberties or franchises,) where the title did not first accrue within the last sixty years.

9 Geo. 3, c. 16, § 1, 10.] ¶ This statute does not give a *title* to the first wrongful possessor, and those claiming under him, but only bars the remedy of the crown against them after sixty years continuing adverse possession of them. Goodtitle dem. Parker v. Baldwin, 11 East, 488. ¶ 22 Mason, 314; 4 Mass. 528; 2 Overt. 352; 1 Const. R. 125; 4 H. & M. 53; Johnson v. Irwin, 3 S. & R. 292; Bagley v. Wallace, 16 S. & R. 245; Morris v. Thomas, 5 Binn. 77. ¶

¶ When the statute once commences running against an heir in tail, no subsequent event can interrupt its progress, and, when it has run twenty years, no *formedon* can afterwards be maintained.

Doe v. Warren, 6 Mass. 328. ¶

(C) Of the Limitation of Time in regard to Actions on Penal Statutes.

By the 31 Eliz. c. 5, § 5, it is enacted, "That all actions, suits, bills, indictments, or informations, which shall be brought for any forfeiture upon any statute penal, made or to be made, whereby the forfeiture is or shall be limited to the *queen*, her heirs and successors *only*, shall be brought within *two years* after the offence committed, and not after two years; and that all actions, suits, bills, or informations, which shall be brought for any forfeiture upon any penal statute, made or to be made, except the statute of tillage, the benefit and suit whereof is or shall be by the said statute limited to the *queen*, her heirs or successors, and to *any other that shall prosecute* in that behalf, shall be brought by any person that may lawfully sue for the same within *one year* next after the offence committed; and in default of such pursuit, that then the same shall be brought for the queen's majesty, her heirs or successors, any time within the *two years after that year ended*; and if any action, suit, bill, indictment, or information, shall be brought after the time so limited, the same shall be void: And it is provided, that where a shorter time is limited by any penal statute, the prosecution must be within that time." (a)

All popular actions were limited to a certain time by 7 H. 8, c. 3, which is repealed by this statute. ¶ (a) This statute extends to all actions brought upon penal statutes, whether made before or since the statute. Barber v. Tilson, 3 Maul. & S. 436. ¶

By the 18 Eliz. c. 5, § 1, it is enacted, "That upon every information that shall be exhibited on any penal statute, a special note shall be made of the very day, month, and year of the exhibiting thereof into any office, or to any officer which lawfully may receive the same, without any antedate thereof to be made; and that the same information be accounted and taken to be of record from that day forward, and not before; and that no process be sued out upon such information until the information be exhibited in form aforesaid, &c., and that every clerk making out process contrary to this act shall forfeit 40s."

It is further enacted by 21 Jac. 1, c. 4, § 3, "That no officer shall receive, file, or enter of record, any information, bill, plaint, count, or declaration, grounded on any penal statute, (being within the provision of the said statute of 21 Jac. 1,) until the informer or relater hath first taken a (b) corporal oath before some of the judges of the court, that he believes, in his conscience, the offence was committed within a year before the information or suit within the county where the said information or suit was commenced," &c.

(b) It hath been adjudged, that if an officer receive an information without such previous oath, yet the proceedings on it are not erroneous. Cro. Car. 316, and vide 2 Inst.

(C) Of the Limitation of Actions on Penal Statutes.

199; 4 Inst. 272. But *quære*, whether motion will not set aside such process as having issued contrary to the directions of the statute? Salk. 376, pl. 19.—*In actions the oath is not now used; and *quære*, if in criminal prosecutions!*

In the construction of these statutes it hath been holden, that the 21 Jac. 1, c. 4, does not extend to any offence created since that statute; so that prosecutions on subsequent penal statutes are not restrained thereby, but that statute is to them, as it were, repealed *pro tanto*.

Salk. 373, pl. 13; 5 Mod. 425; ¶Rex v. Gaul, Salk. 373, pl. 13; Shipman v. Henbest, 4 T. R. 109; Barber v. Tilson, *per* Ld. Ellenborough, C. J., 3 Maul. & S. 439.¶

That if an offence prohibited by any penal statute be also an offence at common law, the prosecution of it, as of an offence at common law, is no way restrained by any of these statutes.

Hob. 270; 4 Mod. 144.

That if an information *tam quam* be brought after the year on a penal statute, which gives one moiety to the informer, and the other to the king, it is naught only as to the informer, but good for the king.

Cro. Car. 331; Cro. Ja. 366, and vide Dalis. 60.

§ The right to bring an action within a year which is given to the party aggrieved, may be lost by the interference of the popular action given by the statute.

Palmer v. Lord, 6 Johns. Ch. R. 95. See Wilcox, *qui tam*, v. Fitch, 20 Johns. 373.g

¶ That where a statute creates a penalty, and says, that one moiety shall be to the use of the king, and the other to a common informer, the king may sue for the whole by an information filed in the King's Bench by the attorney-general, unless a common informer has commenced a *qui tam* suit for the penalty.

Rex v. Hymen, 7 T. R. 536.¶

That if a suit on a penal statute be brought after the time limited, the defendant need not plead the statute, but may take advantage of it on the general issue.(a)

Show. Rep. 353; ¶and see Hodsdon v. Harridge, 2 Saund. 63.¶ (a) For the statute says the same shall be void; consequently, the party does not owe the penalty demanded, the informer, in such case, not having a right to demand the penalty.

§ The cause of action for usury arises *eo instanti* the money is paid, and the limitation then begins to run.

Breckenridge v. Churchill, 3 J. J. Marsh. 16.

When the usurious contract, the lending and the forbearance or interest concur, the offence is committed, and the statute of limitations runs from that time, and not from the time of the payment of the money borrowed to the lender.

Commonwealth v. Frost, 5 Mass. 59.g

That the party grieved is not within the restraint of these statutes, but may sue in the same manner as before.

Cro. Eliz. 645; Noy, 71; 3 Leon. 237; Show. Rep. 354, and Carth. 233, S. P. That where the penalty is given to the party alone, this is out of the statute 31 Eliz. c. 5; but *per* Holt, if given to the king and party separately, it seems within the statute; but hereof the other judges doubted. ¶ Holt's opinion seems, however, to be sound law, on the ground that the informer being bound, when the king is joined with him, ought with much greater reason to be bound when he sues by himself; in confirmation of his opinion see Chance v. Adams, 1 Ld. Raym. 78; Tidd's Pract. 8th ed. p. 13.¶

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§ The right of action against an officer for taking insufficient bail, accrues upon the return of *non est investus* on the execution against the principal, and the statute begins to run from that time.

Rice v. Hosmer, 12 Mass. 127; Mather v. Green, 17 Mass. 60; Caesar v. Bradford, 13 Mass. 169. See Miller v. Adams, 16 Mass. 456. g

It seems doubtful, whether a suit by a common informer on a penal statute, which first gives an action to the party grieved, and in his default, after a certain time, to any one who will sue, be within the restraint of these statutes. (a)

Show. 353, 354. ¶ (a) The Court of C. P. has decided that it is. Frederick v. Lookup, *qui tam*, &c.; 4 Burr. 2018; Bull. N. P. 195.¶

It has been held by three judges, that the suing out a *latitat* within the year was a sufficient commencement of the suit to save the limitation of time on a penal statute, because the *latitat* is the original of B. R., and may be continued on record as an original. But Holt held otherwise, for the action being for a penalty given by a statute, the plaintiff might have brought an action of debt by original in B. R., because the statute gives the action; and he held, that there was a difference between a civil action and an action given by statute; for in the first case the suing out a *latitat* within the time, and continuing it afterwards, will be sufficient; but in the other case, if the party proceeds by bill, he ought to file his bill within time, that it may appear so to be upon the record itself.

Carth. 232; Culliford v. Blandford, Show. Rep. 353, S. C. [Upon a writ of error, all the judges in the Exchequer chamber held, that a *latitat* is a kind of original in the King's Bench; 2 Ld. Raym. 833. Accordingly, in two subsequent cases, it was holden to be a good commencement of the suit in a penal action. Bridges v. Knapton, and Hardiman v. Whitaker, cited in 2 Burr. 950; 3 Burr. 1423; Cowp. 454. But if it be replied to a plea of the statute of limitations, the defendant, in order to maintain his plea, may aver the *real* time of suing it out, in opposition to the *teste*. 2 Burr. 950; 3 Burr. 1423.] {Vide Peake N. P. 209, Snell v. Philips; Ibid. 164, Maugham v. Walker.}

In debt *qui tam* on the statute 1 H. 5, c. 4, for practising as an attorney during the time he was under-sheriff, the point was on the 31 Eliz. c. 5, which limits informers and plaintiffs in popular actions to a year; the defendant in this case was taken upon a *testatum cap.* that bore *teste* 13 January, when his office expired in November twelvemonth before, and so a year and two months after his offence; but by antedating the original, and making it of Mich. term before, it was brought within the year; and North and Wyndham said it was well warranted by the practice of the court, and therefore they would make no rule to stop the filing of the original; but Atkins was against it, and said it was nothing but a practice to evade the statute of 31 Eliz. c. 5. (b)

Trin. 3 Car. 2, in C. B., Greenwood v. Scott. ¶ (b) Such a proceeding as this, it is suggested, would not at the present day be allowed, but the court would inquire into the actual time of suing the writ.¶

Serjeant Hawkins makes it a question, Whether the clause in 31 Eliz. c. 5, § 4, by which it is enacted, *That nothing in the said act contained shall extend to champerty, king's customs, or forestalling, &c., but that every such offence may be laid in any county, any thing in the said act to the contrary notwithstanding*, doth except the said offences out of the above-recited clause, relating to the time within which suits on penal statutes must be brought; for the words above mentioned, viz. *but that every such offence may be laid in any county*, seem to restrain the generality of the precedent

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words, which say, that nothing in the act contained shall extend to such offences.

2 Hawk. P. C. c. 26, § 50.

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1. Of Actions of Assault and Battery.

By the 21 Jac. 1, c. 16: "All actions of trespass, of assault, battery, wounding, imprisonment, or any of them, shall be commenced and sued within *four* years next after the cause of such actions or suits, and not after."

It seems, that if a man brings trespass for beating his servant, *per quod servitium amisit*, this is not such an action as is within this branch of the statute, being founded on the special damage.

Salk. 206, pl. 5; 5 Mod. 74; Ld. Raym. 831, ||but see *contra*, Cooke v. Sayer, 2 Wils. 85; Bull. N. P. 128; Macfadzen v. Olivant, 6 East, 398, and Blansh. on Lim. 95, *et seq.*||

If to an action of assault, battery, and imprisonment, the defendant pleads, as to the assault and imprisonment, the statute of limitations, without answering particularly to the battery, otherwise than by using the words *transgressio prædicta*, it is sufficient, for these words are an answer to the whole.(a)

Lev. 31. (a) But the general form and best mode of pleading is to say, not guilty of the trespass aforesaid, &c.

In trespass for assault and battery, the defendant pleaded *non culp. infra sex annos* by mistake, and not according to the statute, which is but four years; and upon demurrer it was adjudged an ill plea: for if it be considered as at common law, there was no such plea: if on the statute, the act is not pursued; and the defendant could not take issue on it, for *quod est culp. infra sex annos* is an issue immaterial, because it may be the jury might find him not guilty *infra quatuor annos*, but guilty *infra sex annos*.

2 Salk. 423, pl. 11, Blackmore v. Tidderl; 6 Mod. 240, S. C.; 2 Ld. Raym. 1099, S. C.

2. Of Actions of Slander.

By the 21 Jac. 1, c. 16, § 3, it is enacted, "That all actions on the case for words shall be commenced and sued within *two* years next after the words spoken, and not after."

In the construction of this branch of the statute it hath been holden,

That an action of *scandalum magnatum* is not within the statute.

Lit. Rep. 342; 3 Keb. 645; ||and see 2 Stark. Ev. 80, n. (g).||

That it extends not to actions for slander of title, for that is not properly slander, but a cause of damage, and the slander intended by the statute is to the person.

Cro. Car. 141, Law and Harwood, adjudged, Ley, 82; Palm. 530; Jon. 196, S. C., adjudged.

That if the words are of themselves actionable, without the necessity of alleging special damage, although a loss ensues, yet in this case the statute of limitations is a good bar; but if the words at the time of the speaking of them are not actionable, but a subsequent loss ensues, which entitles the plaintiff to his action, in such case the statute is no bar.

Sid. 95, Saunders v. Edwards; Raym. 61, S. C.; and vide 3 Mod. 111, S. C. cited.

As, for calling a woman whore, by which she lost her marriage seven

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years afterwards, the statute is no bar; for it is not the words, but the special damage, which is the cause of action in this case.

Sid. 95, Salk. 206, pl. 5, S. P. ¶Tonson v. Springe, 1 Rol. Abr. 35, l. 15.¶ It was incumbent upon the plaintiff to prove the special damage; otherwise the action would not have lain for the words. ¶And see Moore v. Meagher, in error, Exch. Ch. 1 Taunt. 39.¶

Also, for calling a man thief, and procuring him to be indicted and imprisoned for felony, and the defendant is found guilty of the whole; the statute in this case seems no bar, for the action is not for words barely, but is an action upon the case in nature of a conspiracy.

Cro. Car. 163, Topsal and Edwards, adjudged on the branch of this statute that says, that for slanderous words the plaintiff shall have no more costs than damages, &c.

That if an action for words be founded upon an indictment, or other matter of record, it is not within the statute, but such action may be brought at any time.

Sid. 95.

In an action for words, the defendant pleaded *non locutus est verba prædicta infra duos annos*; and upon a special demurrer it was objected, that it ought to have been *non culp. infra duos annos*; for, as it is, it may be the defendant spoke the substantial words of the slander, and yet did not speak all the words; and yet the plaintiff could not have a verdict upon this issue; as, in an action of debt for 10*l.*, if the defendant says *non debet* the 10*l.*, without adding *nec aliquem inde denarium*, it would be naught: but the court held the cases not alike; for in an action of debt, every penny that stands in demand is of equal weight; but here the action is founded upon the substantial words only, and the *verba prædicta* shall refer only to them; and it was held well enough.

Keb. 820, 918, Lidiate and Buttle.

¶In an action of slander, if no notice is given of a defence under the statute of limitations, the plaintiff may give in evidence words spoken more than two years before the commencement of the action.

Brickett v. Davis, 21 Pick. 404.

The statute of limitations must be pleaded in slander as in other cases.

Brand v. Longstreet, 1 South. 325.*g*

3. Of Actions arising upon Contract and founded in Maleficio: And herein,

1. Of what nature or Degree the Action must be so as to be barred by the Statute.

By the 21 Jac. 1, c. 16, § 3, it is enacted, "That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur trover*, and replevin for the taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the end of the then session of parliament, shall be commenced and sued within the time of limitation hereinafter expressed, and not after; that is to say, the said actions upon the case, (other than for slander,) and the said actions of account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*,(a) within three years next after the end of the then session of parliament, or within *six* years next after the cause of such actions or suit, and not after;(b) and the said actions of trespass, of assault,

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battery, wounding, imprisonment, or any of them, within one year next after the end of the then session of parliament, or within *four* years next, after the cause of such actions or suit, and not after; and the said action upon the case for words, within one year after the end of the then session of parliament, or within *two* years next after the words spoken, and not after.

β (a) In an action of trespass *quare clausum fregit*, it seems that although the statute of limitation be not pleaded, the plaintiff will not be permitted to give in evidence any act of trespass which was not committed within the time limited by the statute. *Pierce v. Pickens*, 16 Mass. 470. (b) In the computation of the six years mentioned in the act of limitation, the day on which the cause of action accrued is to be included, as an action might have been commenced on that day. *Presbrey v. Williams*, 15 Mass. 193.g

“Nevertheless, that if in any the said actions or suits judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after (a) reverse the outlawry, that in all such cases, the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

(a) Whether reversed by plea or writ of error, not material, Cro. Car. 294, 5.

“Provided, that if any person or persons, that is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of accounts, actions of debt, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be or shall be, at the time of any such cause of action, given or accrued, fallen or come, within the age of twenty-one years, *feme covert*, *non compos*, imprisoned, or beyond the seas; that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done.”

Winch. 82, Jon. 312.

Here we shall consider and set down such cases, about which there hath been any contest, as to the actions being grounded on a contract or lending, as the statute speaks; those by (b) specialty, as all others of a superior nature, being plainly excepted out of the statute.

(b) But though a bond or specialty be out of the statute, yet it seems to be the practice at this day, where an action is brought on a bond of twenty years' standing, and on which no interest has been paid for that time, to admit the defendant on a plea of *solvit ad diem*, || where interest has been paid more than twenty years back, on the plea of *solvit post diem*, || to give this matter in evidence, which, from the length of time, will be presumptive proof of payment. So, in Chancery, an obligee on a bond of twenty years' standing was refused any relief. Chan. Rep. 78, 98, 106. [Vide tit. Evidence.] {Vide 3 Esp. Rep. 161, *Cole v. Saxby*.} || And see *Oswald v. Legh*, 1 T. R. 270; *Anon.* 6 Mod. 22. A bond may also in some cases be presumed satisfied though twenty years have not elapsed. *Rex v. Stephens*, 1 Burr. 434, n.(a); *Colsell v. Budd*, 1 Camp. 26; 1 T. R. 272; *Tidd's Pract.* 8th ed. p. 18. This presumption is not confined to actions of debt on bond; but has been made after twenty years in an action of debt or *scire facias* on a judgment. *Flower v. Bolingbroke*, 1 Str. 639; *Tidd's Pract.* 18. And in a case where it appeared that the bond was not satisfied, the jury under the particular circumstances, and on account of the great lapse of time, presumed it to have been released. *Washington v. Brymer*, Hil. 42 G. 3, K. B., *Peake's Evid.* *Blanshard on Lim.* 93. ||

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And to this purpose it hath been adjudged, that an action of debt on the 2 & 3 E. 6, c. 13, for not setting out tithes, is not within the statute, the action being grounded on an act of parliament, which is the highest record.

Cro. Car. 513; Talory and Jackson, Saund. 38; 2 Saund. 66; Sid. 305, 415; Keb. 95; 2 Keb. 462.

|| But by the statute 53 Geo. 3, c. 127, s. 5, "No action shall be brought for the recovery of any penalty for the not setting out tithes, nor any suit instituted in any court of equity, or in any ecclesiastical court, to recover the value of any tithes, unless such action be brought, or such suit commenced, within six years from the time when such tithes became due." ||

So, it hath been adjudged, that an action of debt for the arrearages of rent reserved on a lease by indenture, is out of the statute, the lease by indenture being equal to a specialty.

Hutt. 109, Freeman and Stacy; Saund. 38, S. C. cited; 2 Saund. 66, S. C. cited, and S. P. admitted; and there said, that the statute extends to rent reserved on parol leases only. || And see Leigh v. Thornton, 1 Barn. & A. 625; Selw. Ni. Pri. 615; 2 Saund. 67, n. (z). || ¶ An action for rent reserved by indenture of lease, is not within the statute of limitations. Bailey v. Johnson, 16 Johns. 210. ¶

¶ The act of limitations is no bar to an action of debt upon an award under seal, although the submission was not under seal.

Smith v. Lockwood, 7 Wend. 241. ¶

Also it hath been adjudged, that an action of debt for an escape is not within the statute, not only because it is founded *in maleficio*, and arises on a contract in law, which is different from those actions of debt on a lending or contract mentioned in the statute, but also because it is grounded on the 1 R. 2, c. 12, which first gave an action of debt for an escape, (a) there being no remedy for creditors before but by action on the case.

Saund. 37, Jones v. Pope; Lev. 191, S. C. adjudged; 2 Keb. 93, S. C. and Sid. 305, S. C., where it is said, that an action on the case, for an escape, is within the statute; and by Wyndham, debt upon a tally is not within the statute. (a) For this vide 2 Inst. 383, and title *Escape*.

So, it hath been adjudged, that this statute cannot be pleaded to an action of debt brought against a sheriff for money by him levied on a *feri facias*, because the action is founded *in maleficio*, as also upon the judgment on which the *feri facias* issued, which is a matter of record.

Mod. 245, Cockram v. Welby, 212; and 2 Show. Rep. 79, S. C.; 2 Mod. 212, S. C.

It has been adjudged, that an action of debt on an award under the hand and seal of the arbitrator, though the submission was by parol, is not within the statute; for though in strictness the award cannot be said to be equal to a specialty, yet by being under hand and seal it becomes matter of that notoriety, that it cannot be liable to any of the inconveniences the statute was made to prevent; such as perjury in witnesses, and the oppression of defendants when their witnesses are dead, or vouchers lost. Also, it was never intended that the statute should extend to all kinds of actions of debt, but only to those which arose on a *contract or lending*.

2 Saund. 64; Sid. 415; Lev. 273; 2 Keb. 462, 497, 533, S. C.

¶ Cases of bailment and unwritten contracts, when the contract is expressed, and the duties are defined, are not open contracts in the view of the statute of limitations of Alabama.

Maury's Adm'r v. Mason's Adm'r, 8 Port. R. 213. ¶

It hath been adjudged, that the statute does not extend to the writ *de rationabili parte bonorum*, founded on the custom of Nottingham, although it conclude in the *detinet*; for this is an original writ in the register; and

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though it conclude in the *detinet*, is yet a different action to the common action of *detinue* mentioned in the statute, which being frequent in practice, is the *detinue* plainly intended by the statute, and not this, which, being founded on a custom, seldom happens; and as the statute is in derogation of the common law, it ought to be construed strictly.

Hutt. 169, Sherwin and Cartwright; Lit. Rep. 341, S. C. adjudged; Saund. 37; 2 Saund. 64, S. C. cited, and admitted to be law. [Arch. pl. 29.]

An action of debt for a fine of a copyholder is not within the statute.

2 Keb. 536; Lev. 273.

If a man recovers a judgment or sentence in France for money due to him, the debt must be considered here only as a debt by simple contract, and the statute of limitations will run upon it.(a)

2 Vern. 540, *per curiam*; {5 Johns. Rep. 132, Hubbel v. Coudrey, *acc.*} [(a) Judgments in the superior courts of Ireland, since the Union, have in a late case been decided *not* to be records in England; therefore *assumpsit* is maintainable upon them. See Harris v. Saunders, 4 Barn. & C. 411, overruling Collins v. Lord Matthew, 5 East, 473.]

{The limitation of the country in which the action is brought, and not that in which the contract was made or the demand arose, is to be observed.

3 Dall. 373, n.; 1 Cain. 402, Nash v. Tupper; 3 Johns. Rep. 263, Ruggles v. Keeler; 2 Mass. T. Rep. 84, Pearsall v. Dwight.}

β In an action brought on a foreign judgment, or a judgment recovered in another state, the statute is a bar.

Hubbell v. Caudrey, 5 Johns. R. 132; Bissell v. Hall, 11 Johns. 168.g

It seems, that to an *assumpsit* brought by the assignees of a bankrupt for a debt due to the bankrupt, this statute is a good bar; for though the assignment is by force of an act of parliament, yet the assignees stand only in the place of the bankrupt, and can have no other right or remedy than he had.

2 Lev. 166; 3 Keb. 645; Comb. 70; {Willes, 28.}

It hath been adjudged, that this statute is a good plea in bar to an *assumpsit* brought by an attorney for his fees; for though the attorney be of record, yet his fees are not.

3 Lev. 367, Ld. Raym. Oliver and Thomas.

It hath been adjudged, that this statute is a good bar to an action brought against the drawer of a bill of exchange; and that such bill is not of as high a nature as a specialty,(b) neither is it within the exception in the statute relating to merchants' accounts.(c)

Carth. 3, Renew v. Axton. (b) Carth. 226, judged. [(c) Chevely v. Bond, 4 Mod. Rep. 105.]

β The act of limitations may be pleaded as to all rents beyond six years.

Huston v. Wickersham, 2 Watts & S. 314.

Debt upon an award at common law is not within the statute of limitations.

Rank v. Hill, 2 Watts & S. 56.g

2. Whether a Trust or Equitable Demand be within the Statute.

It seems clearly agreed, that, though the statutes of limitations bind the courts of equity, yet a trust(d) is not within these statutes.(e)

March, 129; 2 Salk. 224, pl. 12. β To exempt a trust from the bar of the statute, it must possess the following qualities: 1. It must be a direct trust; 2. It must be of the kind belonging exclusively to the jurisdiction of a court of equity; 3. The question must arise between the trustee and the *cestui que trust*. Lyon v. Marclay, 1 Watts, 275.

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See *Wisner v. Ogden*, 4 Wash. C. C. R. 631; *Rush v. Burr*, 1 Watts, 120; *Finney v. Cochran*, 1 Watts & Serg. 118; *Doebler v. Snavelly*, 5 Watts, 225; *Thompson v. McGraw*, 2 Watts, 161; *Spottswood v. Dandridge*, 4 Hen. & Munf. 139; *Singleton v. Moore, Rice*, Eq. 110; *Talbot v. Todd*, 5 Dana, 199; *Houssal v. Gibbes*, 1 Bail. Eq. 482; *Cooke v. Williams*, 1 Green's Ch. 209; *Paige v. Hughes*, 2 B. Monroe, 438; *Stephen v. Yandle*, 3 Hayw. 221; *Gist v. Heirs of Cattel*, 2 Desaus. 53; *Ramsey v. Deas*, 2 Desaus. 238; *Overstreet v. Bate*, 1 J. J. Marsh. 370; *Pugh's heirs v. Bell's heirs*, 1 J. J. Marsh. 401; *Thomas v. White*, 3 Litt. 177; *Coster v. Murray*, 5 Johns. Ch. 224; *Jones v. Scott*, 1 Russ. & My. 255; *Benzien v. Lenoir*, 1 Car. Law Repos. 508; *Wisner v. Barnett*, 4 Wash. C. C. R. 631; *Turner v. Dobell*, 2 A. K. Marsh. 384; *Bryant v. Puckett*, 3 Hayw. 352; *Shelby v. Shelby*, Cook, 182; *Pinson v. Ivey*, 1 Yerg. 297; *Van Rhyn v. Vincent's Executor*, 1 M'Cord, Ch. 314; *Decouche v. Savetier*, 3 Johns. Ch. 216; *Shelby v. Shelby*, Cooke, 179, 185; *Bryant v. Puckett's Administrator*, 3 Hayw. 252; *Pinson v. Ivey*, 1 Yerg. 296; *Cocke v. M'Ginnin's Adm'r*, Martin & Yerg. 361; *Armstrong's heirs v. Campbell*, 3 Yerg. 201.¶ [(d) But the rule of equity, that the statute of limitations does not bar a trust estate, holds only as between *cestui que trust* and trustees, not between *cestui que trust* and trustee on one side, and strangers on the other; for that would be to make the statute of no force at all; because there is hardly any estate of consequence without such trust, and so the act would never take place: therefore, where a *cestui que trust* and his trustee are both out of possession for the time limited, the party in possession has a good bar against them both. *Per* Lord Hardwicke in the case of *Llewellyn v. Mackworth*, 2 Eq. Ca. Abr. 579, pl. 8. See too *Townshend v. Townshend*, 1 Br. Ch. Rep. 534.] ¶15 Vin. 155, pl. 1, and see 1 Sander's Uses and Trusts, 280, and *Cholmondeley v. Clinton*, 1 Meriv. 257, *et seq.* (c) This only applies to declared trusts, and not to cases where the trustee is appointed by the decree of a court of equity. 2 Scho. and Lef. 633; Com. Dig.; Hardy, Lim. Stat. of, II. 5.¶ The statute of limitations does not run against express trusts, so long as the fiduciary relation exists; but this rule does not apply when there is only an implied trust, and he who has the legal title denies or disclaims it. *Walker v. Walker*, 16 S. & R. 379. And if a trustee take possession of property as his own, during the right of *cestui que trust*, and hold it adversely, lapse of time from that period will constitute a bar in equity. *Terrill v. Murray*, 4 Yerg. 104.¶

And therefore, where the plaintiff, who was the son and executor of Ch. Just. Heath, who was made chief justice at Oxon during the difference between the king and parliament, but never sat at Westminster-hall, exhibited a bill against the defendants, prothonotaries of the K. B. at that time, to have an account of the money, &c., received by them during that time by an implied trust *virtute officii*, to which the defendants pleaded the statute of limitations, the plea was, upon argument, overruled.

Chan. Ca. 20, *Sir Edward Heath v. Henley et al.*; 2 Ld. Raym. 1204.

So, where the plaintiff exhibited a bill to have an account of money received by the defendant from his father, (whose executor he was,) who gave it to him to compound for his estate, sequestered for delinquency at Goldsmiths'-Hall; it was ordered accordingly, the court declaring it a trust, and therefore not within the statute of limitations.

2 Chan. Ca. 26, *Sheldon v. Weldman*; ¶*Warner v. Conduit*, East. T. 6 G. 2, 1733, MS., cited 2 Madd. Chan. 310, note (u).¶

So, where my Lady Hollis lent 100*l.*, and in the note which was given for it mention was made, that it should be disposed of as my lady should direct; and a bill being exhibited for it, the court held it a *depositum* or trust, and decreed payment of it; though otherwise it had been barred by the statute of limitations.

2 Vent. 345.

A charity is not barred by length of time, nor within the statute of limitations.

2 Vern. 399.

¶The crown is not bound by the statute—and therefore in an action on a

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promissory note given by defendant to J S, who was returned *felo de se* by a coroner's inquest, whereupon the note was forfeited to the crown, who granted it to the plaintiff, and the defendant pleaded that the cause of action did not accrue to J S, the *felo de se*, within six years of exhibiting the bill, the plea was held bad after verdict, for it did not show that J S was barred by the statute at the time of his death; and after that time the statute ceased to operate, since the note vested in the crown.

Lambert v. Taylor, 4 Barn. & C. 138.]

So, it hath been held, that a legacy is not within the statute of limitations.

§ The act of limitation may be pleaded against legacies, not charged upon lands, both at law and in equity.

Souzer v. De Meyer, 2 Paige, 574; Kane v. Bloodgood, 7 Johns. Ch. 90, *sed vide contra*, Arden v. Arden, 1 Johns. Ch. 313; Wilson v. Kilcannon, 4 Hayw. 185; Irby v. M'Crae, 4 Desaus. 422; Myers v. Skrine, Harp. Eq. 179. *g*

|| But though the statutes of limitations do not expressly apply to legacies, yet courts of equity will, after a long lapse of time, presume payment, and twenty years unexplained seems by analogy to raise a presumption of payment, unless repelled by evidence of particular circumstances. (a) But if the legatee allege that he knew not of his right, it should seem that the presumption cannot be raised. (b)

(a) Jones v. Tuberville, 2 Ves. jun. 11; Higgins v. Crawford, 2 Ibid. 571; Pickering v. Stamford, 2 Ves. jun. 272; 4 Bro. C. C. 214; Montresor v. Williams, 1 Roper on Leg. 792; and see Lee v. Brown, 4 Ves. 362; Lovell on Wills, 316, n. (8). Blanshard on Lim. 79; § Thompson v. McGraw, 2 Watts, 161; Doebler v. Snively, 5 Watts, 225. *g* (b) Ord v. Smith, Sel. Ca. Ch. II.; and see 1 Fonblanque's Tr. Eq. 332, note (r).] § Where the legacy claimed was a debt due by the executor himself, and in his account settled more than six years before the commencement of the action, he refused to charge himself with it, and always denied his liability; held, that he was entitled to the benefit of the act of limitations. App v. Driesbach, 2 Rawle, 287. *g*

It seems to be the doctrine of courts of equity, that mortgages are not within the statute of limitations; yet, where a man comes in at an old hand, it hath been sometimes decreed, that the possessor should account no farther than for the profits made in his own time, to discourage the stirring in such dormant titles. Also the courts have allowed length of time to be pleaded in bar, where the mortgaged estate hath descended as a fee without entry or claim from the mortgagor, and where the possessor would be entangled in a long account; and in these cases the statute of limitations hath been mentioned as a proper direction to go by.

Chan. Ca. 102, but now by the 7 Geo. 2, c. 20, the redemption of mortgages is expressly limited to 20 years, which vide tit. *Mortgages*. || This seems a mistake, for the 7 Geo. 2, c. 20, entitled, "An Act for the more easy redemption and foreclosure of mortgages," does not even mention a limitation of time to equities of redemption: however, it is now settled, from analogy to the statute of James, in case of lands, that after twenty years a right of redemption will be presumed to be abandoned. See Clapham v. Bower, 1 Ch. Rep. 286; White v. Ewer, 2 Vent. 340; Floyer v. Lavington, 1 Peere Wms. 270; Meldicot v. O'Donel, 1 Ball & Beatty, 156; 1 Saunderson's Uses and Trusts, 281. || [And therefore, to a bill to redeem a mortgage, if the mortgagee has been in possession twenty years, the statute of limitations may be pleaded. Aggas v. Pickerell, 3 Atk. 225. And indeed a demurrer has been allowed in this case, where the possession has appeared upon the face of the bill, 3 P. Wms. 287, note B.; 1 Vern. 418; Bumb. 54, though later cases seem to be to the contrary; Aggas v. Pickerell, *ubi supra*; Deloraine v. Smith, 3 Br. Ch. Rep. 634;] {2 Day, 363, Bulkley v. Bulkley. See 1 Wash. 17—19, Ross v. Norvell.} || See Redesdale's Tr. Pl. 213, 2d ed. *affirm*. Welsh mortgages are redeemable at any time, Lawley v. Hooper, 3 Atk. 280. But if a man be permitted to hold over twenty years after the debt is fully paid, Lord Eldon has said, "then such a holding may, I think, amount to saying that he is

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barred, upon the same principle as if it were a mortgage of an ordinary nature." *Fenwick v. Reed*, 1 Mer. 125; and see 1 Madd. Chancery, 519, n. (x).] β The statute will run against a mortgage of negroes, and protect a purchaser. *Frazer v. M'Pherson*, 3 Desaus. 414; *Young v. Wiseman*, 7 Monr. 272. γ

3. At what Time the Right of Action shall be said to have accrued, before which the Statute can be no Bar.

This statute cannot be a bar, unless the six years are expired after there hath been complete cause of action; as, if a man promise to pay 10*l.* to J S when he comes from Rome, or when he marries, and ten years after J S marry, or come from Rome, the right of action accrues from the happening of the contingency, from which time the statute shall be a bar, and not from the time of the promise.

Godb. 437; [*Fenton v. Emblers*, 1 Bl. Rep. 353;] $\parallel$ 1 Hen. Bl. 631; Com. Dig. *Temps*, G. 6; *Tidd's Pract.* 8th ed. 16. $\parallel$

So, in action on the case, wherein the plaintiff declared, that, in consideration that he would forbear to sue the defendant for some sheep killed by his (the defendant's) dog, the defendant promised to make him satisfaction upon request, and that such a time he requested, &c.; it was held, that the right of action accrued from the request, and not from the time of killing the sheep; and that therefore the defendant could not plead the statute of limitations, the request being within six years, though the killing the sheep, and promise of satisfaction, was long before.

Godb. 437, *Shutford v. Burroughs*, adjudged; $\parallel$ 1 Hen. Bl. 631; *Tidd's Pract.* 8th ed. 16. $\parallel$

$\parallel$ And where the breach of a contract is attended with special damage, the statute runs from the time of the breach, which is the gist of the action, and not from the time when it was discovered, or the damage arose. Thus, where plaintiff employed defendant, in 1808, to lay out money for him in the purchase of an annuity; and discovered, in February, 1814, that the security provided by the defendant was void within the defendant's own knowledge at the time of the purchase, and, in January, 1820, sued defendant in *assumpsit*, for breach of an implied contract to provide good security; it was held, that the action proceeding on the contract, and not on the *fraud*, was too late, and the statute was a good bar.

Browne v. Howard, 2 Bro. & B. 73; *Short v. M'Carthy*, 3 Barn. & A. 626; *Battle v. Faulkner*, 3 Barn. & A. 288; *Granger v. George*, 5 Barn. & C. 149; *Howell v. Young*, 5 Barn. & C. 259. $\parallel$

So, in *assumpsit*, in consideration that the plaintiff would deliver to the defendant such a deed, the defendant promised, that he would re-deliver it to him on request; and also in consideration that he had, upon request, delivered to him another deed, the defendant promised to pay him 40*l.*, and alleges, that he had delivered to him the first deed, and although at such a day afterwards he made request, yet he had not re-delivered the first deed, nor paid the 40*l.*: the defendant pleads the statute of limitations, and that he did not promise within six years before the action brought; whereupon the plaintiff demurs: for the cause of action, as to the first deed, did not arise upon the promise, but upon the refusal after request; and the request was within six years; and so held the court.

Lev. 48, *Webb and Martin*; Sid. 66; Keb. 177, S. C. $\parallel$ In case of notes payable on or after demand, the statute runs from the time of demand, not from the date. *Holmes v. Kerrison*, 2 Taunt. 323; *Thorpe v. Booth*, 1 Ry. & Moo. 388. $\parallel$

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So, in *assumpsit*, in consideration that the plaintiff, at the defendant's request, would receive A and B into his house *ut hospites*, and diet them, the defendant promised, &c., *non assumpsit infra sex annos* was pleaded; the plaintiff demurred, and held no plea; for the defendant cannot in such case plead *non assumpsit infra sex annos*,^(a) but *actio non accrevit infra sex annos*; for it is not material when the promise was made, if the cause of action be within six years, and the dieting might be long afterwards.

2 Salk. 493, pl. 9; 2 Ld. Raym. 838, Gould and Johnson. [So, in equity, 3 Atk. 70.] (a) For this vide 1 Vent. 191; 3 Keb. 613.

An executor, several years before the action brought, left some household stuff in the house, by the consent of the heir, who used them after; and within six years of the action brought, the executor demands the goods, and the heir refused to let him have them; whereupon trover was brought, and the statute of limitations pleaded. And *per cur.*, the user before the demand was no conversion, nor evidence of it, for it was the consent of the executor till then, and the demand being within six years, the refusal which ensued it, and is the only evidence of a conversion in the case, was within the six years; and (b) where a trover is before six years, and a conversion after, the statute cannot be pleaded.

7 Mod. 99, Wortley Montague v. Lord Sandwich. || Compton v. Chandlees, 4 Esp. N. P. R. 20; Granger v. George, 5 Barn. & C. 149; Topham v. Braddick, 1 Taunt. 572. And it appears now to be fully settled that the statute does not begin to run until the happening of the last event necessary to complete the cause of action. See Hibbert and others v. Martin, 1 Camp. 539. || (b) But for this vide Cro. Car. 245, 246, 333; Jon. 252; 3 Mod. 111.

In an action upon the case against an executor, the plaintiff declares, that upon a marriage treaty it was agreed between the plaintiff and testator, that he should pay to the plaintiff 100*l.*, and whilst that should be unpaid he should pay the plaintiff 10*l.* *per annum*, which agreement was made *anno* 1618, and the action was brought for all the arrears by the space of twenty-eight years. The defendant pleaded the statute of limitations; and on demurrer it was held, that all could not be barred by the statute; and therefore the plaintiff had judgment.

Allen, 62, Harvey and Thorne, adjudged, nobody appearing for the defendant.

§ A son forbore to press his claim against his father, in consequence of an intimation that it would be satisfied after his father's death: held, that the act of limitation did not begin to run against any part of it, until after the father's death.

Price v. Price, 1 Cheves' Eq. R. 167.*g*

Trespass for imprisoning the plaintiff, and detaining him in prison from 32 Car. 2, till the third of April, 4 Jac. 2. The defendant pleaded as to all till 32 Car. 2, such a day, *non culp. infra quatuor annos*, and as to the rest, a plaint, and *capias* issued; the plaintiff demurred. *Et per Curiam*, though the imprisonment be complained of as one continued imprisonment, yet the defendant may divide the time, and plead the statute as to part; and the plaintiff may reply the continuance; therefore, as to this, judgment was given against the plaintiff upon his demurrer, but for him as to the rest, because the *capias* was awarded by the court *ex officio*, and it did not appear that the defendant meddled in it.

2 Salk. 420, pl. 3, Coventry v. Apsley; and vide 3 Mod. 110; Comb. 26.

In case of seamen, the duty does not arise from the contract, but from the

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service done; and therefore, though the contract be above six years, if any part of the service be within that time, it is out of the statute.

6 Mod. 26. β The statute does not begin to run against the claim of an attorney for professional services, before a demand has been made, or the professional relation has been dissolved. *Foster v. Jack*, 4 Watts, 334; 2 C. & M. 629; 4 Tyrw. 445. γ

[A bill of exchange was drawn, payable at a certain future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill. The payee was allowed to recover the money on an action for money lent, although six years had elapsed since the time when the loan was advanced; the statute of limitations beginning to operate only from the time when the money was to be repaid, that is, when the bill became due.

Wittersheim v. Countess Dowager of Carlisle, 1 H. Bl. Rep. 631;] [Holmes v. Kerrison, 2 Taunt. 323.]

β When an action is brought on a contract to perform certain work, the act of limitations begins to run from the time when the work was completed, and not from the time the plaintiff received damages from its imperfect execution.

Rankin v. Woodworth, 3 Penns. R. 48.

The length of time requisite to bar a claim by the act of limitations is not increased by a transfer of the claim to another.

M'Euen v. Girard, 2 Rawle, 311.

Where the wife had a separate estate, and lent money to her husband; held, that the act of limitations does not begin to run against that debt, until the death of the husband.

Towers v. Hagner, 3 Whart. 48.

Where a defendant had subscribed for a stock in a company, and promised to pay the amount of such stock "in such manner, at such times, and in such proportions as shall be determined by the president and managers of such company;" held, that the statute does not begin to run until such determination and demand made by the company, as the act of incorporation directs.

Sinkler v. The Indiana, &c. Turnpike Co., 3 Penns. R. 149.

When there has been a secret fraud, the statute of limitations commences running only from the time of its discovery.

Pennock v. Freeman, 1 Watts, 401. See *Leinhart v. Forringer*, 1 Penns. 492; *Harrisburg Bank v. Forster*, 8 Watts, 12; *Buist v. Smyth*, 2 Desaus. 215; *Payne v. Hathaway*, 3 Verm. 212; *Bertine v. Varian*, 1 Edw. R. 343; *First Mass. Turnpike v. Field*, 3 Mass. 201; *Homer v. Fish*, 1 Pick. 435; *Welles v. Fish*, 3 Pick. 74; *Forman v. Brooks*, 9 Pick. 212; *Ex parte Bolton*, 1 Mont. & Ayr. 60.

On a parol promise to guaranty the payment of a mortgage payable by instalments, the statute commences to run only from the year after the last instalment became due.

Overton v. Tracy, 14 S. & R. 311.

The mere statement of an account before auditors for the purpose of facilitating the examination of matters before them, is not a revival of a demand barred by the act of limitations.

Maury's Administrator v. Mason's Administrator, 8 Port. R. 213.

Where the purchaser of land, subject to a mortgage given by a former owner, and duly recorded, recognised the right of the mortgagee within twenty years previous to the complainant's bill to foreclose the mortgage;

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held, that neither such purchaser, nor those who derived their title to the premises under him, subsequently to such recognition, could set up the statute of limitations in bar of the suit although the mortgage had been due more than twenty years.

Hyer v. Pruyn, 7 Paige, 465.

A promise to settle an account, is an admission of a subsisting liability, and an engagement to pay any balance which may be found due upon a settlement, and repels the plea of the act of limitations.

M'Lin v. M'Namara, 2 Dev. & Bat. Eq. 82.

Statute does not run in cases of voluntary conveyances, void against creditors.

Buist v. Smyth, 2 Desaus. 215.

Ignorance of rights, and fraud and concealment, will prevent the operation of the statute.

Bertine v. Varian, 1 Edw. 343.

The statute does not run against an equity founded on a fraud, while the person against whom the equity is claimed keeps the fraud concealed from the party claiming the equity.

Payne v. Hathaway, 3 Vern. 212; *Ex parte Bolton*, 1 Mont. & Ayr. 60.

The statute does not run so as to protect a legatee against his liability for the testator's debts, until the remedy has been exhausted against the executor; until then no cause of action accrued against him.

M'Mullen v. Brown, 2 Hill's Ch. 461. See *Walker v. Bradley*, 3 Pick. 261; *Wood v. Leland*, 1 Metc. 387.

In cases of mistake, the time of limitation begins to run from the time of discovery of the mistake.

Brooksbank v. Smith, 2 Y. & Coll. 58.

In trover the statute begins to run from the time of the conversion, and not from the sale of the property found.

Denys v. Shuckburgh, 4 Y. & Coll. 42. See *Haslett's Adm'r v. Glenn*, 7 Harr. & J. 14; 1 Tenn. R. 22.

When the rents of a mine are reserved to be paid in produce in specie, the profits will be considered as accruing to the lessor at the time of receiving such produce, and not at the time of its sale; and therefore the statute will begin to run from the time of such receipt and not from the time of the sale.

Denys v. Shuckburgh, 4 Y. & Coll. 42.

On the fourth day of June, 1812, A B devised a rent-charge as a salary for a schoolmaster, to be appointed by the owner for the time being of the estate on which the rent was charged. A schoolmaster was never appointed. In 1839, an information was filed to carry this trust in execution, to which the statute of limitation was pleaded. Held, that the statute did not begin to run until after a schoolmaster was appointed.

Attorney-General v. Persse, 2 Dru. & War. 67.

When an action will not lie without making a previous demand, as, for example, on a promise to deliver goods or to perform service on demand the statute begins to run from the time of making the demand.(a) In such case, however, the demand must be made in reasonable time, and, when no cause of delay is shown, it ought to be made within the time limited by the statute for bringing the action.(b)

(a) *Little v. Blunt*, 9 Pick. 488. (b) *Codman v. Rogers*, 10 Pick. 112.

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The cause of action against an officer, for not paying over moneys collected on execution, does not accrue till demand made; and that is the period when the statute of limitations begins to run against such action.

Hutchins v. Parkhurst, 1 Aik. 258.

The act of limitations begins to run from the time the cause of action accrues, and not from the time of making the promise.

Murdock v. Winter's Adm'r, 1 Harr. & Gill, 471; *Payne v. Webster*, 1 Verm. 101.

A note payable on demand is payable from its date ;(a) and so is a note payable "when called on to do so."(b)

(a) *Ruff's Adm'r v. Bull*, 7 Harr. & J. 14. (b) *Darnall's Executors v. Magruder*, 1 Harr. & Gill, 439.

When a note is payable on demand after a given day, the statute of limitations commences running only from the time of the demand.

Wenman v. Mohawk Ins. Co., 13 Wend. 267.

The statute of limitations does not begin to run until the cause of action has accrued.

Payne v. Webster, 1 Verm. R. 101; *Picquet v. Curtis*, 1 Sumn. 478; *Astor v. Girard*, 4 Wash. C. C. R. 711; *Mayfield v. Seawell*, *Cooke's R.* 437; *Emery v. Day*, 1 C. M. & R. 245; 4 Tyrw. 695.

When a principal promises to save a surety harmless, and the surety is sued and charged in execution, the promise to indemnify is broken, and an action may be maintained without the debt having been paid by the surety.

Powell v. Smith, 8 Johns. 249.

{Goods were taken on an execution, which was afterwards set aside for irregularity; an action of trover was brought, and the defendant pleaded the statute of limitations. It was held, that the execution, being irregular, was a nullity; and that the time when the statute began to operate was from the first taking of the goods, and not from the time when the execution was set aside.

3 Johns. Rep. 523, *Read v. Markle*.}

4. In what Court the Demand must be made, or what Courts are bound by the Statute.

It is clearly agreed, that the statute of limitations is a good plea in a court of equity; but it seems the safest way for him who pleads it, in his answer, also to say, that he has paid the money; because, otherwise, the court supposes a trust between the plaintiff and defendant, and that the money is a *depositum* in the hands of the defendant for the benefit of the plaintiff; and the statute of limitations, as has been observed, does not reach trusts.

March, 129; 2 *Salk*. 424, pl. 13. β Courts of equity are bound by the act of limitations in all cases of bailments, loans, powers, deposits, and the like, though express trusts, when the remedies are concurrent at law and in equity. *Armstrong v. Campbell*, 3 *Yerg.* 201. See *Smith v. Carney*, 1 *Lit.* 296; *Wright v. Wright*, 2 *Lit.* 8; *Codman v. Rogers*, 10 *Pick.* 112; *Breckenridge v. Churchill*, 3 *J. J. Marsh.* 15; *Frame v. Kenny*, 2 *A. K. Marsh.* 145; *M'Dowell v. Heath*, 3 *A. K. Marsh.* 223; *Thompson v. Blair*, 3 *Murph.* 583; *Perkins v. Hays*, *Cook*, 170; *Watkins v. Harwood*, 2 *Gill & Johns.* 307; *Bell v. Bemen*, 3 *Murph.* 273; *Long's Administrator v. White's Administrators*, 5 *J. J. Marsh.* 231; *Reeves v. Dougherty*, 7 *Yerg.* 222; *Walker v. Smith*, 8 *Yerg.* 238; *Saunders v. Gatlin*, 1 *Dev. & Bat. Eq.* 95; *Ex parte Hanks*, 1 *Cheves' Eq.* 203; *Ridley v. Hetman*, 10 *Ohio*, 524; *Tiernan v. Rescaniere's Adm'r*, 10 *Gill & Johns.* 218; *Humbert v. Trinity Church*, 24 *Wend.* 587; *Bertine v. Varian*, 1 *Edw.* 343; *Terrill v. Murry*, 4 *Yerg.* 104; *Pratt v. Northam*, 5 *Mason*, 95; *Sherwood v. Sutton*, 5 *Mason*, 143; *Allen v. Beall*, 3 *A. K. Marsh.* 554; *Lewis v. Marshall*, 5 *Pet. R.* 470; *Miller v. M'Intyre*, 6 *Pet. R.* 61; *Hughson v. Mandeville*, 4 *Desaus.* 92; *Lansing*

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v. Starr, 2 Johns. Ch. 150; Elmendorf v. Taylor, 10 Wheat. 176; M'Crea v. Purnort, 16 Wend. 460; Dorsey v. Dorsey, 6 Gill & Johns. 12; Hepburn's case, 3 Bland, 95; Crutcher v. Trabue, 5 Dana, 82; Whitney v. Whitney, 5 Dana, 331; Farnam v. Brooks, 9 Pick. 212; Bank of U. S. v. Daniels, 12 Pet. R. 32; Baker v. Biddle, Bald. R. 419; Coulson v. Walton, 6 Pet. 62.g

[To a bill, on an equitable title to a presentation to a living, seeking to compel the defendant to resign, plenarty six months before the bill was filed may be pleaded in bar; the statute of Westminster the second being considered for this purpose as a statute of limitation, in bar of an equitable as well as of a legal demand. But if a *quare impedit* is brought before the six months are expired, though the bill is filed after, it may, in some cases, be a ground for the court to interfere, and, consequently, plenarty would not in such cases be pleadable in bar.

Gardner v. Griffith, 2 P. Wms. 403; Boteler v. Allington, 3 Atk. 458; [Redesd. Tr. Pl. 2d ed. p. 213; and see 2 Madd. Chan. 311.]

If a bill charges a fraud, and that the fraud was not discovered till within six years before the filing of the bill, the statute of limitations is not a good plea, unless the defendant denies the fraud, or avers that the fraud, if any, was discovered within six years before filing the bill.

South Sea Company v. Wymondsell, 3 P. Wms. 143. § When the defendant in equity pleads the statute of limitations, and the defendant comes within any of the exceptions of the act, he will not be entitled to the benefit of such exceptions, unless he sets them forth in his replication. Lewis's Executor v. Bacon's Legatee, 3 Hen. & Munf. 89.g [Redesd. Tr. Pl. 218, 2d edit.; see the case cited 2 Madd. Chan. 309, note (a), and Clarke v. Cogley, 2 Cox. 173.] But even at law, fraud will not prevent the statute of limitations from operating, though discovered by the plaintiff within six years before the commencement, unless it can be shown that the defendant was consulant of it. Bree v. Holbech, Dougl. 655. {At law, however, as well as in equity, if a plaintiff is prevented from obtaining a knowledge that he has a cause of action by a fraudulent concealment on the part of the defendant, he will not be barred by the statute, if he commences his action within six years after the fraud is discovered. Therefore, where the defendants contracted to complete a turnpike road in a particular manner, but, though they made the road, they did not complete it agreeably to their contract, but executed their work fraudulently and deceitfully, so that the breach of the contract was not discovered until a long time after it was to be performed, and the action for the breach was commenced within six years after the discovery of the fraud, the statute was held to be no bar. For the cause of action ought not to be considered as having accrued, until the plaintiff could obtain the knowledge that he had a cause of action. 3 Mass. T. Rep. 201, First Massachusetts' Turnpike Corporation v. Field.} [And now, at law, even if it can be shown that the defendant was consulant of it, it will not prevent the statute running from the time the breach of contract actually took place. Buchanan v. Brown, Cook, 185; Egleberger v. Kibler, 1 Hill's Ch. 191; Haywood v. Marsh, 6 Yerg. 60; Pugh v. Bell, 1 J. J. Marsh. 401; Crane v. Prather, 4 J. J. Marsh. 77; Van Rhyn v. Vincent's Executor, 1 M'Cord, Ch. 314; Croft v. Arthur, 3 Desaus. 223; Wamburzee v. Kennedy, 4 Desaus. 474; Shield v. Anderson, 2 Leigh, 729.g See Howel v. Young, 5 Barn. & C. 259; and ante.]

§ When a bill in chancery charges circumstances to take the case out of the statute of limitations, the plea of the statute is no bar unless it be supported by an answer denying or destroying the force of those circumstances.

Bloodgood v. Kane, 8 Cowen, 360.g

Upon a bill for discovery of a title, charging fraud, and praying possession, the statute of limitations alone is not a good plea to the discovery; for the defendant must answer to the charge of fraud.

Bicknell v. Gough, 2 Atk. 558.]

[If, however, it appear that the circumstances of fraud imputed were known to the party, and that with such knowledge he has lain by a con-

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siderable time ; in such case, length of time may be objected, for otherwise the mere imputation of fraud might operate as a fraud, as the evidence might be lost by which the imputation might have been repelled.

Shelly v. Brewster, Rolls, T. 1795; Weston v. Cartwright, Sel. Ca. Chan. 34; Fonbl. Eq. 1, 330 note; and see Alden v. Gregory, 2 Eden, 280; Whalley v. Whalley, 1 Mer. 436. ¶ In cases of fraud the act of limitation begins to run from the time of the discovery of the fraud. Croft v. Arthur, 3 Desaus. 223; Wamburzee v. Kennedy, 4 Desaus. 474; Buchanan v. Brown, Cook, 185; Van Rhyn v. Vincent's Executor, 1 McCord, Ch. 314; Pugh v. Bell, 1 J. J. Marsh. 401; Crane v. Feather, 4 J. J. Marsh. 77; Hadix v. Davison, 3 Monr. 40; Shield v. Anderson, 3 Leigh, 729; Haywood v. Marsh, 6 Yerg. 60; Eigelberger v. Kibler, 1 Hill's Ch. 121.g

[Although the statute of limitations is a bar in equity to the claim of a debt, it is not to a discovery when the debt became due; for, if that is set forth, it will appear to the court whether the time limited by the statute is elapsed.]

Mackworth v. Clifton, 2 Atk. 51.

The statute of limitations may be pleaded to a bill of revivor, if the proper representative does not proceed within six years after abatement of a suit, provided there has been no decree.

Hollingshead's case, 1 P. Wms. 742.]

¶ The shortest period which in equity is a bar to a suit respecting real estate is twenty years, and this is in analogy to limitation in actions at law.

Hawley v. Cramer, 4 Cowen, 718; Reed v. Bullock, Lit. Sel. Cas. 511; Hinton v. Fox, 3 Lit. 381; Elmendorf v. Taylor, 10 Wheat. 176; Floyd v. Johnson, 2 Lit. 112.g

But it seems to be agreed, that the statute of limitations is no plea in the court of admiralty, or spiritual court, where they proceed according to their law, and in a matter in which they have consueance.

6 Mod. 25, 26, 76; 2 Salk. 424, pl. 12; 3 Keb. 366, 392.

Therefore it hath been agreed, that for a suit upon a contract *super altum mare*, no prohibition should go upon their refusal of a plea of the statute of limitations.

6 Mod. 26.

¶ Courts of admiralty will not entertain suits upon stale demands; and a demand will be considered stale when there has been a delay of twelve years, unless explained.

Willard v. Dorr, 3 Mason, 161. See The Brig Sarah Ann, 2 Sumn. 206; Brown v. Jones, 2 Gallis. 477; The Harmony, 1 Gallis. 123.g

So, it has been held not to be pleadable to a proceeding in the spiritual court, *pro violenta manuum injectione super clericum*, because the proceeding is *pro reformatione morum*, and not for damages.

2 Salk. 424, pl. 12.

It has been doubted, whether, to a suit in the admiralty for mariners' wages, this statute is a good plea; because it is said, that this is a matter properly determinable at common law; and the allowing the admiralty jurisdiction therein, only a matter of indulgence.

2 Salk. 424, pl. 12; 6 Mod. 25.

But this is now settled by the 4 & 5 Ann. c. 16, by which it is enacted, "That all suits and actions in the court of admiralty for seamen's wages, shall be commenced and sued within six years next after the cause of such suits or actions shall accrue, and not after."

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[With respect to certain suits in the spiritual court, it is enacted by st. 27 G. 3, c. 44, that "no suit for defamatory words shall be commenced in any of the ecclesiastical courts, unless the same shall be commenced within six calendar months from the time when such defamatory words shall have been uttered." And by § 2, "no suit shall be commenced in any ecclesiastical court for fornication, or incontinence, or for striking or brawling in any church or churchyard, after the expiration of eight calendar months from the time when such offence shall have been committed."]

(E) Of the Exceptions in the Statute 21 Jac. 1, c. 16, and what will save a Bar thereof: And herein,

1. *What Actions are within the Exceptions of the Statutes.*

As to this, it hath been adjudged, that the last proviso in the statute not only extends to those actions therein enumerated, but also to an *assumpsit*, though not mentioned, and to all other actions on the case, being of equal mischief, and plainly within the intention of the legislature.

Cro. Car. 245, 333; 2 Saund. 120; 2 Mod. 71; Sid. 453. Debt upon escape is out of the statute, Saund. 37; but an action on the case for an escape is not. Sid. 305. ¶ The words in this proviso extend to actions of *assumpsit* for unliquidated damages. *Piggott v. Rush*, 6 Nev. & M. 376; 4 Adol. & Ell. 912. *g* So is debt for not setting out of tithes, for these are not grounded upon any contract. Cro. Car. 515; Hutt. 109. ¶ As has been shown, *ante*, p. 377, actions for not setting out tithes must now, by 53 G. 3, c. 127, s. 5, be brought within six years from the time when such tithes became due. ||

2. *Of the Exception in relation to Infants, &c.*

As to this it hath been holden, that the statute being general, infants had been included, had they not been particularly excepted.

Lev. 31.

It hath been holden, that if an infant, during his infancy, by his guardian, brings an action, the defendant cannot plead the statute of limitations; although the cause of action accrued six years before, and the words of the statute are, *That after his coming of age, &c.*

2 Saund. 121 a.

It hath been held in Chancery, that if one receives the profits of an infant's estate, and six years after his coming of age he brings a bill for an account, the statute of limitations is as much a bar to such a suit as if he had brought an action of account at common law; for this receipt of the profits of an infant's estate is not such a trust as, being a creature of the court of equity, the statute shall be no bar to; for he might have had his action of account against the defendant at law, and therefore no necessity to come into this court for the account; for the reason why bills for an account are brought here, is from the nature of the demand, and that the party may have a discovery of books, papers, and the party's oath, for the more easy taking of the account, which cannot be so well done at law. But if the infant lies by for six years after he comes of age, as he is barred of his action of account at law, so shall he be of his remedy in this court.

Abr. Eq. 304, *Lockey v. Lockey*.

¶ And in equity, the interest of infants is so far taken care of, that they are allowed a day after their full age before a decree of foreclosure is allowed to be made against them.

Mallack v. Galton, 3 P. Wms. 352.

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But if an executor, or administrator, or trustee for an infant, neglect to sue within six years, the statute of limitations binds the infant.

Wych v. The East India Company, 3 P. Wms. 309. || β See *Weddle v. Robertson*, 6 Watts, 486. γ

β When the husband conveys lands without joining the wife in the deed, the statute of limitations does not begin to run against her until after the death of the husband.

Culler v. Motzer, 13 S. & R. 256.

A contract was entered into between husband and wife, after marriage, which, by the law of the country where it was made, was valid, by which he promised to pay her certain sums of money which he borrowed of her. In an action by her against his executors, held, that the act of limitation did not begin to run until after his death.

Dougherty v. Snyder, 15 S. & R. 84.

The disability of marriage cannot be added to the prior disability of infancy, to avoid the operation of the statute.

Carlisle v. Stitler, 1 Penns. 6; *Rankin v. Tenbroke*, 6 Watts, 388; *Thompson v. Smith*, 7 S. & R. 209. See *Guion's Lessee v. Bradley Academy*, 4 Yerg. 232; *McDonald v. Johns*, 4 Yerg. 258.

In case of joint rights, all the complainants must labour under some legal disability, provided for by the statute, to prevent the operation of the statute as a bar.

Smith v. Carney, 1 Lit. 296; *Turner v. Debell*, 2 A. K. Marsh. 384; *Floyd v. Johnson*, 2 Lit. 112. See *Thomas v. Machir*, 4 Bibb, 412; *Kennedy v. Duncan*, Hard. 365; *Mayfield v. Seawell*, Cooke, 437; *Cooke's R.* 437.

When the act of limitations once begins to run, it runs over all mesne acts, such as coverture, infancy, and the like.

Hudson v. Hudson, 6 Munf. 352; *Demarest v. Wynkoop*, 3 Johns. Ch. 136; *Moers v. White*, 6 Johns. Ch. 372; *McCoy v. Nichols*, 4 Howard, 31.

The disability which entitles a party to the benefit of the proviso in the act of limitations, must exist when the right of action first accrues.

Demarest v. Wynkoop, 3 Johns. Ch. 136; *Jackson v. Johnson*, 5 Cowen, 74.

A person held in slavery is "imprisoned," within the meaning of the proviso in the statute of limitations.

Matilda v. Cranshaw, 4 Yerg. 299. γ

3. Of the Exception in relation to Merchants' Accounts.

As to the exception relating to merchants, it hath been a matter of much controversy, whether it extends to all actions and accounts relating to merchants and merchandise, or to actions of account open and current only, the words of the statute being, *That all actions of trespass, &c., all actions of account and upon the case, other than such accounts as concern the trade of merchants*; so that by the words, *other than such actions*, not being said actions of account, it has been insisted that all actions concerning merchants are excepted.

Jon. 401; 2 Saund. 124, 125; *Lev.* 287; 2 Keb. 622; *Lev.* 298; *Vent.* 90; *Mod.* 70, 270; 2 *Mod.* 312; 2 *Vern.* 456; || *Bull. N. P.* 149, 150; *Cranch v. Kirkman*, *Peake's C.* 164; *Welford v. Liddell*, 2 *Ves.* 400; *Sir W. Jones*, 401. || β *Bass v. Bass*, 6 *Pick.* 362; *Bass v. Bass*, 8 *Pick.* 187; *Hancock v. Cook*, 18 *Pick.* 30. γ

But it is now settled, that accounts open and current only are within the statute; and that therefore, if an account be stated and settled between merchant and merchant; and a sum certain agreed to be due to one of them, if in such case he to whom the money is due does not bring his action within the time limited, he is barred by the statute.

Vide the authorities *supra*. β Liquidated demands on bills or notes, which are only

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traced up to trade or merchandise, are too remote to come within the description of accounts between merchant and merchant. *Toland v. Sprague*, 12 Pet. 300. *g* {2 Johns. Rep. 200, *Ramchander v. Hammond, acc.*}

g When there are mutual dealings between the parties, if there be items on both sides within six years, the statute does not attach to those of an earlier date.

Davis v. Smith, 4 Greenl. 337. See *Bennett v. Davis*, Adams, 19; *Franklin v. Camp*, 1 Coxe, 196; *Smith v. Ruccaster*, 2 Halst. 357. See as to what are mutual dealings, *Chamberlain v. Cuyler*, 9 Wend. 126; *Edmondstone v. Thompson*, 15 Wend. 554. *g*

So, it hath been adjudged, that by the exception in the statute concerning merchants' accounts, no other actions are excepted but actions of account. (a)

Carth. 226. *g* (a) The law is now taken to be, that the exception in the statute applies also to actions on the case. See *Webber v. Tivill*, 2 Saund. Rep. by Williams, 127 b, note (7). *g* The exception applies as well to actions of assumpsit as to actions of account. *Mandeville et al. v. Wilson*, 5 Cranch, 15. *g*

Also, it hath been adjudged, that bills of exchange for value received, are not such matters of account as are intended by the exception in the statute of limitations.

Carth. 226; g 5 Cranch, 15. *g*

g A special contract between the shipowner and the shipper of goods, to receive half profits in lieu of freight, on a shipment for a foreign voyage, is not a case of merchants' accounts within the meaning of the statute of limitation.

Spring v. Gray, 5 Mason R. 505; S. C. 6 Pet. 151.

The exception in the statute of merchants' accounts extends to cases only where there are mutual accounts, and reciprocal demands between two or more persons: when the demand is altogether on one side, the exception does not apply, although payments on account have been made.

Ingram v. Shererd, 17 S. & R. 347.

Accounts between principal and factor, although they are merchants, are not within the act.

Stiles v. Donaldson, 2 Dall. 264; S. C. 2 Yeates, 105.

The death of one of the parties to an account concerning the trade of merchandise, between merchant and merchant, does not operate as a settlement or statement of the accounts so as to bar by the lapse of six years from the time of his death.

Bass v. Bass, 8 Pick. 187.

A bill in equity for the settlement of the accounts of a partnership, which has been dissolved, does not concern merchants' accounts.

Codman v. Rogers, 10 Pick. 112.

The exception in the statute as to merchants' accounts applies only to the action of account, and for not accounting, and not to the action of *indebitatus assumpsit*.

Inglis v. Haigh, 9 Dowl. 817. *g*

[But, though the exception in the statute is so far limited to transactions merely between merchant and merchant, that where there is no item of account at all within six years before the action brought, the plaintiff will be precluded, unless he can show that the accounts were between merchant and merchant, &c.; yet a mutual account of any sort between a plaintiff and

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defendant, though neither of them of the description of merchant, for any item of which credit has been given within six years, is evidence of a promise to pay the balance, and will take the case out of the statute of limitations. But where all the items of an open, unliquidated account are on one side, the last item which happens to be within six years shall not draw after it those that are of longer standing.

Catling v. Skoulding, 6 Term Rep. 189. { Peake, N. P. 121, Cranch v. Kirkman, 2 Mass. T. Rep. 217, Cogswell v. Dolliver. Vide 1 Day, 245, Nichols v. Leavansworth; 2 Esp. Rep. 570, Ord v. Ruspini; 6 Ves. J. 580, Jones v. Pengree. } || Cranch v. Kirkman, Peake's C. 164; and see Duff v. East India Company, 15 Ves. 198; Barber v. Barber, 18 Ves. 386. || Cotes v. Harris, Bull. N. P. 149.]

{Accounts between principal and factor are merchants' accounts within the exception of the statute.

2 Dall. 264, Stiles v. Donaldson.}

¶When there are mutual demands, if any item of the account be within six years before the commencement of the action, the statute does not run against any part of the account.

Van Swearingen v. Harris, 1 Watts & S. 356; Thompson v. Hopper, 1 Watts & S. 467. See Hay v. Kramer, 2 Watts & S. 137.

Accounts between partners of a firm are not embraced by the terms "accounts concerning the trade of merchandise between merchant and merchant;" hence, the statute is a bar to such accounts.

Patterson v. Brown, 6 Monr. 11.

The exception in the Maryland act of limitations in relation to accounts which concern the trade of "merchandise between merchant and merchant," &c., apply to dealings between a merchant creditor residing out of Maryland, and a debtor residing in Maryland.

Bond v. Jay, 7 Cranch, 350.g

4. Of the Exception in relation to Persons beyond Sea.

It seems to have been agreed, that the exception as to persons being beyond sea extends only where the creditors or plaintiffs are so absent, and not to debtors or defendants, because the first only are mentioned in the statute; and this construction hath the rather prevailed, because it was reputed the creditor's folly, that he did not file an original, and outlaw the debtor, which would have prevented the bar of the statute.

Cro. Car. 245, 333; Jon. 252; Lev. 143; 3 Mod. 311; 2 Lutw. 950; 2 Salk. 420, pl. 1.

But as the creditor's being beyond sea is saved by the 21 Jac. 1, c. 16, so now by the 4 & 5 Ann. c. 16, it is enacted, "That if any person or persons, against whom there is or shall be any cause or suit of action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, action *sur trover*, or replevin, for taking away goods or chattels, or of action of account, or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, of assault, menace, battery, wounding, and imprisonment, or any of them, be or shall be, at the time of any such cause or suit of action given or accrued, fallen or come, beyond the seas, that then such person or persons, who is or shall be entitled to any such suit or action, shall be at liberty to bring the said actions against such person and persons after their return from beyond the

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seas, within such times as are limited for the bringing of the said actions by the 21 Jac. 1, c. 16."

Show. 98; Carth. 136.

[This exception is not confined to Englishmen, who may occasionally go beyond sea, but is general, and extends to foreigners, who are constantly resident abroad.

Strithorst v. Græme, 2 Bl. Rep. 723. β In New York, the statute of limitations is not available as a defence for one who has remained beyond the jurisdiction of their courts, during the term which has elapsed; and the same construction is given to their statute in Pennsylvania. *Case v. Cushman*, 3 Watts & Serg. 544. γ

As the statutes of 21 Jac. and 4 & 5 Ann. are both express, that the party to be excused must be *beyond sea*, of course Scotland is not included in the exception.

King v. Walker, 1 Bl. Rep. 286. β In Pennsylvania, the term "beyond sea" signifies "out of the limits of the United States." *Thurston v. Dawes*, 9 S. & R. 288; *Ward v. Hallam*, 2 Dall. 217; S. C. 1 Yeates, 329; in Maryland, it means "out of the jurisdiction of the state." *Pancoast v. Addison*, 1 Har. & J. 350; *Brent v. Tasker*, 1 Har. & M.H. 89. The term used in Kentucky, is "out of the country," which signifies out of the state. *Mansell v. Israel*, 3 Bibb. 510. In Connecticut, it was held that Halifax, in the province of Nova Scotia, was not beyond sea. *Gustin v. Brattle*, Kirby, 299. In Georgia, the expression beyond sea means out of the state. *Murray's Lessee v. Baker*, 3 Wheat. 541. In Virginia, "beyond sea" signifies "out of the commonwealth." *Faw v. Roberdeau's executor*, 3 Cranch, 174. See *Shelby v. Guy*, 11 Wheat. 361. In Tennessee, a person who resided out of the state, but in another state, was held not to reside "beyond seas." *Pike v. Greene*, 1 Yerg. 465. γ {For the same reason, in Pennsylvania, the statute was held to be a bar where the plaintiff was a citizen of and resident in the state of South Carolina, and the defendant was a citizen of and resident in Pennsylvania. 2 Dall. 217, *Ward v. Hallam*.}

If a plaintiff be in England at the time the cause of action accrues, the time of limitation begins to run, so that if he, or, if he die abroad, his personal representative, do not sue within six years, the statute attaches; and this, though the personal representative were abroad at the time of the testator's or intestate's death.

Smith v. Hill, 1 Wils. 134. $\parallel$ See Lord Kenyon's observations in *Doe dem. Duroure v. Jones*, 4 Term Rep. 311; and see *Doe dem. Griggs v. Shawe*, mentioned in the note to *Duroure v. Jones*.]

{So if the debtor departs after the cause of action has accrued, the action must be brought within the six years. The general rule is that when the statute of limitations once begins to run, it continues to run notwithstanding any subsequent disability.

1 Johns. Rep. 165, *Peck v. Randall's Trustees*.}

The absence of one of several co-plaintiffs will not prevent the statute of limitations from attaching, for it lays the others under no disability of suing. *Perry v. Jackson*, 4 Term Rep. 510.]

{A debtor's *return*, from which the statute begins to run, must be such a return as will enable his creditor, using reasonable diligence, to arrest him. If the debtor returns privately, secretes himself except on Sundays, and departs again in a short time, it is not such a return that the statute will begin to run; as the creditor is chargeable with no neglect in not arresting him.

3 Mass. T. Rep. 271, *White v. Bailey*.

If an act of limitations have a clause saving to persons *out of the commonwealth* three years after that disability removed, a creditor resident in another state removes his disability by coming into the commonwealth even

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for temporary purposes; provided the debtor be at that time within the commonwealth.

3 Cran. 174, *Paw v. Roberdeau's Exr.*

Where a statute of limitations saved a plaintiff's right of action if the defendant was *out of the state*, a defendant who, during a war, went and continued within the enemy's lines within the state, and departed with them at the close of the war, was deemed to be out of the state with respect to the right of the plaintiff; because he was out of the jurisdiction of the state, and no writ of the state could run there.

1 Johns. Ca. 76, *Sleght v. Kane*; 3 Cain. 205.]

¶If the cause of action accrue in India, and the plaintiff sues the defendant in England within six years after the defendant's return to this country, according to 4 Ann. c. 16, s. 19, the defendant cannot plead the statute of limitations, although more than six years elapsed in India after the cause of action accrued there; and although plaintiff might have sued in the courts there, which, by their charter, have the same jurisdiction in civil cases as the King's Bench by the common law.

Williams v. Jones, 13 East, 439.¶

§The return which is mentioned in the statute is an open appearance, and, when the party came into the commonwealth privately, and secreted himself, except on Sundays, it was held that such return was not within the proviso.

White v. Bailey, 3 Mass. 271. See *Byrne v. Crowninshield*, 1 Pick. 263; *Little v. Blunt*, 9 Pick. 488; *S. C.* 16 Pick. 359; *Vans v. Higginson*, 10 Mass. 29; *Fowler v. Hunt*, 10 Johns. 464.¶

5. Where no Executor or Administrator to sue or be sued.

If A receives money belonging to a person who (a) afterwards dies intestate, and to whom B takes out administration, and brings an action against A, to which he pleads the statute of limitations, and the plaintiff replies, and shows that administration was committed to him such a year, which was *infra sex annos*; though six years are expired since the receipt of the money, yet not being so since the administration committed, the action is not barred by the statute.

Salk. 422, pl. 4, *Curry v. Stephenson*; *Skin.* 555, pl. 3, *S. C.*; 4 *Mod.* 376, *S. C.*; *Carth.* 335, *S. C.*; in which last book it is said, that *Holt* was of opinion, that the administrator should have six years from the time of granting administration, according to *Stanford's* case, cited in *Saffin's* case, *Cro. Ja.* 60, 61, but in the principal case there was judgment against the plaintiff on another point. [(a) *Note*: This statement of the facts of the case of *Curry v. Stephenson* is incorrect. It appears from *Skinner's Report*, that the money was not received by A until *after* the death of the intestate: so that, before administration was granted, there was no person who could claim it: and the statute begins to operate only from the time a right to demand the thing in question vests in some one. In *Stanford's* case the fine was not levied till *after* the death of the intestate. Had the money been received in the lifetime of the person who died intestate, that person would have had a right of action against A vested in him, and from that period the time of limitation would have commenced; and the statute would have been a bar. For, when once the time of limitation has begun to run, it suffers no interruption from the death of the claimant, nor does it revive in favour of any person upon whom the right of claim may devolve.] {And accordingly, in *Hickman v. Walker, Willes*, 27, where the statute of limitations was pleaded to an action brought by an executor on a promise made to his testator, the court of common pleas decided that the six years should be computed from the time when the cause of action arose, and not from the time of obtaining the probate of the will.} ¶And see *Hickman v. Walker, Willes*, 27; *Murray v. East India Company*, 5 *Barn. & A.* 204.¶ §The statute of

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limitations does not begin to run against a claim asserted for a defendant's estate, until the qualification of an executor or administrator of the decedent. *Hamsford v. Elliott*, 9 Leigh, 79. See *Goodhue v. Barnwell*, Rice's Eq. R. 199. *g*

¶ The statute of limitations respecting suits against executors or administrators begins to run from the time of the defendant's accepting the trust, and not from the time of giving public notice of his acceptance.

¶ *Sewall v. Valentine*, 6 Pick. 276. See *Hemenway v. Gates*, 5 Pick. 321; *Grinnell v. Baxter*, 17 Pick. 383. *g*

¶ So, where a bill of exchange was drawn payable to the intestate in his life, but *accepted after* his death, in an action by the administrator against the acceptor, it was held, that the statute only began to run from the date of the letters of administration, for till that time there was no person capable of suing, and consequently no cause of action.

Murray v. East India Company, 5 Barn. & A. 204; and see *Pratt v. Swaine*, 8 Barn. & C. 285. ¶ Where the testator gave a promissory note in his lifetime, which became due after his death, and an action was brought upon it after a lapse of more than six years after it became due; held, that the act of limitation was a bar, although the testator provided in his will for the payment of his debts, and for carrying on his business. *Man v. Warner*, 4 Whart. 455. *g*

It is said in general, that where one brings an action before the expiration of six years, and dies before judgment, the six years being then expired, this shall not prevent his executor. (a)

2 Salk. 424, pl. 13. (a) See *Stra.* 907, the next case.

But if an executor sues upon a promissory note to the testator, and dies before judgment, and six years from the original cause of action are actually expired, and the executor of the executor brings a new action in four years after the first executor's death, the statute of limitations shall be a bar to such action; for though the debt does not become irrecoverable by an abatement of the action after the six years elapsed by the plaintiff's death, yet the executor should make a recent prosecution, to which the clause in the statute, that provides a year after the reversal of a judgment, &c., may be a good direction; or show that he came as early as he could, because there was a contest about the will, or right of administration; for the statute was made for the (b) benefit of defendants, to free them from actions when their witnesses were dead, or their vouchers lost.

Trin. 5 G. 2, *Wilcox and Huggins*, *Barnard*. K. B. 335; *Fitzgib.* 170; 2 *Stra.* 907; {1 *Wash.* 302, *Brown's Ex'rs v. Patney*; 1 *Dall.* 413, *Schlosser v. Leshner*. Vide 3 *Cain.* 197, *Jackson v. Horton*.} ¶ *Hodsden v. Harridge*, 2 *Saund.* 63 h; and see *Blanshard on Lim.* 110. ¶ (b) That the statute of limitations was one of the best of statutes, and the pleading thereof no disparagement to anybody. *Per Holt*, C. J., 7 *Mod.* 12. [It is a noble, beneficial act. *Per Wilmot*, J., 1 *Bl. Rep.* 287. It is allowed to be pleaded in the courts both of C. P. and K. B. after an order for time to plead on the terms of pleading issuably. *Rucker v. Hannay*, 3 *Term Rep.* 124. Vide *Studholme v. Hodgson*, 2 *Term Rep.* 390, *contr.*]

[Where a statute for allotting waste lands within a manor directed all disputed claims to be tried by a feigned issue, and limited the time of bringing the action to six months; it was holden, that an action brought against a copyholder, within time, if abated by his death, must be revived against the heir within six months after the plaintiff had notice of the descent, though the heir were not admitted till long after that time.

Knight v. Bate, *Cowp.* 738.] ¶ Where the plaintiff could not sue until the passage of a special act of Assembly authorizing the bringing of the suit, which act was passed within six years before the commencement of the action; held that the act of limitation was no bar to the action. *Leasure v. Mahony Township*, 8 *Watts*, 551. *g*

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If there is no executor against whom the plaintiff may bring his action, he shall not be prejudiced by the statute of limitations, nor shall any laches in such case be imputed to him.

2 Vern. 695; *Levering v. Rittenhouse*, 4 Whart. 130.*g*

{But the plea was allowed where the testator died in 1786, and probate was not taken till 1802, because the defendant had possessed himself of the personal estate, and therefore might have been sued as executor *de son tort*, previously to 1792.

10 Ves. J. 93, *Webster v. Webster*.}

6. *Where no Jurisdiction to sue in, or where hindered by some Authority.*

It seems agreed, that there being no courts, or the courts of justice being shut, is no plea to avoid the bar of the statute of limitations; as, where after the civil war an *assumpsit* was brought and the defendant pleaded the statute of limitations; to which the plaintiff replied, that a civil war had broke out, and that the government was usurped by certain traitors and rebels, which hindered the course of justice, and by which the courts were (a) shut up, and that within six years after the war ended he commenced his action; this replication was held ill; (b) for the statute being general, must work upon all cases which are not exempted by the exception.

Keb. 157; Lev. 31, 111; Carth. 137; 2 Salk. 420, pl. 1; *Aubry v. Fortescue*, 10 Mod. 206. || (a) In Plow. 9 b, that things happening by an invincible necessity, though they be against the common law, or an act of parliament, shall not be prejudicial. Therefore to say the courts were shut, is a good excuse, on voucher of record. Bro. tit. *Failure of Record*. So, in the times of domestic war, when the courts of justice are shut, a descent shall not take away an entry, though the disseisin was in times of peace; for then the disseisee would be without all remedy, there being no courts open to bring his action in. Co. Lit. 249. (b) In some books it is said, that the defendant rejoined, and set forth the act of oblivion, and that for confirmation of judicial proceedings; and for this reason also the replication was held ill. Keb. 157; Lev. 111.

And in confirmation of this doctrine we find, that an act of parliament was made 1 W. & M., whereby it is enacted, that from the 10th of December, (which was the day that King James departed, till the 12th of March, 1688, when King William assumed the government,) shall not be accounted any part of the time within which any person by virtue of the statute of limitations might bring his action; but that he shall have so much allowance of time as is from the 10th of December to the 12th of March for bringing his action.

3 Lev. 283.

It is clearly agreed, that the defendant's being a member of parliament, and entitled to privilege, will not save a bar of the statute; because the plaintiff might have filed an original without being guilty of any breach of privilege.

Lev. 31, 111; Carth. 136, 137.

It is said, that if a man sues in Chancery, and, pending the suit there, the statute of limitations attaches on his demand, and his bill is afterwards dismissed, the matter being properly determinable at common law; in such case, the court will preserve the plaintiff's right, and will not suffer the statute to be pleaded in bar to his demand.

Vern. 73, 74. But it seems, that there must be some equitable circumstances attending his case; and therefore in 2 Chan. Ca. 217, it is said, that unless the plaintiff was stayed by some act of the court, as injunction, &c., the court will not interpose. *See Barker v. Milsard*, 16 Wend. 572.*g*

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If the statute of limitations be pleaded to an action, the plaintiff to save his action may reply, that he had commenced (a) the suit in an inferior court within the time of limitation, and that it was removed to Westminster by *habeas corpus*; and this shall be allowed by a favourable construction of the statute of limitations; although in strictness the suit is commenced in the court above, when it is removed by *habeas corpus*.

Sid. 228; 3 Keb. 263, Beven and Chapman; Lev. 143, S. C., but same point does not appear. (a) The plaintiff must aver, that the cause of action in the court below, and that removed, is the same. Cro. Car. 294. But a difference in value is not material. Vent. 252.

So, in a like case, where debt was brought in the Palace-court, and after some proceedings there, the six years expired, the defendant sued a *habeas corpus*, and removed the cause into B. R., where the plaintiff declared *de novo*; and the defendant pleaded, that the cause of action did not accrue within six years before the *teste* of the *habeas corpus*; this was held to be a good plea; but that the plaintiff might reply the suit below, and show that to have been within the six years; not that this suit was a continuance of the suit below, but that the plaintiff had rightfully and legally pursued his right; and it should not be in the power of the defendant to defeat or hinder him of a remedy without any default. (b)

2 Salk. 424, pl. 13, Matthews v. Phillips. (b) So of a plaint in the sheriff of London's court, Stra. 719; Lord Raym. 1427.

|| To a plea of the statute of limitations the plaintiff may also reply the fourth section of the stat. 21 Jac. c. 16, that heretofore he obtained a judgment which was reversed, and that he now sues within a year after the reversal; or that he obtained a verdict and judgment which was reversed; and that he now sues within a year after the reversal; or that he obtained a verdict and judgment which was arrested. So the plaintiff may say in his replication, that he sued out an original, upon which the defendant was outlawed, and the outlawry was afterwards avoided by plea or reversed on error, and he sued within a year afterwards.

Finche v. Lambe, Sir W. Jones, 312; S. C. Cro. Car. 294; Whitwick v. Hoven-
don, 3 Lev. 245. ||

A B made his promissory note on the 17th of April, 1812, in favour of C D, who endorsed it to E F. An act of Assembly was passed in Pennsylvania on the 13th of March, 1812, which was in fact a bankrupt law. On the 31st of March, 1817, the Supreme Court of Pennsylvania held that the said act was constitutional, and a discharge under it a bar to a recovery. (c) The case on which this decision was made was removed to the Supreme Court of the United States, and there reversed on the 13th of February, 1821. (d) More than six years after the cause of action arose on the said note, E F brought a suit on it against A B, and, on a case stated, the following question was submitted for the opinion of the court: "Did the act of limitations run against the plaintiff while the act of the 13th of March, 1812, was held by the Supreme Court of Pennsylvania to be constitutional?" Held, by the Supreme Court of Pennsylvania, that these circumstances did not stop the running of the statute. (e)

(c) Farmers' and Mechanics' Bank v. Smith, 3 S. & R. 63. (d) 6 Wheaton, 13. (e) Hudson v. Carey, 11 Serg. & R. 10.

Five years, five months, and twenty days are to be taken out of the act of limitations, with reference to British claims accruing before the Revolu-

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tion, and prosecuted after the treaty of peace, this being the period embraced by the revolutionary war.

Dunlap v. Ball, 2 Cranch, 185.g

7. Where the Suing out a Writ will save the Bar of the Statute.

It is clearly agreed, that the suing out an original will save a bar of the statute of limitations, and that thereupon the defendant may be outlawed; and that if beyond sea at the time of the outlawry, though it shall be reversed after his return, yet the plaintiff may bring another original by (a) *journies accounts*, and thereby take advantage of his first writ.

Carth. 136; Salk. 420, pl. 1; 3 Mod. 311. (a) For this vide Lutw. 260. β As to what shall be a sufficient commencement of an action to take the case out of the statute, see Guild v. Hale, 15 Mass. 455; Cook v. Darling, 2 Pick. 605; Coffin v. Cottle, 16 Pick. 383; Gardner v. Webber, 17 Pick. 407; Hunt v. Spaulding, 18 Pick. 521; M'Dowell v. Goodwin, 2 Rep. Const. Ct. 441; Hume v. Dickinson, 4 Bibb, 276.g

Also, it is agreed, that the suing out a *latitat* is a sufficient commencement of a suit, to save the limitation of time, because the *latitat* is the original of B. R. and may be continued on record as an original writ.(b)

Sid. 53, 60; Carth. 233; Salk. 421; 1 Str. 550; 2 Str. 734; Lord Raym. 1441; 2 Burr. 961. ||(b) But if a *latitat* be replied for part of the demand, it must be averred that the cause of action is the same. Holloway v. Thurston, 8 Mod. 109.β The filing of a bill in Chancery, which is afterwards dismissed on the ground that the claim is exclusively cognisable at law, cannot be pleaded to prevent the statute of limitations from being a bar to his subsequent recovery at law. Gray's Administratrix v. Berryman, 4 Munf. 181.g

Also, it hath been ruled, that to a plea of the statute of limitations the plaintiff may reply, that he sued out a *latitat*, and continued it down by a *vicecomes non misit breve*, without concluding *prout patet per recordum*; for the *latitat* roll is only for the private use of the court, and no record.

2 Keb. 46, Bottle and Wood. β When a second writ is issued, unless it appears on the record to be an *alias*, it cannot be connected with the former writ, so as to avoid the statute of limitations. Hume v. Dickinson, 4 Bibb, 276. See M'Dowell v. Goodwin, 2 Rep. Const. Ct. 441.g

||And where the replication to a plea of the statute of limitations set forth a writ returned, and continued down to the time of declaring, adding a *prout patet* at the conclusion; this averment was taken to refer to the first writ alleged to have been returned, as well as to the last.

Harrington v. Taylor, 15 East, 378; and so ruled in the Exchequer, Lister v. Jackson, Trin. Term, 8 Geo. 4.||

So, it seems, the plaintiff may reply, that he sued out a *latitat* of such a term, without setting forth the day of the *teste*; and that in such case it shall have relation to the first day of the term.

Style, 178; 2 Keb. 369, S. C. cited. [But in this case, the defendant may in his rejoinder show the true day on which the *latitat* was sued out, in opposition to the *teste*. Johnson v. Smith, 2 Burr. 950;] {Peake N. P. 209, Snell v. Phillips.} ||And where a declaration is intitled generally, the defendant may give evidence of the time when it was actually filed, in order to support the allegation in his plea, "that the cause of action did not accrue within six years next before the exhibiting of the plaintiff's bill." Granger v. George, 5 Barn. & C. 149.||

But though the suing out of an original, or *latitat*, will be a sufficient commencement of a suit, yet the plaintiff, in order to make it effectual, must show that he hath (c) continued the writ to the time of the action brought.

Carth. 144; 2 Salk. 420, pl. 2; Lutw. 101, 254; 3 Mod. 33. (c) That the attorney's writing the continuances on the writ in his chambers is sufficient, Sid. 53; Keb. 140.

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{Vide 1 Dall. 411, Schlosser v. Leshner; 7 Term, 618, Doe v. Dolman.} [The continuances, it seems, may be entered at any time. Bates *qui tam* v. Jenkinson, E. 24 G. 3, cited in 6 Term Rep. 618;] [Beardmore v. Rattenbury, 5 Barn. & A. 452. But the first writ must be *duly returned* before the statute has run. Therefore, where *alias* and *pluries* writs had been sued out in 1812, 1813, against the plaintiff, and endorsed *non est inventus*, but had not been returned and filed until Trin. Term, 1821, after which the roll had been carried in and continuances entered down to the term next preceding the date of a commission of bankruptcy issued against the plaintiff, in an action to try the validity of this commission, it was held that the continuances did not set up the writs so as to take the claim out of the statute, and make it a good petitioning creditor's debt. Gregory v. Hurrill, 5 Barn. & C. 341, overruling S. C. 1 Bing. 324. It has been held, that a suit regularly commenced within six years, and entered down in one court, prevents the debt being barred, so that it may be recovered in another court. Gregory v. Hurrill, 2 Brod. & B. 212.]

As, in *assumpsit* for fees due to an attorney, the defendant pleaded *non assumpsit infra sex annos*, the plaintiff replied, that on such a day two years before he had sued out an attachment of privilege against the defendant; upon which writ *taliter processum fuit*, that the defendant (on such a day) in Hilary term anno 2 Will. &c. appeared, and the plaintiff declared against him *modo et forma, &c.* And upon demurrer to this replication it was held ill; because the plaintiff did not set forth any continuance of this writ of attachment, (*per vic. non misit breve*), which was sued out two years before; for it is impossible that the defendant should appear in Hilary term anno 2 Will. to a writ returnable two years before, and no other writ is set forth by the plaintiff; but if the plaintiff, after the *taliter processum fuit*, had shown the last attachment, and the return thereof, upon which, in truth, the defendant did appear, it had been well enough without showing any of the continuances.

Carth. 144, Rudd v. Berkenhead; 2 Salk. 420, pl. 2, S. C.; β Livingston v. Ostrander, 9 Wend. 306.β

An *indebitatus assumpsit* was laid several ways; the defendant pleaded, *actio non, quia dicit quod billa predict. exhibit. fuit 20 die Junii, et non antea, et quod ipse ad aliquod tempus infra sex annos ante exhibitionem billæ predict. non assumpsit, &c.* The plaintiff replied a bill of Middlesex tested *die Lunæ prox. post tres septimanas, &c.*, returnable the same day; whereupon was returned *non est inventus*, and continued down by *vic. non misit breve et præcept. sicut alias*. To this it was demurred, and judgment given for defendant; for there cannot be such a bill of Middlesex as this, which is returnable the very day of the *teste*; and the statute of limitations, on which the security of all men depends, is to be favoured.

Salk. 421, Green v. Rivett.

[An attachment of privilege is not a continuance of a bill of Middlesex.

Smith v. Bower, 3 Term Rep. 662; Leadbeater v. Markland, 2 Bl. Rep. 1131.

[[But it has been held that aailable writ with an *ac etiam* clause is a sufficient continuance of a bill of Middlesex notailable, and that the continuances need not be by *alias* and *pluries* writs.

Plummer v. Woodburne, 4 Barn. & C. 625.

So a plaintiff may reply a *capias*, without an original writ first sued out, to a plea of the statute of limitations, if it be *duly returned*, entered, and continued, as well as a *latitat*; for a *capias* is now considered to be the actual commencement of the suit in the Common Pleas.

Leader v. Moxon, 2 Blac. Rep. 925; 3 Wils. 461.]

Although a suit actually commenced, though informally or irregularly,

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will have the effect of preventing the operation of the statute, yet the plaintiff must show that the first writ was (a) returned; for until the return of the writ the court is not in possession of the cause.

(a) *Harris v. Woolford*, 6 Term Rep. 617; *Bull. N. P.* 151. {*Willes*, 225, *Karver v. James*; 2 Bos. & Pul. 157, *Stanway v. Perry*; 7 East, 538.} || *Kinsey v. Hayward*, 1 Lutw. 256; S. C. 1 Ld. Raym. 432; *Brereton v. Moyse*, 1 Lutw. 279, 280; *Stratton v. Savignae*, 3 Bos. & Pul. 330, S. P.; *Brown v. Babington*, 2 Ld. Raym.; *Atwood v. Burr*, 7 Mod. 5; *Stanway v. Perry*, 2 Bos. & Pul. 157; *Weston v. Fournier*, 14 East, 491; *Gregory v. Hurrill*, 5 Barn. & C. 341.||

A bill may be filed against an attorney in the vacation, in order to prevent the statute from attaching.

* *Lane v. Wheat*, B. R. M.; 23 Geo. 3, Dougl. 313, n.;] || decided in *Waghorne v. Fields*, 5 Term Rep. 173, to be a general rule, and not merely an exception in the case of the statute of limitations.||

|| But where in an action against an attorney the plaintiff takes issue on the plea of the statute, and relies on the title of his bill, the defendant may show by evidence that the bill was filed in the vacation after the term of which it is entitled.(b)

Snell v. Phillips, Peake's N. P. Ca. 275. (b) It is now the practice, when a bill is filed in vacation, to insert the day of filing it in the memorandum. *Dodsworth v. Bower*, 5 Term Rep. 325; *Mellor v. Walker*, 2 Saund. 1 a, note(1).||

¶ By suing out a writ, the plaintiff saves the bar of the statute, and when the writ has not abated, it is not requisite that the action should be prosecuted within a year after the six years have expired.

Schlusser v. Leshner, 1 Dall. 411; *Ontario Bank v. Rathbun*, 19 Wend. 291.

In general it is not requisite to enter continuances in order to prevent the bar of the act of limitations, but when the writ and declaration disagree, it becomes necessary to enter such continuances.

1 Dall. 412, 413.

When a Court of Chancery retains a bill with liberty to bring an action, that stops the statute of limitation from running, from the day the suit was commenced in Chancery.

Brady v. Holmes, 2 Moll. 1; *Sirdefield v. Price*, 2 Yo. & Jer. 73.

In Pennsylvania, the operation of the act of limitations was not suspended during the period that the bankrupt act of that state of 1812 was held by the state courts to be constitutional and valid.

Hudson v. Carey, 11 S. & R. 10.

The statute stops running at the time the writ is sued out and not at its date or service, when they are of a different time.

Society for Prop. the Gospel v. Whitcomb, 2 N. H. Rep. 227.

A *capias ad respondendum*, to save the statute of limitations, is a mere matter of form, and may be delivered to the sheriff with instruction to return it *non est inventus*.

Beckman v. Satterlee, 5 Cowen, 519. See as to what process will save the statute. *Ontario Bank v. Rathbun*, 19 Wend. 291; *Edmonstone v. Thompson*, 15 Wend. 554; *Souliden v. Van Rensselaer*, 3 Wend. 472; *Baskins v. Wilson*, 6 Cowen, 471; *Ivins v. Schooley*, 3 Har. R. 269.g

8. Where a Debt barred by the Statute shall be said to be revived.

It is clearly agreed, that if after the six years the debtor acknowledges the debt, and promises payment thereof, that this revives it, and brings it out of the statute; as, if a debtor by promissory note, or simple contract,

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promises within six years of the action brought that he will pay the debt; though this was barred by the statute, yet it is revived by the promise; for as the note itself was at first but an evidence of the debt, so that being barred, the acknowledgment and promise is a new evidence of the debt, and being proved, will maintain an *assumpsit* for recovery of it.

Salk. 28, pl. 16, 29, 19; Carth. 470; 5 Mod. 425, 426; 2 Show. 126, pl. 104; 2 Vent. 151; *Hurst v. Parker*, 1 Barn. & A. 93; *Triggs v. Newnham*, 1 Carrington & Payne, 631.l]

Also, it hath been adjudged, that a conditional promise will revive a debt barred by the statute of limitation; as, where to an *assumpsit* by an executor, for goods sold and delivered by the testator, the defendant pleaded the statute; and upon evidence it appeared, that the defendant within six years, being applied to by the executor for the debt, said, *If you prove that I had the goods, I will pay you*; which being fully proved at the trial, it was held that this conditional promise revived the debt; and that though made to the executor, after the death of the testator, it was sufficient to maintain the issue; (a) because the promise did not give any new cause of action, but only revived the old cause, and was of no other use but to prevent the bar by the statute of limitations.

Com. 53, S. C.; Carth. 470, *Heylin v. Hastings*; Salk. 29, pl. 19, S. C.; 5 Mod. 425, S. C. cited. {A promise to pay *when he was able* is conditional, and the plaintiff must prove his ability at the time of the action brought. 4 Esp. Rep. 36, *Davies v. Smith*. Vide 4 Ves. J. 372, *Ex parte Tootell*. *Quære, et vide infra.*} (a) Where the plaintiff declared as executor, on a promise to the testator, and the defendant pleaded *non assumpsit infra sex annos*; and upon the trial of the issue it appeared, that there was a new promise made within six years, but it was a promise made to the plaintiff himself, and not to the testator, it was held *per cur.* that he should have declared accordingly. Salk. 28, *Dean v. Crane*; 6 Mod. 309, S. C.; [Bull. N. P. 150, S. C.] {*Willes*, 27, *Hickman v. Walker*; 3 East, 409, *Sarell v. Wine*; 1 Hen. & Mun. 563, *Fisher's Exr. v. Duncan, acc.* And see 2 Hen. & Mun. 401, *Quarles's Admx. v. Littlepage.*} [Executors of the Duke of Marlborough *v.* *Widmore*, 2 Stra. 890; *Ward v. Hunter*, 6 Taunt. 210.]]

So, it hath been held, that a bare (b) acknowledgment of the debt within six years of the action is sufficient to revive it, and prevent the statute, though no new promise was made. (c)

Carth. 470, said to be so held by all the judges in *Serjeants'-Inn*. (b) As, stating an account of the goods sold. March, 105, 106.—[And an acknowledgment of the debt even after the commencement of the action will take it out of the statute. *Yea v. Fouraker*, 2 Burr. 1099. What is an acknowledgment is matter for the consideration of a jury. *Lloyd v. Maund*, 2 Term Rep. 760. {See 4 Bos. & Pul. 20, *Bicknell v. Keppel*.} *Frost v. Bengough*, 1 Bing. 266.]] But although a promise is not necessary to take the demand out of the statute, yet the declaration of the defendant must amount to an acknowledgment of a debt; and therefore, where a person sued by an executor said, "I acknowledge the receipt of the money, but the testatrix gave it me," Clive, Baron, held it not sufficient. *Owen v. Wolley*, Bull. N. P. 148. {But an acknowledgment of the debt, though accompanied with a declaration by the defendant "that he did not consider himself as owing the plaintiff a farthing, it being more than six years since he contracted," is sufficient. 4 East, 599, *Bryan v. Horseman*; 5 Esp. Rep. 81, S. C. See farther as to what amounts to an acknowledgment, *Peake*, N. P. 93, *Lawrence v. Worral*; 1 Esp. Rep. 435, *Baillie v. Lord Inchiquin*, and Mr. Day's note; 3 Esp. Rep. 157, *Clarke v. Bradshaw*, and the note; 4 Esp. Rep. 46, *Peters v. Brown*; *Ibid.* 184, *Birk v. Guy*; 4 East, 604, n. *Rucker v. Hannay*; 4 Bos. & Pul. 20, *Bicknell v. Keppel*; 1 Dick. 163, *Galway v. Earl of Barrymore*; *Addis*. 291, *Smith v. Freel*; 4 Johns. Rep. 461, *Sluby v. Champlin*;] *Craig v. Cox*, Holt, N. P. 380; 4 Esp. Rep. 184; 5 Esp. 81; *Bicknell v. Keppel*, 1 New Rep. 20. So where the defendant promises to pay when he is able, the plaintiff must prove his ability to do so. *Davies v. Smith*, 4 Esp. 36; *Scales v. Jacob*, 3 Bing. 638; *Ayton v. Bolt*, 4 Bing. 105; 3 Dow. and Ry. 267; *Tanner v. Smart*, 6 Barn. & C. 603. And an acknowledgment to take a case out

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of the statute need not come from the debtor himself. *Burt v. Palmer*, 5 Esp. Rep. 145; *Anderson v. Sanderson*, 2 Stark. Rep. 204; *S. C. Holt*, 591; *Gregory v. Parker*, 1 Camp. 394. β The acknowledgment of a debt barred by the statute is not a revival of the old debt, but the evidence of a new promise. *Jones v. Moore*, 5 Binn. 573, 577. But such acknowledgment may be given in evidence to remove the bar of the statute, although it may have been made after the action was brought on the original cause of action. *Lonsdale v. Brown*, 3 Wash. C. C. R. 404. In such case, however, the promise must not vary from the original contract. *Ibid.* See also *Read v. Wilkinson*, 2 Wash. C. C. R. 514. γ (c) But see 9 Geo. 4, c. 14, s. 1, and *post.*]

But if an *indebitatus assumpsit* for goods sold be brought against four persons who plead the statute of limitations, and it be found that one of them promised within six years, there can be no judgment against him, for the contract being entire, it must be found that they all promised.

2 Vent. 151, *Bland v. Haselrig*, adjudged by three judges against *Ventris*, who inclined to the contrary; because the plea of *non assumpsit infra sex annos* implies a promise at first; and if one should renew his promise within six years, it is reasonable it should bind him; and the plaintiff must sue them all, else he will vary from the original contract.—[But it hath been lately determined, that the acknowledgment of one out of several drawers of a joint and several promissory note, will take it out of the statute as against the others, and may be given in evidence in a separate action against any of the others. *Whitcombe v. Whiting*, Dougl. 652. And if in such case one of the drawers becomes bankrupt, and the payee receives a dividend under the commission on account of the note, this payment of the dividend under the commission will amount to such an acknowledgment of the debt as will prevent any of the others from availing themselves of the statute of limitations in an action brought against them for the remainder of the money due on the note. *Jackson v. Fairbank*, 2 H. Bl. 340.—The case of *Bland v. Haselrig* in the text, Mr. Douglas observes, may be explained on the manner of the finding; for, as the plea was *joint*, and the declaration must have alleged a *joint undertaking*, the verdict did not find what the plaintiff had bound himself to prove. But, according to the principle in *Whitcombe v. Whiting*, the jury were to consider the promise of one as the promise of all, and therefore to find a general verdict against all. Dougl. 653, n.] β When there are several defendants, to renew the debt, the promise must be made by all, or from a then partner or person competent to contract for all. *Lingan v. Henderson*, 1 Bland, 277. See *Fisher's Executors v. Tucker*, 1 McCord, Ch. R. 169. But an acknowledgment of a debt by a partner, after the dissolution of the partnership, will not take the debt out of the statute so as to make the copartners liable. *Searight v. Craighead*, 1 Penns. R. 135, 138; *Bell v. Morrison*, 1 Pet. 360. *Sed vide* *Intire v. Oliver*, 2 Hawks, 209, *contra.* γ [Since the above note was written, it has been decided that an acknowledgment by one of several drawers of a joint and several promissory note, must, to charge the others, be an express acknowledgment. *Holme v. Green*, 1 Stark. C. 489; *Atkins v. Tredgold*, 2 Barn. & C. 23; *S. C.* 3 Dow. & Ry. 200. And in the case of executors, Lord Tenterden, C. J., in a case before him against two executors, both of whom had acknowledged, and one of them expressly promised to pay the debt within six years, nonsuited the plaintiff, saying, "I think as against an executor an acknowledgment merely is not sufficient to take the case out of the statute: there must be an express promise—the promise by one only is not enough to entitle the plaintiff to recover; there ought to be a promise by both." *Tullock v. Dunn*, 1 Ry. & Mood. 416. And see *Brandram v. Wharton*, 1 Barn. & A. 463. β As to what will be considered a sufficient acknowledgment, see *Cambridge v. Hobart*, 10 Pick. 232; *Gardner v. Tudor*, 8 Pick. 206; *Whitney v. Bigelow*, 4 Pick. 110; *Robbins v. Otis*, 1 Pick. 368; *Robbins v. Otis*, 3 Pick. 4; *Brown v. Anderson*, 13 Mass. 201; *Sullivan v. Holker*, 15 Mass. 374; *Barnard v. Bartholomew*, 22 Pick. 291; *Oliver v. Gray*, 1 Harr. & Gill, 204; *Chapman v. Dixon's Administratrix*, 4 Harr. & J. 527; *Hudson v. Carey*, 11 Serg. & Rawle, 10; *Bell v. Morrison*, 1 Pet. R. 351; *Perley v. Little*, 3 Greenl. 97; *Porter v. Hill*, 4 Greenl. 41; *Deshon v. Eaton*, 4 Greenl. 413; *Miller v. Lancaster*, 4 Greenl. 159; *Stewart v. Lord*, 1 Greenl. 163; 11 Mass. 452; *Lord v. Harvey*, 3 Conn. 370; *Lord v. Shaler*, 3 Conn. 131; *White v. Potter*, 1 Cox, 159; *Tichenor v. Calfax*, 1 South. 153; *Billews v. Bogan*, 1 Hayw. 13; *Ferguson v. Taylor*, 1 Hayw. 20; *Walker v. Campbell*, 1 Hawks, 304; *Anon.* 1 Hayw. 243; *Colkings v. Thackston*, Cam. & N. 93; *Gray v. Kernahan*, 2 Rep. Const. Ct. 65; *Cowans v. Magauran*, Wallace, 66; *Gaylord v. Van Loan*, 15 Wend. 308; *Bryan v. Willcocks*, 3 Cowen, 159; *Allen v. Webster*, 15 Wend. 284; *Danforth v.*

(E) Of the Exceptions in the Statute 21 Jac. 1, c. 16.

Culver, 11 Johns. 146; Stafford v. Bryant, 3 Wend. 532; Utica Ins. Co. v. Kip, 3 Wend. 339; Hancock v. Bliss, 7 Wend. 267; Oothout v. Thompson, 20 Johns. 277; Sands v. Gelston, 15 Johns. 511; Dean v. Petts, 10 Johns. 35; Pinkerton v. Bailey, 8 Wend. 800; Patterson v. Patterson, 7 Wend. 441; Sluby v. Champlain, 4 Johns. 461; Smith v. Ludlow, 6 Johns. 267; Lawrence v. Hopkins, 13 Johns. 288; Bush v. Barnard, 8 Johns. 407; Jackson v. Moore, 13 Johns. 510; Clarke v. Dutcher, 9 Cowen, 674; Dabbs v. Humphrey, 4 M. & Scott, 285; S. C. 10 Bing. 446; Linley or Linsell v. Bonsor, 2 Scott, 399; S. C. 2 Bing. N. R. 241; 1 Hodges, 305; Dodson v. Mackey, 4 Nev. & M. 337; Edmunds v. Downs, 2 C. & M. 469; S. C. 4 Tyrw. 173; Poynder v. Bluck, 5 Dowl. 570; Routledge v. Ramsay, 3 Nev. & P. 319; Morrell v. Frith, 3 Mees. & W. 402; 8 C. & P. 246. *g* But a payment made by one of two makers of a joint and several note, operates as a promise to the full extent of the promise in the instrument, and consequently takes the note out of the statute as against the administrator of the other maker, who died after the payment made. *Burleigh v. Stott*, 8 Barn. & C. 36, recognising *Whitcomb v. Whiting*, and *Jackson v. Fairbank*. And see *Perham v. Raynal*, 2 Bing. 306; but see 9 Geo. 4, c. 14, § 1. *post.* *h* See *Hunt v. Bridgham*, 2 Pick. 581; *Isley v. Jewett*, 2 Metc. 168; *Sigourney v. Drury*, 14 Pick. 387; *Porter v. Blood*, 5 Pick. 54. *g*

{It has been ruled that the acknowledgment or promise of any servant or agent intrusted by the defendant to transact his business for him, will take the case out of the statute.

2 Esp. Rep. 511, n., *Paletorp v. Furnish*; 5 Esp. Rep. 145, *Burt v. Palmer*.}

||Where the acknowledgment, to save the statute, is of a less sum than the one originally due, it seems that a jury would only find for the smaller sum acknowledged to be due.(a)

(a) *Shaddock v. Bennett*, 4 Barn. & C. 769; and see *Collyer v. Willock*, 4 Bing. 313, where the payment of the principal sum was held not to revive a claim for interest.

b The acknowledgment of a debt within six years will take the case out of the statute.(b) But such acknowledgment must not be inconsistent with a promise to pay.(c)

(b) *Cowan v. Magauran*, Wall. 66; *Jones v. Moore*, 5 Binn. 573. (c) *Eckert v. Wilson*, 12 S. & R. 397; *Miles v. Moodie*, 3 S. & R. 211; *Hudson v. Carey*, 11 S. & R. 10; *Fries v. Boisselin*, 9 S. & R. 128; *Bailey v. Bailey*, 14 S. & R. 195; *Brown v. Campbell*, 1 S. & R. 176; *Bell v. McCall*, 1 P. A. Bro. 123; *Guier v. Pearce*, 2 P. A. Bro. 35; *Church v. Feterow*, 2 Penns. 301; *Gallagher v. Milligan*, 3 Penns. 179; *Gleim v. Rise*, 6 Watts, 44; *Allison v. James*, 9 Watts, 380; *Magee v. Magee*, 10 Watts, 120; *Berghaus v. Calhoun*, 6 Watts, 220; *Murray v. Coster*, 20 Johns. 576; *Roosevelt v. Mark*, 6 Johns. Ch. R. 289; *Bangs v. Hall*, 2 Pick. 368; *Whitney v. Bigelow*, 4 Pick. 110; *Gardner v. Tudor*, 8 Pick. 206; *Wetzell v. Bussard*, 11 Wheat. 309; *Moore v. The Bank of Columbia*, 6 Pet. R. 86; *Harwell v. McCulloch*, 2 Tenn. 275; *Lewis' Executors v. Hickman's Executors*, 2 Tenn. 317; *Peck v. Wheaton's Heirs*, Mart. & Yerg. 353; *Stump v. Hughes*, 5 Hayw. 93; *Russell v. Gass*, Mart. & Yerg. 270.

Where a debt was contracted by the wife *dum sola*, and after marriage, and when the debt was barred by the act of limitations, the husband and wife promised to pay it; held, in an action against the wife, after the death of the husband, that the act of limitations was a bar.

Kline v. Guthart, 2 Penns. 490.

After the dissolution of a partnership, the acknowledgment of one of the former partners will not take the case out of the statute of limitations as to the other partners.

Searight v. Craighead, 1 Penns. 135.

The acknowledgment of one heir or devisee is sufficient to take the case out of the statute as respects all.

Johnson v. Beardslee, 15 Johns. 3.

A mere request to pay does not take the debt out of the statute.

Williams v. Root, 14 Mass. 273.

(E) Of the Exceptions in the Statute 21 Jac. 1, c. 16.

A promise by the guardian of a spendthrift, to pay a debt due by the ward, will not take the case out of the statute of limitations so as to bind the ward.

Manson v. Felton, 13 Pick. 206.

A note made and delivered as a settlement of a demand barred by the statute of limitations, was given up by the payee to the maker for the purpose of putting the parties in *statu quo*. Held, that it did not take the original demand out of the statute.

Sumner v. Sumner, 1 Metc. 394.

An acknowledgment made by the debtor to a stranger, in the absence of the creditor, will take the case out of the statute.

Whitney v. Bigelow, 4 Pick. 110.

And now, by the 9 Geo. 4, c. 14, § 1, it is enacted, "That in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence (a) of a new or continuing contract, whereby to take any case out of the operation of the said enactments, [of the Eng. Act, 21 Jac. 1, c. 16; and the Irish Act, 10 Car. 1, sess. 2, c. 6,] or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter, or take away, or lessen the effect of any payment (b) of any principal or interest made by any person whatsoever: Provided also, that in actions to be commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

(a) It has been held by Lord Tenterden, C. J., (the author of this useful law,) by James Parke, J., and other judges, that it applies to acknowledgments made before the day when the act took effect, as well as to those made subsequently. See a different construction put on the statute of frauds as to agreements by Lord Nottingham, Ash v. Abdy, 3 Swanst. R. 664, and *Gilmore v. Shooter*, 2 Mod. 310. (b) But *query*, whether such payment can now be proved by the parol admission of the party?

And by the 3d sect. of the same statute it is further enacted, "That no endorsement or memorandum of any payment written or made after the time appointed for this act to take effect, (c) upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes." (d)

(c) 1st January, 1829. (d) 21 Jac. 1, c. 16, and 10 Car. 1, sess. 2, c. 6.

And by sect. 4, it is further enacted, "That the said recited acts and this act shall be deemed and taken to apply to the case of any debt on simple

(F) Of the Manner of Pleading, &c.

contract, alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise.”

It seems to be the doctrine of the courts of equity, that if a man by will or deed subject his lands to the payment of his debts, debts barred by the statute of limitations shall be paid, for they are debts in equity, and the duty remains; and the statute hath not extinguished that, though it hath taken away the remedy.

Salk. 154, pl. 3; 2 Vern. 141. [See, as to this point, *Blakeway v. Earl of Strafford*, 2 P. Wms. 373; *Andrews v. Brown*, Pr. Ch. 385; *Jones v. Earl of Strafford*, 3 P. Wms. 77; *Vaughan v. Guy*, Mos. 245; *Legastick v. Cowne*, Ibid. 391; *Lacon v. Briggs*, 3 Atk. 107; *Truman v. Fenton*, Cowp. 548; *Oughterlongy v. Earl of Powis*, Amb. 231.]

||However, it is now settled that a devise in trust for payment of debts will not revive a debt upon which the statute of limitations has taken effect before the testator's death.

Burke v. Jones, 2 Ves. & B. 275; *Lovell on Wills*, p. 313, note (7), 11th ed. by Mr. Gow.

But when a debt is not barred at the death of the testator by the statute, time does not run in equity after his death.

Hughes v. Wynne, Turn. & Russ. 307.

Also it hath been ruled in equity, that if a man has a debt due to him by note, or a book-debt, and has made no demand of it for six years, so that he is barred by the statute of limitations; yet if the debtor, or his executor, after the six years, put out an advertisement in the Gazette, or any other newspaper, that all persons who have any debts owing to them may apply to such a place, and that they shall be paid; this (though general, and therefore might be intended of legal subsisting debts only) yet amounts to such an acknowledgment of that debt which was barred, as will revive the right, and bring it out of the statute again.

Abr. Eq. 305, *Andrews v. Brown*.

(F) Of the Manner of Pleading, and taking Advantage of the Statute of Limitations.

It seems to be admitted, that the statute of limitations must be pleaded (a) positively by him that would take (b) advantage thereof; (c) and that the same cannot be given in evidence, especially in an *assumpsit*, because the statute speaks of a time past, and relates to the time of making the promise.

Lev. 111; Sid. 253, and vide Cro. Ja. 115. β Evidence of a demand cannot be rejected, because it arose at a period beyond the time prescribed by the act of limitations. *Boggs v. Bard*, 2 Rawle, 102. γ (a) And therefore, if the defendant pleads, that if any such promise was made, it was not within six years, and so within the statute of limitations; such conditional plea is not good; vide head of Pleadings.—But pursuant to the statute 4 & 5 Annæ, c. 16, for amendment of the law, the defendant, by way of double plea, may plead *non assumpsit*, and *non assumpsit infra sex annos*; though it may seem inconsistent, the plea of *non assumpsit infra sex annos* implying a promise. (b) If a man devises all the rest and residue of his personal estate, after debts and legacies paid, to J S, and several of the creditors are barred by the statute of limitations, who notwithstanding bring actions against the executor, and he refuses to plead the statute of limitations; yet equity will not in favour of J S, to whom the surplus is devised, compel the executor to plead the statute. Abr. Eq. 305, *Castleton v. Lord Fanshaw*. (c) That though it appears upon the face of the declaration that the cause of action did not arise within six years, yet the defendant shall not take advantage of that without pleading, because there might be an original sued out, which the plaintiff cannot otherwise show, than by way of replication, upon the defendant's putting him upon it. 2 Salk. 422, 423; *||Puckle v. Moor*, 1 Vent. 191; *Gould v. Johnson*, 2 Lord Raym. 838.

(F) Of the Manner of Pleading, &c.

But in debt for rent, upon *nil debet* pleaded, the statute of limitations may be given in evidence; for the statute has made it no debt at the time of the plea pleaded, the words being in the present tense.(a)

Salk. 278, pl. 1, *per* Holt. {*Contra*, 2 Mass. T. Rep. 87; and see 1 Cran. 343, 465.} ||(a) Since the same reasons for pleading the statute apply equally to both actions, the modern practice is to plead the statute in the action of debt as well as in *assumpsit*. *Duppa v. Mayo*, 1 Saund. 283, note (2); and Bayley, J., held that the statute could not be given in evidence on *nil debet*, because the debt remained though the remedy was barred. *Woodhouse v. Williams*, York Sum. Ass. 1829.||

In replevin the defendant pleaded not guilty *de capt. prædict. infra sex annos jam ultimo elapsos*; and though it was urged that this was the same with pleading *non cepit*, and if he did not take he could not be guilty of the detainer; and if this way of pleading were not allowed, the statute would be entirely evaded as to this action; yet the plea was held ill, because he ought to have answered to the detainer as well as to the taking; for there may be a detainer without a taking: besides, a thing may be lawfully distrained, although unlawfully kept; as, by being put into a castle, &c., by which means it could not be replevied.

Sid. 81, *Arundel and Trevil*; Keb. 279, S. C.

In trespass, for a trespass done thirteen years before, the defendant pleads, that *infra sex annos, &c., non est inde culpabilis*. Plaintiff replies, that he brought his action such a term, and that within six years before that time the defendant did the trespass; and upon this the defendant takes issue, and is found guilty; and it was held, 1st, That the defendant's plea was good in bar, without pleading the statute. 2dly, That the plaintiff's replication was no departure; although it was objected, that he could have replied nothing, but that he was under some of the disabilities, for which there is a saving in the statute; for the plaintiff is not tied to the time or place laid in the declaration, but may vary from it upon evidence; and so when the defendant, by his plea, pleads to a certain time or place, and thereby makes the time or place material, the plaintiff may follow him without any (b) departure.

Raym. 86; Lev. 110; Keb. 566, S. C., *Lee v. Rayner*. ||And see 2 Saund. 84 d, note.|| (b) This case seems to differ from *Tyler and Wall*, Cro. Car. 229, for there the plaintiff in his replication varies as well from the time laid by the defendant in his plea, as the time laid in the declaration.

§ When to a plea of the statute of limitations, the plaintiff replies an original sued out within the time prescribed by the act of limitations, he must show it to have been continued up to the time of trial.

M'Dowell v. Goodwyn, 2 Rep. Const. Ct. 441. See *Hume v. Dickinson*, 4 Bibb, 276.g

[In equity, where a particular special promise is charged to avoid the operation of the statute, the plaintiff must deny the promise charged, by averment in the plea, as well as by answer to support the plea.

Anon. 3 Atk. 70.] ||*Redesdale's Tr.* Pl. 2d ed. 212.|| § It is not requisite that a plea of the statute of limitations to a bill in equity should be accompanied by an answer alleging that the debt was paid. *Smith v. Hickman, Cooke*, 330.g

§ If one of several administrators, defendants, remain neutral, the others may plead the act of limitations. Whether one may charge the estate by refusing to plead the act seems to be doubtful.

Scully v. Wallace, 15 S. & R. 231.

When the defendant gives evidence of a set-off, the plaintiff may avail himself of the act of limitations, without pleading it in any way.

Levering v. Rittenhouse, 4 Whart. 130. See *Hinkly v. Walters*, 8 Watts, 264.g

β(G) Miscellaneous Cases.

IN connected transactions and accounts, if one party is out of the statute of limitations, the other is also.

Johnson v. Carneal, Lit. Sel. Cas. 172.

A bill filed by one creditor on behalf of himself and the others, will prevent the statute from running against any of the creditors who come in under the decree.

Sterndale v. Hankinson, 1 Sim. 393.

When one of the persons against whom a decree is given is an infant, his infancy will prevent the statute of limitations from barring those who must necessarily join with such infant in a writ of error to reverse such decree.

Kennedy v. Duncan, Hardin, 366.

In general a partial payment of a debt takes the case out of the statute.(a) But a payment by trustees, or by assignees of a bankrupt, not parties to the original contract, will not amount to an acknowledgment of the original debt, so as to take it out of the statute of limitations.(b)

(a) *Morton v. Harrison*, 1 Bland, 493; *Bailey v. Ashton*, 4 Perr. & D. 204; *Maghee v. O'Neil*, 7 Mees. & W. 531. (b) *Roosevelt v. Mark*, 6 Johns. Ch. 292.

An executor is not bound to plead the act of limitation to a debt which he believes to be just.

Walter v. Radcliffe, 2 Desaus. 577.

Any person having an interest under a will may set up the statute of limitations, without requiring the concurrence of the executor.

Partridge v. Mitchell, 3 Edw. 180.

Whenever the statute is a bar to the recovery of one of the parties, it operates against the whole, because the disability of one does not save the rights of the others. The proviso in the statute protects the rights of those who are unable to protect themselves; when some of the parties are competent, they ought to take care of the interests of all, by commencing a suit within the time.

Riden v. Frion, 3 Murph. 577.

Unless compelled by the force of former decisions, the courts do not now give a strained construction to evade the effect of the statute of limitations.

McClung v. Silliman, 3 Pet. R. 276.

A mortgage of property as security for the payment of a book-debt, takes it out of the statute of limitations.

Clark v. Bull, 2 Root, 329. But see *Shields v. Brändige*, 4 Louis. R. 326.

The act of limitations cannot be pleaded by a garnishee nor by any other person, except the defendant.

Anon. 1 Hayw. 459.

The statute of limitation of the country where the remedy is sought, and not of the country where the contract was made, must govern.

Graves v. Graves, 2 Bibb, 207; *Pearsall v. Dwight*, 2 Mass. 84; *Le Roy v. Crowninshield*, 2 Mason, 151; 3 Pet. 270; *Atwater's Adm'r v. Townsend*, 4 Conn. 47; 6 Wend. 475; *Medbury v. Hopkins*, 3 Conn. 472. But see *Woodbridge v. Austin*, 2 Tyl. 264.

The statute is a bar to a contract made in another state, and on which, by the laws of that state, the limitation had not expired when the action was brought.

Nash v. Tupper 1 Caines, R. 402.

(B) How punished.

The same rule applies to a set-off arising on a contract made in another state.

Ruggles v. Keeler, 3 Johns. R. 263.

A law of a foreign country, which authorizes proceedings for calling on creditors to present their demands against a debtor by a specified day, and which declares the effect of omission to be, not only to take away the remedy, but to extinguish the debt, will be considered, where there is no insolvency nor surrender of property, in the nature of a statute of limitations, affecting the remedy and not the validity of the contract.

Lincoln v. Battelle, 6 Wend. 475.g

MAIHEM.

(A) What it is.

(B) How punished.

(A) What it is.

MAYHEM is defined to be any hurt done to a man's body whereby he is rendered less able in fighting, either to defend himself, or annoy his adversary; such as the cutting off, disabling, or weakening a hand or finger, striking out an eye or foretooth, or castration, &c., and these are properly said to be mayhems, and to come under the notion of felonies; but the cutting off an ear, or nose, are said not to be properly mayhems, because they do not weaken a man, but only disfigure him.

Co. Lit. 126, 128; 3 Inst. 62, 118; Hawk. P. C. c. 44; 3 Bl. Comm. 121. *§* This definition appears not to be entirely correct. The "hurt" must have been done unlawfully and violently.g

(B) How punished.

By the old common law castration was punished with death, and other mayhems with the loss of member for member; but of later days mayhem was punishable only by fine and imprisonment.

Bract. 144; 3 Inst. 62. *§* Vide Bouv. L. D. *Castration*. By the civil law this offence was punished with death. Dig. 48, 8, 4, 2.g

And by the statute (a) 22 & 23 Car. 2, c. 1, it is enacted, "That if any person shall on purpose, and of malice forethought, and by lying in wait, (b) unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject of his majesty, with intention in so doing to maim or disfigure, in any the manners before mentioned, such his majesty's subject, that then, and in every such case, the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to the offence as aforesaid, shall be and are by the said statute declared to be felons, and shall suffer death as in cases of felony without benefit of clergy."

|| (a) This act is now repealed by 9 G. 4, c. 31, s. 1. || The occasion of this act was an assault that was made on Sir John Coventry, a member of the House of Commons,

(B) How punished.

by slitting his nose, and thence called Coventry's act. [(b) This does not imply concealment, but merely that the defendant waited in some particular place for the prosecutor, intending to wound or maim him as soon as he should arrive. See *Rex v. Carol et al.*, 1 East, P. C. 394; *Rex v. Mills*, 1 Leach, 259.]

"Provided, that no attainer of such felony shall extend to corrupt the blood, or forfeit the dower of the wife, or the lands, goods, or chattels of the offender."

If a man attack another of malice forethought, in order to murder him with a bill, or any other such like instrument, which cannot but endanger the maiming him, and in such attack happen not to kill, but only to maim him, he may be indicted on this statute, together with all those who were his abettors, &c., and it shall be left to the jury on the evidence, whether there was a design to murder by maiming, and consequently, a malicious intent to maim, as well as to kill; in which case the offence is within the statute, though the primary intention was murder.(a)

Stat. Tri. vol. 6, f. 211, so ruled in Coke's trial, who together with Woodburne were condemned and executed at Suffolk assizes, 8 Geo. 1, for slitting the nose of Mr. Crispe.

(a) REMEDY by Action.—For a threat, assault, battery, or mayhem, the party shall have a remedy by action of trespass, *quare manus imposuit ita quod, &c.* Lut. 1428.—*Quare in ipsum insulsum fecit et ipsum verberavit, &c.* F. N. B. 86, l.—And such is the form, though he does not wound him. F. N. B. 86, K.—*Quare in ipsum insulsum fecit, verberavit, vulneravit, et imprisonavit, &c.* F. N. B. 86, K.—*Quare, cepit, imprisonavit, et in prisona quousque finem, &c. fecisset, delinuit.* F. N. B. 86, K.

By Indictment.—So, mayhem is the greatest offence under felony. Co. Lit. 127 a.—So, for a mayhem a man may be indicted, fined, and ransomed. Co. Lit. 127 a, b; 3 Inst. 63.—Though the mayhem be done by himself. Co. Lit. 127 b.—Though the person be his villain, who cannot maintain an action for it against his lord. Co. Lit. 127 a.—So, an indictment lies for an assault, battery, or imprisonment of a subject. Com. Dig. 1 V. 526.

When the Damages shall be increased for a Mayhem.—If the declaration mention a mayhem, the court, upon view of the mayhem, may increase the damages given by the jury.—1 Roll. 572, l. 10, 15 R.; 1 Leo. 139.—Though the particular part in which the mayhem was, be not specified. R. Hard. 408. [In *Brown v. Seymour*, the court seemed to think a declaration, that defendant assaulted and maimed the plaintiff in the left hand, particular enough, though they did not allow the circumstances of the case to be such as called for an increase of damages. 1 Wils. 6.] So, in battery, where the manner of the battery is described, the court, upon view, may increase the damages. *Per Hale*, Hard. 408.—So, the court may increase damages, upon view and examination of witnesses, where the declaration is general *quod mathemavit*, without making any description of the mayhem, if the judge of assize certify the particulars of the mayhem, or be in court, and affirm, that the particulars, now proved, were given in evidence at the trial. 1 Sid. 108.—But where the declaration does not mention a mayhem, nor describe the manner of the battery, the court cannot increase the damages upon view. Hard. 408.—So, if the mayhem was not the act of the defendant directly, but by a horse, after the plaintiff was thrown down by the defendant. R. 1 Sid. 433.—Or, by a gun, which the defendant let off, and which maimed the plaintiff against his will. R. 1 Sid. 108.—So, if the declaration be general *quod mathemavit*, without describing how, and the judge do not certify it. 1 Sid. 108.—[In *Smallpiece v. Bokenham*, M 27 Car. 2, C. B., upon a motion to increase damages *super visum vulneris*, the court said, it was necessary to be proved to be the same wound for which the damages were given, and ordered notice to be given to the defendant who appeared, and witnesses on the one part and on the other were examined, and several of the jurymen, who all said, that no evidence was given to them that any blow was given upon the eye, or that the plaintiff had lost his eye by the battery; and for this reason the court would not increase the damages; for new evidence ought not to be given, this being a censure on the first verdict, and a correction of it. Bull. N. P. 21.]

By Appeal.—So, he may prosecute his appeal of mayhem. Han. Ent. 270; Co. Ent. 50 c.—And the writ of appeal and indictment shall say, *quod felonice mathemavit*. 3 Inst. 63, 118.—To an appeal of mayhem, the defendant may plead not guilty. Han. 271.—So, if he did it *se defendendo*, he may plead in bar, *son assuult demesne*. Han. 271,

(B) How punished.

277; Co. Ent. 52.—And he must plead it; for he cannot give it in evidence upon *not guilty*. 2 Inst. 316.—So, the defendant may plead a release of the mayhem. Com. Dig. 1 vol. 597.—Or, of all actions personal; for the damages only are recovered in such appeal. Lit. s. 502.—So, the defendant may plead 20*l*. or other sum given in satisfaction. Han. 274.—A recovery in trespass for the same mayhem. Co. Ent. 50 b.

[[The statute 9 Geo. 4, c. 31, repealing, but imbodying and extending the 43 Geo. 3, c. 58, (Lord Ellenborough's act,) enacts, § 12, "That if any person unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or any of his accomplices, for any offence for which he or they may respectively be liable by law to be apprehended or detained, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon: provided always, that in case it shall appear on the trial of any person indicted for any of the offences above specified, that such acts of shooting, or of attempting to discharge loaded arms, or of stabbing, cutting, or wounding as aforesaid, were committed under such circumstances, that, if death had issued therefrom, the same would not in law have amounted to the crime of murder, in every such case, the person so indicted shall be acquitted of the felony."

By the stat. 6 Geo. 4, c. 126, reciting the title of the repealed statute 43 Geo. 3, c. 58, similar provisions for the prevention of some of the crimes mentioned in that statute are enacted with regard to Scotland.

By the 24 Geo. 3, sess. 2, c. 47, s. 11, shooting at or dangerously wounding any officer of the navy, customs, or excise, in the execution of his duty, is made felony without benefit of clergy.

The following cases upon the construction of the statute 43 Geo. 3, c. 58, may assist in the construction of the new law.

Shooting has been held within the statute 43 Geo. 3, c. 58, where the instrument was loaded with powder and paper only, but fired so near the person, and in such a direction, as made it likely it would kill, &c.(a) But it has been ruled in a variety of cases upon that statute, that the words "stab or cut," contained in it, relate only to such wounds as are made by an instrument capable of stabbing or cutting; stabbing being properly a wounding with a pointed instrument, and cutting being a wounding with an instrument having a sharp edge.(b) This defect is, however, obviated in the new act, by the insertion of the word "wound," which it is supposed will include all cases of injuring the person, whether they be perpetrated by blunt or other instruments.

(a) *Rex v. Kitchen*, Mich. T. 1805; MS. Bayley, J., and Russ. & Ry. 95; and see Russ. on Crimes, vol. 1, 596. (b) *Rex v. M'Dermot*, East. T. 1818; Russ. & Ry. 356; *Rex v. Whitfield*, cor. Bayley, J., Salop Sum. Ass. 1822, M. T.; and see Russ. on Crimes, 597.

Upon the stat. 43 Geo. 3, c. 58, it has also been held that the cutting must be expressly laid with the intent stated in the act, and that an indictment for cutting with intent to do some grievous bodily harm, without saying "in so doing or by means thereof," was not sufficient.(c) And where the offence is charged to have been committed with intent to obstruct, &c. a lawful apprehension, it must be shown that the offender had some notifica-

tion of the purpose for which he was apprehended before he inflicted the wound. (d)

(c) *Anon. cor. Dallas, C. J., and Burton, J., at Chester, 5 Evans, Col. Stat. part 5, cl. 4, p. 334, n. (3); Rex v. Duffin and Marshall, East. T. 1818, MS. Bayley, J., and 1 Russ. & Ry. 365. (d) Rex v. Ricketts, Worcester Sum. Ass. 1811, cor. Lawrence, J., 3 Camp. 68; and see the cases cited in Russel on Crimes, 1 vol. p. 600, 1.]*

MAINTENANCE, AND THE OFFENCE OF BUYING OR SELLING A PRETENDED TITLE.

MAINTENANCE in general signifies an unlawful taking in hand, or upholding of quarrels, or sides, to the disturbance or hinderance of common right; and is said to be twofold:

[See Mr. J. Buller's comment on the doctrine of maintenance, 4 Term Rep. 340.] Co. Lit. 368 b; 2 Inst. 208, 212; Hawk. P. C. c. 83; {3 Ves. J. 500—503.}

1. *Ruralis*, or in the country; as where one assists another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtlety; or, where one stirs up quarrels and suits in the country, in relation to matters wherein he is no way concerned; for this kind of maintenance is punishable at the king's suit by fine and imprisonment, whether the matter in dispute any way depended in plea, or not; but it is said not to be actionable.

Co. Lit. 368; 2 Inst. 213; 2 Roll. Abr. 115.

2. *Curialis*, or in a court of justice; where one officiously intermeddles in a suit depending in any such court, which no ways belongs to him, by assisting either party with money, or otherwise, in the prosecution or defence of any such suit.

2 Inst. 212; 2 Roll. Abr. 115.

Of this second Kind of Maintenance there are said to be three Species:

1. *Where one maintains one side to have part of the thing in suit, which is called Champerty.*
2. *Where one laboureth a jury, which is called Embracery.*
3. *Where one maintains another without any contract to have part of the thing in suit, which generally goes under the common name of Maintenance; and of which in the following order.*

(A) What shall be said to amount to an Act of Maintenance.

(B) In what Respects some such Acts may be justified: And herein,

1. *How far they are justifiable in respect of an Interest in the Thing in variance.*
2. *How far in respect of Kindred or Affinity.*
3. *How far in respect of other Relations; as that of Lord and Tenant, Master and Servant.*
4. *How far in respect of Charity.*
5. *How far in respect of the Profession of the Law.*

(C) How Maintenance is restrained and punished by the Common Law.

(D) How restrained and punished by Statute.

(E) Of the offence of Buying or Selling a pretended Title.

(A) What shall be said to amount to an Act of Maintenance.

It is said, that not only he who assists another with money in his cause, as by retaining counsel for him, or otherwise bearing him out in the whole or part of the expense, but also he who, by his friendship or interest, saves him that expense, which otherwise he may be put to, is guilty of maintenance; as where one persuades, or but endeavours to persuade, a man to be of counsel for another *gratis*.

Bro. *Maint.* 7, 14; 2 Roll. Abr. 118; Hawk. P. C. c. 83, § 5; {3 Ves. J. 494, *Wallis v. The Duke of Portland*.}

Also, it seems to be an act of maintenance to open evidence to the jury, or to give evidence officiously without being called upon to do it, or to speak in a cause as one of counsel with the party, or to retain an attorney for him; and some have said, that it is maintenance even barely to go along with him to inquire for a person learned in the law.

Hetl. 78, 79; Cro. Eliz. 735; Roll. Abr. 593; 2 Roll. Abr. 118. ¶But see the judgment of Buller, J., in *Master v. Miller*, 4 Term Rep. 340.¶

It seems to be maintenance for a man of great power and interest to say publicly, that he will spend 20*l.* on one side, or that he will give 20*l.* to labour the jury; and it hath been said to be maintenance for such a person to come to the bar with one of the parties, and stand by him while his cause is tried, without saying any thing: but a promise to maintain another is not maintenance, unless it be in respect of the public manner in which it is made, or the power of the person by whom it is made.

Hawk. P. C. c. 83, § 7, and several authorities there cited.

It is said to be maintenance for a juror to solicit a judge to give judgment according to the verdict; but it seems to be no maintenance for a juror to exhort his companions to join with him in such a verdict as he thinks right.

Hawk. P. C. c. 83, § 8.

It seems to be no maintenance for a man to give another friendly advice what action is proper for him to bring for such a debt; or what method is safest to free him from such an arrest; or what counsellor or attorney is likely to do his business most effectually; for it would be extremely hard to make such neighbourly acts of kindness, which seem rather commendable than blameworthy, to come under the notion of maintenance; which always seems to imply a contentious and over-busy intermeddling with other men's matters, in which respect it is so highly criminal; yet it is said, that a man of great power, not learned in the law, may be guilty of maintenance, by telling another, who asks his advice, that he has a good title.

Hawk. P. C. c. 83, § 9.

It is no maintenance to give a man money, who has no suit then depending, unless it plainly appear that it was given with a design to assist him in a suit intended, which suit is afterwards actually brought.(a)

Hawk. P. C. c. 83, § 10. ¶(a) *Seemle*, That a party jointly interested with others, plaintiffs in an action for the recovery of a debt, may, by releasing his interest in that debt to those others, (for the purpose of making him a competent witness to prove it on the trial,) be guilty of maintenance. See *Bell v. Smith*, (in error,) 5 Barn. & C. 188; S. C. 7 Dow. & Ry. 846.¶

It is as much an act of maintenance to support a man after judgment given, as to do it pending the plea.

Hawk. P. C. c. 83, § 11.

¶Where the representatives of a deceased navy officer entitled to prize-

(B) In what Respects Acts of Maintenance justified.

money assigned a share of it to certain navy-agents, on condition of their indemnifying the representatives against all costs of proceedings in the prize suit then depending, this was held by Sir W. Grant, M. R., to be a void agreement, as amounting to champerty; viz. the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it, which is not confined to suits in the courts of common law.

Stevens v. Bagwell, 15 Ves. 139; and see *Wallis v. Portland*, 3 Ves. 394, 502, and *Hartley v. Russell*, 2 Sim. and Stu. 244.

And beneficial contracts or conveyances obtained by an attorney from his client during their relation as such, and connected with the subject of the suit, are liable to the charge of champerty, and have been decreed to stand as security only for what was actually due.

Wood v. Downes, 18 Ves. 120.]]

¶ When the mother of an illegitimate child deposited a sum of money to defray the expenses of obtaining an act for dissolving her marriage, held not to be illegal.

Moore v. Usher, 7 Sim. 384.g

(B) In what Respects some such Acts may be justified: And herein,

1. *How far they are justifiable in respect of an Interest in the Thing in Variance.*

It seems clear, that not only those who have an actual interest in the thing in variance, as those who have a reversion expectant on an estate-tail, or on a lease for life, or years, &c., but also those who have a bare contingency of an interest in the lands in question, which possibly may never come *in esse*, and even those who, by the act of God, have the immediate possibility of such an interest, as heirs apparent, or the husbands of such heirs, though it be in the power of others to bar them, may lawfully maintain another in an action concerning such lands; and if a plaintiff, in an action of trespass, alien the lands, the alienee may produce evidence to prove that the inheritance, at the time of the action, was in the plaintiff, because the title is now become his own.

2 Roll. Abr. 115, 117; 2 Inst. 564; Bro. *Maint.* 28, 53..

Also, he who is bound to warrant lands may lawfully maintain the tenant in the defence of his title, because he is bound to render other lands to the value of those that shall be evicted.

Bro. *Maint.* 51.

Also, he who has an equitable interest in lands or goods, or even in a chose in action, as, a *cestui que trust*, or a vendee of lands, &c., or an assignee of a bond for a good consideration, may lawfully maintain a suit concerning the thing in which he has such an equity; and from the same ground it seems plainly to follow, that the grantee of a reversion for good consideration might, without any attornment, maintain the tenant of the land, before the statute 4 & 5 Annæ, c. 16, which makes such attornment needless.

Noy, 99, 100; Moor, 620; Cro. Eliz. 552; Sid. 217.

Wherever any persons claim a common interest in the same thing, as, in a way, churchyard, or common, &c., by the same title, they may maintain one another in a suit concerning such thing; and a man's bail may take care to have his appearance recorded; but, as some say, they cannot safely inter-meddle farther.

Hawk. P. C. c. 83 § 18.

(B) In what Respects Acts of Maintenance justified.

2. *How far in respect of Kindred or Affinity.*

Whoever is of kin, or godfather to either of the parties, or related by any kind of affinity still continuing, may lawfully stand by at the bar and counsel him, and pray another to be of counsel for him; but cannot lawfully lay out his money in the cause, unless he be either father, or son, or heir apparent to the party, or husband of such an heiress.

2 Inst. 564; Hawk. P. C. c. 83, § 20.

3. *How far in respect of other Relations; as that of Lord and Tenant, Master and Servant.*

Not only the actual lord, but also the *cestui que use* of a seignior, may come with the tenant to a trial in an assize against him, and stand by him, and assist him, and also pray the sheriff to return an indifferent jury; and it seems a plausible opinion, that he may also justify laying out his money in defence of his tenant's title: also, the lord of a town may maintain the inhabitants in an action, wherein the right to their common burying-place is questioned, by showing authentic evidence of it to the jury.

Co. Lit. 65, 101, 384; 2 Roll. Abr. 116, 117.

A tenant may lawfully come with his lord, and stand with him at a trial. Hawk. P. C. c. 83, § 22.

A master may go along with his servant, or with his domestic chaplain, to retain counsel: also, he may pray one to be of counsel for him, and may go with him, and stand with him, and aid him at the trial, but ought not to speak in court in favour of his cause: also, if the servant be arrested, the master may assist him with money to keep him from prison, that he may have the benefit of his service; but the master cannot safely lay out money for the servant in a real action, unless he have some of his wages in his hands; but those, with the servant's consent, he may safely disburse.

Bro. Maint. 44, 52; Hetley, 79; Moor, 814.

A person retained generally as a servant, and not for a particular occasion only, may lawfully ride about to speed his master's business, and may go to counsel for him, and show his evidence to the counsel, or to the jury, and stand by him at a trial, but cannot lawfully lay out his own money in the suit.

Hawk. P. C. c. 83, § 24.

¶ A landlord may sue in the name of his tenant to try a right; (a) and a mortgagee, not a party in a suit, may, without being guilty of maintenance, advance money to support the title; (b) for maintenance is justifiable from the privity of the parties in estate. (c)

(a) *Payne v. Rogers*, Doug. 407. (b) 3 P. Wms. 375. (c) 3 Ves. 503.¶

4. *How far in respect of Charity.*

Any one may lawfully give money to a poor man to enable him to carry on his suit: also, any one may lawfully go with a foreigner, who cannot speak English, to a counsellor, and inform him of his case.

Bro. Maint. 14.

5. *How far in respect to the Profession of the Law.*

A counsellor, having received his fee, may lawfully set forth his client's cause to the best advantage; but can no more justify giving him money to maintain his suit, or threaten a juror, than any other person.

2 Inst. 564; 2 Roll. Abr. 116.

(D) How restrained and punished by Statute.

Also, an attorney specially retained may lawfully prosecute or defend an action in the court wherein he is an allowed attorney, and lay out his own money in the suit, and maintain an action against his client for the money so laid out, by virtue of the retainer, without any special promise: also, an attorney so retained may in like manner maintain his client in a court wherein he is not an allowed attorney; but as some say cannot have an action for the money laid out in the suit, without a special promise: but an attorney, who maintains another, is no way justified, by a general retainer, to prosecute for him in all causes; neither can an attorney lawfully carry on a cause for another at his own expense, with a promise never to expect a re-payment; and it is questionable whether solicitors, who are no attorneys, can in any case lawfully lay out their own money in another's case.

Keilw. 50; 2 Inst. 564; Winch. 52; Jon. 208; Cro. Car. 159; 3 Mod. 98.

But counsellors and attorneys, using deceitful practice in maintenance of their clients' causes, are punishable by the common law, as well as by the statute of Westm. 1, c. 28, which enacts, "That if any serjeant, pleader, or other, do any manner of deceit or collusion in the king's court, or consent unto it in deceit of the court, or to beguile the court or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that court for any man; and if he be no pleader, he shall be imprisoned in like manner by the space of a year and a day at the least; and if the trespass require greater punishment, it shall be at the king's pleasure."

2 Inst. 215.

It is an offence within this statute for an attorney to sue out an *habere facias seisinam*, falsely reciting a recovery where there was none, and by colour thereof to put the supposed tenant in the action out of his freehold.

Dyer, 249, pl. 84; 2 Inst. 215.

Also, it is an offence within the statute to bring a *præcipe* against a poor man, having nothing in the land, on purpose to oust the true tenant; or to procure an attorney to appear for a man, and confess a judgment without any warrant; or to plead a false plea, known to be utterly groundless, and invented merely to delay justice, and to abuse the court. (a)

2 Inst. 215. (a) In most of these cases the court would grant an attachment against the offender, on motion.

(C) How Maintenance is restrained and punished by the Common Law.

By the common law, all unlawful maintainers are not only liable to render damages in an action at the suit of the party grieved, but may also be indicted and fined, and imprisoned, &c., and it seems that a court of record may commit a man for an act of maintenance in the face of the court.

2 Roll. Abr. 114; 2 Inst. 208; Hedley, 79.

¶ Maintenance being an offence at common law, although additional penalties are given by statute, it is not requisite to allege it *contra formam statuti*.

Peckel v. Watson, 8 Mees. & W. 691.

(D) How restrained and punished by Statute.

By the 1 E. 3, c. 14, and 20 E. 3, c. 4, it is enacted, "That none of the king's ministers, nor no great man of the realm, by himself nor by other, by sending of letters nor otherwise, nor none other great nor small, shall

(E) Offence of Buying or Selling a pretended Title.

take upon them to maintain quarrels, nor parts, in the country, to the disturbance of common right.”

And by the 1 R. 2, c. 4, it is enacted, “That no person whatsoever shall take or sustain any quarrel by maintenance in the country or elsewhere, on grievous pain, that is to say, the king’s counsellors and great officers, on a pain that shall be ordained by the king himself, by the advice of the lords of this realm, and other officers of the king, on pain to lose their offices and to be imprisoned, and ransomed, &c., and all other persons, on pain of imprisonment and ransom,” &c.

In the construction of these statutes the following points have been holden :

That *nul tiel record* is a good plea to an action on these statutes, by which it appears that they extend not to taking out an original, which is never returned, but they extend as well to maintenance in a court-baron, as to maintenance in a court of record ; neither is it material whether the plaintiff in the action, wherein there was such maintenance, were nonsuited or recovered : But it is said, that none of the statutes of maintenance extend to the spiritual court.

Hawk. P. C. c. 83, § 40, 41.

He who fears that another will maintain his adversary, may, by way of prevention, have an original grounded on these statutes, prohibiting him to do it.

Hawk. P. C. c. 83, § 42.

By the 32 H. 8, c. 9, “No person shall unlawfully maintain or cause or procure any unlawful maintenance in any suit, in any of the king’s courts, where any person shall have authority by the king’s commission, patent, or writ to hold plea of lands, or to examine, hear, or determine any title of lands, &c., and no person shall unlawfully maintain, for maintenance of any suit or plea, any person or persons, or embrace any freeholders or jurors, or suborn any witness by letters, rewards, or promises, or any other sinister means, to maintain any matter or cause, or to the disturbance of justices, &c. on pain of 10*l.*, one moiety to the king, the other to the informer.”

In an information thereon, it is not sufficient to say, that the defendant maintained the party, without adding, that he did it unlawfully ; neither is it sufficient to say, that a bill was exhibited, without further showing that a plea was depending. (a)

Hawk. P. C. c. 83, § 45. (a) Vide also the statutes, 3 Ed. 1, c. 25, 28, and 33 ; 13 Ed. 1, c. 36, and c. 49 ; 28 Ed. 1, c. 11 ; 4 Ed. 3, c. 11 ; 20 Ed. 3, c. 5 ; 1 R. 2, c. 7 ; 13 R. 2, stat. 3 ; 20 R. 2, c. 1 ; 8 H. 6, c. 9, and 7 R. 2, c. 15, *et infra*.

(E) Of the Offence of Buying or Selling a pretended Title.

It seems an high offence at common law, as plainly tending to oppression, for a man to buy, at an under rate, a doubtful title known to be disputed, to the intent that the buyer may carry on the suit, which the seller doth not think it worth his while to do ; and it seems not to be material whether the title be good or bad ; or whether the seller were in possession or not, unless the possession were lawful and uncontested.

Moor, 751, pl. 1031 ; Hob. 115 ; Plow. 80.

Also by the 1 R. 2, c. 9, reciting, that many persons having true title to lands, &c. were wrongfully delayed, by means that the defendants did make gifts and feoffments of their lands in debate, and of their goods to great men, against whom the said pursuants durst not make their pursuits ; and also

(E) Offence of Buying or Selling a pretended Title.

that many persons used to disseise others, and anon to make feoffments sometimes to great men to have maintenance, and sometimes to persons unknown, to the intent to delay the said disseisees, &c. ; therefore it is enacted, "That no gift or feoffment of tenements or goods be made by such fraud or maintenance, and that if any be so made, they shall be holden for (a) none ; and that the said disseisees shall recover against the first disseisor their lands and damages, without having regard to such alienations, so that they commence their suit within a year after the disseisin."

(a) In respect of the disseisees ; but they are effectual between the feoffor and feoffee. Co. Lit. 369.

It is further enacted by 32 H. 8, c. 9, "That no person shall bargain, buy, or sell, or by any means obtain any pretended rights or titles, or take, promise, grant, or covenant to have any right or title to any (b) hereditaments, unless the seller, &c., his ancestors, or they from whom he claims, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, for one whole year next before the said bargain and sale, &c. on pain that such seller shall forfeit the whole (c) value of the hereditaments so sold ; and the buyer or taker, knowing the same, shall forfeit the value of the hereditaments so by him bought or taken ; the one-half of the said forfeitures to be to the king, and the other to him who will sue."

(b) Whether freehold or copyhold. 4 Co. 26 a ; Co. Lit. 369 b ; Moor, 655. (c) And therefore the plaintiff in his action must show the value at the time of the bargain. Cro. Car. 233.

But it is provided, "That it shall be lawful for any person, being in lawful possession, by taking of the yearly farm-rents or profits of any hereditaments, to buy or get, by any reasonable means, the pretended right or title of any other person to the same.

{See 1 Wash. 39, Wilcox v. Calloway.}

"Provided, that no one shall be charged with these penalties, unless he be sued within one year after the offence."

In the construction of this statute the following opinions have been holden :

That the statute being public, there is no need to recite it in an action brought upon it ; but if you take upon you to recite it, a material misrecital will be fatal.

Lit. Rep. 369 ; Plow. 84 ; Cro. Car. 233 ; Dyer, 74.

In an action against the buyer of a pretended title, it must expressly appear that the defendant knew that the seller had not been a year in possession ; but in such an action by the buyer, the contrary must expressly appear ; for otherwise it may be intended that he was *particeps criminis*.

Leon. 167 ; Lit. Rep. 369.

It is not sufficient to show that the seller had not been in possession a year before, &c. without averring, that he had a pretended right or title, for that is the point of the action.

Dyer, 74, pl. 19, 20 ; Plow. 80, 87 ; Cro. Car. 233.

A contract for a lease for years, unless fairly made to try a title in ejectment, is within the statute, whether it were made off the land, or upon the land, by a person in or out of possession ; and in an action on the statute for making such a lease, there is no need to show its commencement or end, because the plaintiff is supposed to be a stranger to it.

Co. Lit. 369 ; Leon. 166 ; And. 76.

(E) Offence of Buying or Selling a pretended Title.

{ Where the deed conveys generally all the grantor's right and title to the land in a particular patent, without specifying the precise quantity or bounds, and the grantor has a legal title to and possession of a part, and a part is unoccupied, though another part of the same patent be in the actual occupation of one who claims and holds adversely to the grantor, yet taking such a deed is not maintenance; especially where the purchase was made by the *bond fide* advice of counsel, and there are other circumstances to show that there was no intention to purchase a pretended title.

1 Johns. Rep. 345, Van Dyck v. Van Beuren & Vosberg. }

No conveyance by one who has the uncontested possession and absolute undisputed propriety of lands, as by a disseisor having obtained a release from the disseisee who had the true right not contested by any other person whatsoever, or by a mortgagor having redeemed his lands, is within the meaning of the statute; because it no way savours of maintenance, and can be prejudicial to no one: neither is a lease for the usual rent, by one who recovers lands by virtue of an ancient title, within the meaning of the statute, though he had the absolute property and possession of the land; for the intent of the statute was to restrain all persons from transferring any disputed right to strangers.

Plow. 88; Co. Lit. 369; Leon. 166; Savil, 95.

Whoever has a reversion or remainder vested in him may lawfully take any conveyance which will strengthen his estate; but cannot take a covenant from a stranger for a conveyance from him, when he shall have recovered the land.

Co. Lit. 369.

{ The deed of a person out of possession, being *void*, does not preclude the grantor from maintaining an action of ejectment to recover possession of the same premises.

1 Johns. Rep. 163, Jackson v. Brinckerhoff; Ibid. 159, Jackson v. Vredenburg; 5 Johns. Rep. 489, Williams v. Jackson; 2 Day. 151, Phelps v. Sage.

Whenever it is intended to be shown that nothing passed by a grant, by reason that at the time there was a possession in another adverse to the grantor, the time to which the grant is to relate is that at which the agreement for the sale was finally concluded between the parties; and consequently any intermediate adverse possession before the execution of the conveyance, which is only the technical consummation or evidence of the grant, can never affect it. And for the same reason, an intermediate sale by the grantee is valid.

1 Johns. Ca. 85, n., Jackson v. Raymond; Ibid. 81, Jackson v. Bull; 2 Cain. Er. 301, S. C.; 2 Johns. Rep. 510, Johnson v. Stagg.

A conveyance of land adversely held is void, though the title under colour of which the person holds may be bad.

2 Cain. 183, Jackson v. Todd; 2 Johns. Rep. 82, 83. Vide 3 Johns. Rep. 375, Jackson v. Hudson.

A feme covert may be disseised, so as to render her deed maintenance.

1 Cain. 90, 91, Van Dyck v. Van Beuren & Vosberg. }

MANDAMUS.

[THE writ of *mandamus* is a high prerogative writ, issuing in the king's name, out of the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice.

3 Bl. Comm. 110; *Parker v. The Judges, &c.*, 12 Wheat. 561.*g*

The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice, and defect of police. Therefore, it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. In the more ancient cases, the grounds upon which the Court of King's Bench have granted or refused a *mandamus* are not explicitly stated. Within the last century, it has been liberally interposed for the benefit of the subject and the advancement of justice. The value of the matter, or its importance to the public police, is not scrupulously weighed. If the party making the application has a right, a *legal* right, and no other *specific legal remedy*, this will not be denied: for his having a remedy in *equity* will not be considered as any ground of refusal. And even though he may have another *legal* specific remedy, if such remedy be *obsolete*, the *mandamus* will be granted.

3 Burr. 1267; 4 Burr. 2188; Cowp. 378. *A mandamus* will not be granted, unless it is clear that there has been a direct refusal to do that which it is the object of the *mandamus* to enforce. *Rex v. Brecknock and Abergavenny Canal Company*, 4 Nev. & M. 871; 3 Ad. & Ell. 217; 1 Har. & Woll. 279.*g* 1 Term Rep. 404; 3 Burr. 1267; 3 Term Rep. 651; [8 East, 2198;] 1 Term Rep. 404; 3 Term Rep. 652.

[And it has been decided to be no objection to the granting a *mandamus* to do a particular act, that an indictment will also lie for the omission to do that act, for the indictment does not compel the doing of the act, and therefore is not equally effectual with the *mandamus*.

Rex v. The Severn and Wye Railway Company, 2 Barn. & A. 646. See also *Rex v. Commissioners of Dean Inclosure*, 2 Maul. & S. 80.]

This writ is the proper remedy to enforce obedience to acts of parliament, and to the king's charters, and, in such cases, is demandable *ex debito justitiæ*. But where the right is of a private nature, as in the case of an office, in which the public are not concerned, such as that of deputy register, it is discretionary in the court either to grant or refuse it.

Bull. N. P. 199; Ca. temp. Hardw. 99; 4 Burr. 2189.]

- (A) Of the Nature of the Writ: And herein of the Suggestion and Manner of awarding thereof.
- (B) Of the Form thereof, and for what Irregularities it may be quashed or superseded.
- (C) In what Cases to be granted: And herein,

1. *Where it lies to restore or admit a Person to an Office, and what shall be said such a public Office for which a Mandamus will lie.*

(A) Of the Nature of the Writ.

2. *Where the Party's having another Remedy is a sufficient Foundation to deny it; and therein of granting Mandamuses to restore Members of Colleges, &c.*
3. *What Removal or Turning out of an Officer will entitle him to a Mandamus.*
- (D) Where it lies to inferior Courts, and Magistrates, to oblige them to do that Justice which the Public Good requires, and the Law enjoins.
- (E) Of the Authority by which it issues: And herein of the discretionary Power in the Court of granting or refusing it.
- (F) To whom to be directed.
- (G) By whom to be returned.
- (H) Of the Manner of enforcing Obedience to the Writ, and compelling a Return.
- (I) What shall be said a good Return.
- (K) Of traversing the Return, and taking Issue thereon.
- (L) Of the Party's Remedy for a false Return.
- (M) Of awarding a peremptory *Mandamus*.

(A) Of the Nature of the Writ: And herein of the Suggestion and Manner of awarding thereof.

A MANDAMUS is a writ commanding the execution of an act, where otherwise justice would be obstructed, or the king's charter neglected, issuing regularly only in cases relating to the public and the government; and is therefore termed (a) a prerogative writ.(b)

β *Mandamus* is described in Bouv. L. D., h. v., as follows: "Mandamus is the name of a writ, the principal word of which, when the proceedings were in Latin, was *mandamus, we command*. It is a command issuing in the name of the sovereign authority from a superior court having jurisdiction, and is directed to some person, corporation, or inferior court, within the jurisdiction of such superior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the superior court has previously determined, or at least supposes to be consonant to right and justice."γ (a) 4 Mod. 281; March, 101. (b) β This writ is a proper remedy to compel all inferior tribunals to perform the duties required of them by law. Comm. v. Hampden, 2 Pick. 414; Chase v. Blackstone Canal, 10 Pick. 244; Johnson v. Randall, 7 Mass. 340; 4 Pick. 68; 21 Pick. 258. A private individual has a right to a writ of *mandamus* only when he has some private or particular interest to subserve, or some particular right or privilege to be pursued and protected by this writ, independently of that which he holds with the public at large; and public officers must apply when public rights are to be subserved. Wellington, petitioner, 16 Pick. 87.γ

And in this (c) sense and use of it, it is said by (d) some to be of modern date, and to owe its original to (e) Bagg's case; but (g) others hold it far more ancient, and that there are instances of such a writ in the reigns of Ed. 1 and Ed. 3,(h) and that it is founded on these words in *Magna Charta*, c. 29: *Nullus liber homo capiatur vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut ullagetur, aut exuletur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ; nulli vendemus, nulli negabimus aut differemus justitiam vel rectum*. 10 Mod. 53.

(c) There is a writ called a *mandamus*, which lay where the king's tenant, who held of him by knight's service, died, his heir within age, and no writ of *diem clausit extremum*, &c., was sued out within a year and a day after his death; then issued a *mandamus* to the escheator, commanding him to inquire of what lands holden by knight's service the tenant died seised, &c., but for this vide F. N. B. 253, B; Dyer, 209, pl. 19, 248, pl. 18; Lamb. 36. (d) Lev. 23; Show. 263; Ca. Law and Eq. 53, 57. (e) 11 Co. 94; Roll. Rep. 173, S. C. (g) Lev. 23; Palm. 51; Dyer, 333; Skin. 293, pl. 3, 310, pl. 4. [(h) Lord Mansfield said, that in a manuscript book of reports which he had seen, the reporter cites (in reporting Dr. Bonham's case) a *mandamus*

(B) Of the Form, and for what Irregularities quashed, &c.

in the time of Ed. 3, directed to the University of Oxford, commanding them to restore a man that was *bannitus*. 4 Bur. 2189.]

It is now an established remedy, and every day made use of, to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their offices, obliged to do; and is a writ of right, (a) which the superior court is obliged to issue in the ordinary form, without imposing any terms on him who demands it; (b) and therefore where a *mandamus* was granted to oblige a corporation to proceed to the election of a capital Burgess, and it was afterwards moved that a day should be fixed for the election, that all parties might have notice,—for that otherwise the person obtaining the *mandamus* might steal an election by surprise,—the court refused to grant the motion, and held, that their power was only to command an election, but not to prescribe the manner of it, which was left to the law, and which must make it good or bad accordingly.

4 Mod. 52; Carth. 217. [(a) This seems to be denied in *The King against the Commissioners of Excise*, 2 Term Rep. 385, where Ashurst, J., said, “An application for a *mandamus* is an application to the discretion of the court; a *mandamus* is a prerogative writ, and is not a writ of right.” See also *The King v. Clear*, 4 Barn. & C. 899. (b) Pasch. 6 G. 2, in B. R.; *The King v. Mayor and Burgesses of Evesham*, 2 Barnard. K. B. 236, 265; 2 Str. 949.

β When the court or officer has a discretion, the Supreme Court will not grant a *mandamus* to control that discretion.

Squier v. Gale, 1 Halst. 157; *Anon.* 2 Pen. R. 576; *Ex parte Bacon*, 6 Cowen, 392; *People v. Columbia*, 1 Wend. 297; *Ex parte Benson*, 7 Cowen, 363; *Ex parte Baily*, 2 Cowen, 479; *People v. Superior Court*, 19 Wend. 68; *Van Rensselaer v. Sheriff of Albany*, 1 Cowen, 502; *Ex parte Nelson*, 1 Cowen, 417; *People v. Albany*, 12 Johns. 414; *Hull v. Oneida*, 19 Johns. 259; *Wells v. Starkhouse*, 2 Har. R. 355; *Vanderver v. Connover*, 3 Green, 271. §

But though it be a writ of right, (c) yet the court seldom grants it without giving the party, to whom it is prayed, a day to show cause against it; (d) also such matter must be laid before the court, by which it may appear that the party is entitled to it, (e) and therefore on a motion for a *mandamus*, to restore the registrar of the Blacksmiths’ Company, the court refused it, because they did not produce their charter, or a copy of it, with an *affidavit*; for this being a private corporation, they held they could not take notice thereof, as they will of a town, &c., without such previous information.

2 Kel. 243, pl. 195; Mich. 4 G. 2, in B. R. [(c) See the above note, (h).] (d) Where it is to swear, or to admit, the court will, in case the right appear plain, grant the writ upon the first motion: but where it is to restore one who has been removed, they will first grant a rule to show cause why such a writ should not issue. Bull. N. P. 199. Where they grant a rule to show cause, though upon showing cause it appear doubtful, whether the party has a right or not, yet the court will issue a *mandamus*, in order that the right may be tried upon the return. *Rex v. Dr. Bland*, T. 1741; Bull. N. P. 200. [(e) *Rex v. Jotham*, 3 T. R. 575; *Rex v. West Looe*, 3 Barn. & C. 683; *Rex v. Clear*, *ubi sup.*]

(B) Of the Form thereof, and for what Irregularities it may be quashed or superseded.

A MANDAMUS is a signable writ, and must be signed by the proper officer of the court before it is sealed. There must be fifteen (g) days between the *teste* and the return of the first writ of *mandamus*, if the party, to whom it is sent, be above forty miles from London; but if but forty miles, or under, then eight days only.

2 Salk. 434, pl. 16, 452, pl. 3. β As to the form of the writ, see *Van Rensselaer v. Sheriff of Albany*, 1 Cowen, 512; *The People v. Salem*, 1 Cowen, 23; *Ex parte La Farge*, 6 Cowen, 61; *People v. Westchester*, 4 Cowen, 73; *Ex parte Jennings*, 6 Cowen, 529; *Blunt v. Greenwood*, 15 Cowen, 15 and 22, n. § [(g) Upon producing the rule in

(B) Of the Form, and for what Irregularities quashed, &c.

this case, it appeared to be *fourteen*, and not *fifteen* days, and so is 1 Str. 407. And one of the days is to be taken inclusive, and the other exclusive, so that a writ tested the 14th may be returnable the 28th. Ibid.]

If there be any irregularity in the writ, it may be amended at any time before it is returnable; (a) but it cannot be superseded after the return is out; neither can the party move to quash it before a return made and filed. (b)

6 Mod. 133. [(a) For the court will not amend it after a return has been made to it, particularly if that return has been traversed. *Rex v. Mayor, &c. of Stafford*, 4 Term Rep. 689. (b) In *Rex v. Mayor of York*, the court held, that it was too late for a party to object to the writ after he had made a return to it. 5 Term Rep. 74. But in *Rex v. College of Physicians*, 3 Burr. 2740, the writ was quashed after the return made. And see *acc. Rex v. Ward*, 2 Str. 893; *Rex v. Mayor of Abingdon*, 1 Ld. Raym. 559; 2 Salk. 699.] [And see *Rex v. Margate Pier Company*, 3 Barn. & A. 220, where it was adjudged that an exception may be taken to the writ even after the return, and at any time before a peremptory *mandamus* issues. See also *Rex v. Bristol Dock Company*, 6 Barn. & C. 189.]

If a *mandamus* be awarded to restore nine persons to the place and office of common councilmen, this is such an irregularity for which the writ will be quashed; for *several persons cannot join in such writ*, the motion of one not being the motion of another: besides, their interests are several, (c) and they might have been removed for several different causes, one for one fault, and one for another; which would make it impracticable for the court to grant a joint restitution to them.

2 Salk. 436, pl. 19; Comb. 307, S. C.; 5 Mod. 11, S. C.; 2 Salk. 433, pl. 13, S. P.; and that several persons cannot join in an action on the case for a false return to a *mandamus* to restore. (c) A *mandamus* was granted to a jury of a court baron to do an act to perfect the rights of several. *Rex v. Ld. Montacute*, 1 Black. 60; [Bull. N. P. 200, S. C. So *Rex v. Borough of Midhurst*, 1 Wils. 283.]

[A motion was made for a *mandamus* to the mayor, to assemble and do the business of the corporation, and the writ was granted accordingly. In drawing up the writ, the officer made it out for an assembly, and to admit all persons having a right to their freedom, who should appear before them to demand it. It was moved to supersede the writ, because every person's right was distinct, and it would be hard to oblige the mayor to make a return that he had admitted all who had a right. *Et per Curiam*, It must be superseded, for we never intended such a complicated *mandamus* as this.

Rex v. Mayor of Kingston-upon-Hull, 1 Str. 578; 8 Mod. 209, S. C., but the reason assigned in this last report for the writ's being superseded is, that "it was not warranted by the rule." And see *Rex v. Wildman*, 2 Str. 893, a *mandamus* superseded on that ground.]

[But where, in the Bristol Dock Act, the directors were, amongst other things, required "to make such other *alterations and amendments* in the sewers of the city as might be necessary in consequence of the floating of the harbour;" the court held, that a *mandamus* calling upon them to "make such alterations and amendments," &c., was in the proper form, and that it was neither requisite nor proper to call upon the company to make any *specific* alteration, the mode of remedying the evil being left to their discretion by the act of parliament.

Rex v. The Bristol Dock Company, 6 Barn. & C. 181.]

If the writ be directed to a corporation by a wrong name, this is such an irregularity for which it may be quashed; as, if to the mayor, aldermen, and commonalty of Rippon, where it should have been, mayor, burgesses, and commonalty; but in this case, the parties having made a good return, the court refused to grant a new writ; for by the return, if false, they sub-

(C) In what Cases to be granted.

jected themselves to an action on the case, and therefore a new writ would be only vexatious.

2 Salk. 433, pl. 12; Ld. Raym. 563; The King v. Mayor, &c., of Rippon; vide Carth. 500, 501.

So where, in a *mandamus* to the corporation of Ipswich, the direction was to the vill *de Gippo*, instead of *de Gippwico*; it was held, that the direction was wrong, *Gippus* and *Gippwicus* being different names; but that yet they should have returned the special matter accordingly, and relied upon it; but that, after the return, they admitted themselves the corporation to whom the writ was directed: besides, a corporation may have several names.

2 Salk. 434, pl. 16; 2 Ld. Raym. 1233, Serjeant Whitaker's case.

||A direction of a *mandamus* to a corporation by its corporate name, notwithstanding the vacancy of the mayoralty, is good, since that is the legal description of the body, as long as it continues to have any corporate existence at all. But where the direction is not to the corporation by its corporate name, it seems to be bad, if it extends beyond the persons who are required by the charter to concur in the particular thing commanded by the *mandamus*.

Rex v. Smith, 2 Maul. & S. 583. ||

If a writ appears on the face of it to be *felo de se*, the court, *ex officio*, may quash it; as, where the Bishop of Ely procured a *mandamus* to the vice-master for Trinity College, Cambridge, to compel him to execute a sentence (a) of deprivation, pronounced by the bishop against Dr. Bentley, master of the said college, which sentence the vice-master, by the statutes of the college, was obliged to execute; and it appearing on the face of the writ that the bishop himself was general visitor, and that therefore it belonged to him to enforce the execution of his own sentence, the court of B. R. quashed the writ, being a matter in which they had no right to intermeddle, there being a proper visitor.

Hil. 9 G. 2, in B. R., The King v. Doctor Walker. [Ca. temp. Hardw. 212, S. C. (a) But if the bishop himself should refuse to compel the execution of the sentence, *qu* whether the Court of King's Bench would not grant a *mandamus* to him for that purpose? See And. 176.]

{All those facts should be alleged in the writ which are necessary to show that the party applying for it is entitled to the relief prayed for, or it will be quashed.

7 Term, 52, The King v. Justices of West Riding of Yorkshire; 7 East, 345, The King v. The Bishop of Oxford.}

(C) In what Cases to be granted: And herein,

1. Where it lies to restore or admit a Person to an Office, and what shall be said such a public Office for which a *Mandamus* will lie.

HEREIN we must observe, that the cases in the books on this head are so unsettled and contradictory, that it is hardly possible to fix on any general rule, whereby to determine in what instances the Court of K. B., having a superintendency over all inferior courts and magistrates, will grant a *mandamus* or not; for though in general it be laid down as a rule, (a) that where a man is refused to be admitted or wrongfully turned out of any office or franchise that concerns the public, or the administration of justice, he may be admitted or restored by *mandamus*, yet it being still matter of controversy, what shall be said a public office, or such as relates to the administration of justice, and as the court of late has rather extended than contracted this

(C) In what Cases to be granted.

remedy, it will be necessary, for the better apprehending hereof, to insert the cases themselves in which a *mandamus* has been granted or denied.

(a) 11 Co. 93, Bagg's case; 2 Sid. 112, same rule laid down by Glyn, C. J. *β* Parker v. The Judges, &c., 12 Wheat. 561; this writ is the only adequate mode of relief when an inferior tribunal refuses to act upon a subject brought properly before it. Life and Fire Ins. Co. v. Wilson, 8 Pet. 291. *g*

It is clearly agreed that the Court of King's Bench, having a superintendency over all inferior courts and magistrates, may, by the plenitude of its power, correct, not only errors in judicial proceedings, but also extrajudicial errors and misdemeanors, tending to the breach of the peace, oppression of the subject, to the raising of faction, controversy, debate, or any manner of misgovernment; so that no retort or injury, whether public or private, can be committed but what may be reformed and punished according to the due course of law.

11 Co. 98; 4 Inst. 71.

And on this foundation it has been adjudged, and admitted in a variety of cases, that if a mayor, alderman, Burgess, (a) common councilman, freeman, or other person, member of a corporation, having a franchise and freehold therein, be refused to be admitted, or being admitted, be turned out or disfranchised without just cause, he may have his remedy by writ of *mandamus*. ¶ But if the office be already full by the possession of an officer *de facto*, (b) no writ will be granted to proceed to a new election until the person in possession has been ousted, on proceedings in *quo warranto*. ¶

11 Co. 94, Bagg's case; 2 Bulst. 122; Style, 299, 457; Raym. 12, 431, 437; Vent. 302. (a) It is said, that a custom to elect one to be of the common council, and to remove him *ad libitum*, is good; but where a man is a freeman or alderman, &c., they cannot remove him from his freedom or place without cause; and a custom to the contrary is void, because the party hath a freehold therein; but that to be of council is a thing collateral to the corporation. Cro. Ja. 450, Warren's case. ¶ (b) Rex v. Bankes, 3 Burr. 1454; Rex v. Cambridge, 4 Burr. 2011; Rex v. Bedford, 1 East, 80; Rex v. Turo, 3 Barn. & A. 592. ¶

And it must appear what the office is; and therefore a *mandamus* to swear one who was elected to be one of the eight men of Ashburn Court was denied, because it was not specially inserted what the nature of the office was, so as the court might be able to determine whether it were such a place for which a *mandamus* will lie or not.

2 Mod. 316.

A *mandamus* lies to restore a town-clerk, being an office of a public nature, and such as relates to the administration of justice. But (c) if a corporation have power by their charter to have a town-clerk, who shall continue *durante bene placito* of the mayor and aldermen; by this they have an arbitrary power of turning him out at pleasure, and need not, to the return of a *mandamus*, assign any reasonable cause for their conduct herein.

Noy, 78; Style, 457. (c) Vent. 77; Sid. 461; Lev. 291, Dighton v. Mayor of Stratford-upon-Avon; Raym. 188, S. C., where it is said, that the court advised to repeal the patent because of this inconveniency.

So, a *mandamus* lies for a (d) recorder and (e) clerk of the peace; for these are officers of a public nature, and relate to the administration of justice.

(d) Style, 452; Vent. 143, 153; [4 Burr. 1999.] (e) 4 Mod. 31; Show. 282; 12 Mod. 13.

It is admitted by all (g) the books which speak of this matter, that a *mandamus* lies to restore a steward of a court leet; but (h) some hold that a

(C) In what Cases to be granted.

mandamus does not lie to restore a steward of a court (i) baron, because but a private office, and such as does not concern the administration of justice; but (k) others hold that it does, because he is judge of that part of the court which concerns copyholds, and is therefore an officer concerned in the administration of justice.

(g) 2 Sid. 112; Raym. 12; Sid. 40; 2 Lev. 18; Vent. 153. (h) Raym. 12; Sid. 40; Comb. 127. (i) Fitzgib. 195. (k) Vent. 153; 2 Lev. 18, S. P. expressly by Hale, C. J.

It hath been adjudged, that a *mandamus* lies to restore one to an attorney's place in an inferior court; because his is an office concerning the public justice, and he is compellable to be an attorney for any man; and has a freehold in his place.

Lev. 75; Sid. 152; Keb. 549, adjudged in Hurst's case, who was restored to an attorney's place of the court of Canterbury; and in one Collin's case, who was restored to an attorney's place of the liberty of St. Martin's Le Grand. {1 Johns. Ca. 134, 181, acc.}

So, a *mandamus* was granted to the mayor of Reading, for an attorney of B. R., who was prohibited to practice in an inferior court in Reading.

Vent. 11; Sid. 410; Mod. 23.

It hath been adjudged, that a *mandamus* lies to restore a sexton; though as to this the court at first doubted, because he was rather a servant to the parish than an officer, or one that had a freehold in his place; but upon a certificate shown from the minister and divers of the parish, that the custom was to choose a sexton, and that he held it for his life, and that he had 2d. a year of every house within the parish, they granted a *mandamus* directed to the churchwardens.

Vent. 143, 153; T. Raym. 211; 2 Lev. 18; 2 Keb. Rep. 802; Ile's case, 7 Mod. 118.

A *mandamus* lies to restore a churchwarden, being a temporal officer, and an office concerning the public; and therefore (a) where to a *mandamus* to swear a churchwarden, chosen according to the custom, the archdeacon returned, that the person presented was a poor dairy-man who had no estate, was *persona minus habilis et idonea* for that office, the court granted a peremptory *mandamus*.

2 Sid. 112; Vent. 143; 3 Mod. 335; 5 Mod. 325; 8 Mod. 325; Style, 457; Comb. 417; [Ca. temp. Hardw. 130; 3 Burr. 1421.] (a) Carth. 393; Salk. 166, pl. 5; The King v. Rees, 12 Mod. 116; Ld. Raym. 138. [Anon. 2 Chit. Rep. 254; 8 Term Rep. 209.]

So, a *mandamus* hath been granted to restore a parish clerk, chosen according to the custom, being a temporal officer.

Style, 457; 2 Sid. 112; Vent. 143; 3 Mod. 335; Comb. 105. [It will equally be granted, though he be appointed by the parson, for the right to the office is a temporal right; and the clerk, though appointed by the parson, is a servant to the parishioners. Rex v. Ashton, Say. Rep. 159. And the office is *primâ facie* an office for life. Ibid. 175.] [And see Anon. 2 Chit. Rep. 254.]

So, a *mandamus* was lately granted to admit one Robert Trott to the office of parish clerk of Clerkenwell, being elected by the parish, it being shown that the official had usually admitted to this office.

King v. Doctor Henchman, official of the consistory court of the Bishop of London.

So, a *mandamus* lies for a schoolmaster or the usher of a school, if he be elected for life, although he be not a sworn officer; for this is a temporal and public office, in which the party hath a freehold.

2 Sid. 112; Sid. 40; Style, 457; Comb. 144; Stra. 58; 2 Stra. 897, 1023; [3 Barnard. K. B. 365.]

(C) In what Cases to be granted.

[So lecturers, if they have fixed salaries, not depending upon voluntary contributions, it seems, may be admitted or restored to their stations, if wrongfully kept out, by a writ of *mandamus*.

Rex v. Bishop of London, 2 Str. 1192; 1 Wils. 11, S. C.; Rex v. Bishop of London, 1 Term Rep. 331; Rex v. Field, 4 Term Rep. 125;] {2 East, 462, The King v. The Bishop of Exeter.}

|| Unless there be an immemorial custom in a parish to elect a lecturer, the court will not grant a *mandamus* to the bishop to license a lecturer so elected, without consent of the rector or vicar; and this notwithstanding the lectureship be endowed out of the impropriate rectory.

Rex v. Bishop of London, 1 Term Rep. 331; Rex v. Field, 4 Term Rep. 125; Rex v. Bishop of Exeter, 2 East, 462; and see Rex v. Bishop of Oxford, 7 East, 345.

And the act of uniformity, 13 & 14 Car. 2, c. 4, § 19, enacting, that no person shall preach as lecturer unless approved by the archbishop or bishop, &c., the court will not entertain a motion for a *mandamus* to the bishop to license, on the bishop's refusal of unfitness, unless a like application has been made to the archbishop.

Rex v. Bishop of London, 13 East, 419.

And where the bishop, in answer to an application for a *mandamus* to license a lecturer, elected by inhabitants, made affidavit that the party had been before him with a view to his being "approved and licensed," and that after inquiry and hearing him he had conscientiously refused him, on the ground of unfitness, the court discharged the rule.

Rex v. Archbishop of Canterbury and Bishop of London, 15 East, 117.]

[This writ lies to restore a curate to a chapel which is a donative, and endowed with lands.

Rex v. Blower, 2 Burr. 1043.

So, it lies to the bishop to grant a license to a curate, if it be refused without just reason.

2 Ld. Raym. 1206; 2 Barnard. K. B. 366; Rex v. Bishop of Carlisle, 2 Burn's E. L. 103. || But where a *mandamus* was moved for to be directed to the Dean of Hereford to license a second curate, on an affidavit that one curate was not sufficient, the rule was refused. Anon. 2 Chit. Rep. 253.]

So, since the act of toleration, it will lie to admit or restore a dissenting minister where there is an endowment.

Rex v. Barker, 3 Burr. 1265; 1 Bl. Rep. 300, 352, S. C.; Rex v. Jotham, 3 Term Rep. Qu. Whether the party applying should not show his compliance with the requisitions of the toleration act.]

|| And a *mandamus* lies to a lord of a manor to admit a copyholder, whether he claims by purchase or descent.

Rex v. Lord of the Manor of Hendon, 2 Term Rep. 484; Rex v. Coggan, 6 East, 431; and see Rex v. the Brewers' Company, 3 Barn. & C. 172, overruling Rex v. Rennet, 2 Term Rep. 197.]

A *mandamus* lies to admit, restore, or discharge a constable; for he is a public officer, and one whose office relates to the administration of justice.

2 Roll. Rep. 82; Roll. Abr. 535; Salk. 175. See Strong, petitioner, 20 Pick. 484.

It hath been adjudged, that no *mandamus* lies to restore a proctor of Doctors' Commons, admitting that no appeal lay from the dean of the Arches to the archbishop, as visitor; because this is an ecclesiastical office, and a matter properly and only cognisable in that court; and that the temporal courts are not to intermeddle or inquire into their sentence, or into the pro-

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ceedings in any matters whereof they have a proper jurisdiction, but are to give credit thereunto; although it was urged, that if a *mandamus* did not lie in this case the party would be without remedy, for that no assize would lie of this office; and though an action on the case might lie, yet it may be defective, because a jury may not well compute the damages in proportion to the loss of a man's livelihood: besides, it was urged, that a *mandamus* ought to lie in this case, as well as for an attorney of an inferior court, because this is an (a) officer of a more public concern.

Carth. 169, 170; 3 Lev. 309; 3 Mod. 333; Skin. 290, pl. 1; Lee's case, Show. 217, 251, 261; S. C. by the name of The King v. Oxenden, 3 Mod. 332; 3 Salk. 230, pl. 4; Holt, 435, pl. 1. (a) A proctor is not an officer, properly speaking; it is only an employment in that court, which acts by different rules from the King's Bench. 3 Mod. 335, *Per Cur.*

¶ Nor will a *mandamus* lie to the Archbishop of Canterbury to issue his fiat to the proper officer for the admission of a doctor of civil law, a graduate of Cambridge, as an advocate of the Court of Arches; for he has no specific legal right to such admission.

Rex v. Archbishop of Canterbury, 8 East, 213.¶

But it hath been held, that a *mandamus* lies for a registrar in an ecclesiastical court, (b) upon an *affidavit* that he hath ecclesiastical jurisdiction. ¶ And so also for the registrar of a corporation. (c)¶

Carth. 170; 6 Mod. 18, S. P. per Holt, but said to be against his consent. (b) Comb. 133; 3 Salk. 232, pl. 9; Ld. Raym. 337; Andr. 177. ¶ (c) Rex v. Corporation of Bedford Level, 6 East, 536.¶

So, upon a *mandamus* to the commissary of York, to admit Mr. Dryden, a deputy registrar under Doctor Sharpe, it was objected, that the writ did not lie for an ecclesiastical officer, because he is under the inquiry and censure of his proper judge; nor for a private officer, because he may have his action on the case for a disturbance, or an assize, in case the place be a freehold; and herein was cited the above case of Lee, and the express opinion of my Lord Holt therein, that a *mandamus* did not lie for a deputy registrar. In answer to which were cited the cases of The King v. Doctor Bettesworth, to admit Mr. Foulkes apparitor general to the Archbishop of Canterbury; Hil. 4 G. 1, The King v. The Chapter of Norwich, to admit Doctor Sherlock to a (d) prebend; Hil. 9 G. 1, to the University of Cambridge, to restore Doctor (e) Bentley to his degrees of master of arts and doctor of divinity; from the reason of which cases the court held, that this writ lay for a registrar, an officer much less spiritual than a prebendary or a doctor in divinity: also this *mandamus* is at the suit of Doctor Sharp, and sets forth his title to the office of registrar, *exercendum per se vel sufficient. deputatum suum*; and that the commissary had refused Mr. Dryden, whom he appointed his deputy; and that therefore the *mandamus* was well awarded, because he had no other way to get his deputy admitted.

Mich. 4 G. 2, The King v. Doctor Ward; 2 Stra. 893; Fitzgib. 123, pl. 8, 194, pl. 7; Barnard. K. B. 254, 294, 380, 411. (d) Stra. 159; Andr. 21; Barnard. K. B. 40. See 2 Stra. 1082; Andr. 20, 185, S. P. (e) Fortesc. Rep. 202; 2 Ld. Raym. 1334; Andr. 177; Stra. 557.

So, where a *mandamus* was prayed to the lord president and council of the Marches, to admit A to the exercise of the office of deputy secretary; it was objected, first, That a deputy could not pray a *mandamus*, because his authority was revocable. Second, That he being an officer belonging to the court, they are to judge of his sufficiency, and so have power to refuse.

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As to the first objection, it was adjudged, that the *mandamus* being at the suit of the principal, and setting forth that he had the office of secretary *exercendum per se vel sufficientem deput. suum*, the *mandamus* was well awarded, because he had no other remedy to have this deputy admitted; and as to the second objection, it was adjudged, that if they refused to admit him for insufficiency, they ought to have returned that he was insufficient.

Vent. 110; Lev. 306; 2 Keb. 738, *The King v. Clapham*. [And see *Rex v. Ward*, 2 Str. 897; *Rex v. St. Alban's*, 12 East, 559, n.; *Rex v. Gravesend*, 2 Barn. & C. 604; *S. C.* 4 Dow. & Ry. 117; *Jones v. Williams*, 5 Dow. & Ry. 660.]

A *mandamus* is said to have been denied to restore a clerk of a dean and chapter; because he hath nothing to do with the public, his office being only to enter leases granted, &c., and therefore he hath no more to do with the public than a bailiff of a manor.

Comb. 133.

It is said, that the court refused to grant a *mandamus* to restore a surgeon to an hospital, because it was not a public office.

Comb. 41; 7 Mod. 118, *S. P.* where, in such a case, the court made a rule to show cause why the *mandamus* should not be granted.

[A *mandamus* hath been refused to admit a vestry clerk, his office being merely of a private nature, and not being fixed and permanent, but depending entirely on the will of the inhabitants, who may choose a different clerk at each vestry.

Rex v. Inhabitants of Croydon, 5 Term Rep. 713.]

It hath been adjudged, that a *mandamus* lies to restore the treasurer of the New River Company: for though it be a private corporation, yet it was created by the king's letters-patent, which being on record the judges are obliged to take notice of them, and see that they are duly executed.

Lev. 123; Sid. 169; Keb. 625, *Middleton's case*; 3 Mod. 334, *S. C.* cited; and said to have been granted *de bene esse*, to bring the matter before the court.

A *mandamus* was granted to the mayor of Bristol, to restore Mr. Roe to the office of sword-bearer.

Comb. 145.

It is said, that a *mandamus* was denied to one, who pretended to be (a) master of the lord mayor's water-house, because not an office, but a service.

Vent. 143. (a) Refused to restore the clerk of the Butchers' Company. 6 Mod. 18; 2 Ld. Raym. 959, 1004. So, to restore the approver of guns to the Gunsmiths' Company. 6 Mod. 82; 2 Ld. Raym. 989; Comb. 347. But *qu.* of these cases; for they seem not to be law.

[A *mandamus* was granted to the court of aldermen in London, to restore a person to the office of yeoman of the wood-wharf, on an affidavit of its being an ancient office, and a freehold.

Case of Scriven and Turner, 2 Str. 832.]

A *mandamus* was granted to restore one Smith to the office of clerk of the city works; it appearing by his *affidavit*, that the office was an ancient office, established time out of mind, to survey the works and edifices of the city, and to see that all the city buildings were well done, and to sign the workmen's bills; and that he was admitted into this office, with the fees belonging to it, *quamdiu se bene gesserit*; and that there was an oath of office taken by him, and the oaths to the government; for the court held, that though there was something here that looked like service, by the nature of the employment, yet there being an oath of office, and oaths to the govern-

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ment to be taken, these import a public office, for which a *mandamus* is proper.

Hil. 7 G. 2, in *B. R. The King v. City of London*; 2 Barnard. K. B. 298, S. P. & C.; [2 Term Rep. 182, note S. C.]

[So, it seems, a *mandamus* will lie to restore to the office of clerk of the bridge-house estates in London, such office being an ancient office for life, the duty of which is to superintend certain estates which are appropriated by the corporation for the support of London Bridge.

Rex v. Mayor of London, 2 Term Rep. 177.]

If there be a dispute between the high steward of Westminster and the dean and chapter about appointing a bailiff, and the steward name one, and the dean and chapter appoint and swear in another, the appointee of the steward may have a *mandamus*, but without prejudice; for though the court will not regularly grant a *mandamus* to try private titles, yet here the appointee of the steward having no seisin, so as to enable him to maintain an assize, and an action on the case only repairing him in damages, without putting him in possession of the office, a *mandamus* is a proper remedy.

4 Mod. 281; Comb. 244; *Knipe and Edwin, Ld. Raym.* 159, 163, 338, 561, 958, 989, 1004; 10 Mod. 146; 12 Mod. 609, 666; *Fitzgib.* 123, 194.

§A *mandamus* lies to compel the commissioners of highways to perform their duties in relation to making roads.

Springfield v. Hampden, 4 Pick. 68; *Danvers v. Essex*, 6 Pick. 20.

It lies to compel the clerk of a town or parish to amend his record, if he omit or refuse to record a vote; (a) to compel a town clerk to deliver the records to his successors in office; (b) to compel county commissioners to estimate damages caused by injuries done by a railroad company to buildings near the line of their road by blasting rocks; (c) to compel them to draw an order for the payment of damages, when a road has been laid out and afterwards discontinued, although the land never was entered upon; (d) to compel them to issue their warrant for empannelling a new jury, where one has already been summoned and acted, without being able to agree in locating a highway. (e)

(a) *Manning v. Gloucester*, 6 Pick. 6. (b) *Taylor v. Henry*, 2 Pick. 397; *Sadbury v. Stearns*, 21 Pick. 148; 3 Mass. 287. (c) *Dodge v. Essex*, 3 Metc. 380; *Danvers v. Essex*, 6 Pick. 20; *Carpenter v. Bristol*, 21 Pick. 258. (d) *Harrington v. Berkshire*, 22 Pick. 263. (e) *Mendon v. Worcester*, 10 Pick. 235.

The Supreme Court of the United States will not issue a *mandamus* in the case of the removal or suspension of an attorney of the District and Circuit Courts, unless the conduct of the court below was irregular, or flagrantly improper.

Ex parte Burr, 9 Wheat. 599.

A peremptory *mandamus* in the first instance, lies to the clerk of a county, who refuses to record a deed presented to him for that purpose, and which has been duly acknowledged by the grantor, and the proper certificate and proof of identity of the grantor are endorsed thereon.

Ex parte Goodell, 14 Johns. 325. See *Cooper v. Dismal Swamp Can. Co.*, 2 Murph. 195.

In New York, a *mandamus* will be granted to compel a court of common pleas to give judgment; as where the plaintiff below obtained a verdict, and judgment was afterwards arrested, he may have a *mandamus* to compel the court to give a judgment against himself, in order that he may bring a

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writ of error; (a) to compel a court of common pleas to seal a bill of exceptions; (b) to require a subordinate court to settle a case after the denial of a motion to set aside the report of referees, so as to enable the party to bring error; but not to direct what facts shall be inserted in the case; (c) to compel a court of common pleas to restore an attorney whom they had unlawfully removed from office. (d)

(a) *Fish v. Weatherwax*, 2 Johns. Ca. 215; *Horne v. Barney*, 19 Johns. 247. (b) *People v. Judges of Westchester*, 2 Johns. Ca. 118; *S. C. Caines's Ca.* 135; *People v. Judges of Washington*, 1 Caines's R. 511; *Sikes v. Ransom*, 6 Johns. 279. (c) *People v. Superior Court*, 20 Wend. 663. (d) *People v. Judges of Delaware*, 1 Johns. Ca. 181.

If the selectmen of a town neglect or refuse to pay the damages assessed on a highway laid out by them, or their predecessors, and to open such highway, a *mandamus* will lie to compel them to do so.

Treat v. Middleton, 8 Conn. 243. But when the commissioners who were bound to pay the damages, return that they have no money in the treasury, a *mandamus* will not be granted. *Comm. v. Commissioners of Philadelphia County*, 1 Whart. 1. See *State of Ohio v. Warren County*, 2 Ohio, 109.

A *mandamus* will lie to the judges of the Court of Common Pleas to compel them to sign a bill of exception; (e) and when it has been signed by the president alone, the associates may be compelled by *mandamus* to sign it. (g)

(e) *Ohio v. Todd*, 4 Ohio, 351; but see *Drexel v. Man*, 6 Watts & Serg. 386; *Ex parte Crane*, 5 Pet. 192. (g) *Springer v. Peterson*, Blackf. 188.

Where an act of assembly directed the secretary of the land office to issue patents to certain original warrantees, "or their legal representatives," it seems, that this is a ministerial duty for which a *mandamus* will lie.

Comm. v. Cochran, 1 S. & R. 473. *g*

2. *Where the Party's having another Remedy is a sufficient Foundation to deny it; and therein of granting Mandamuses to restore Members of Colleges, &c.*

It seems to be now agreed, that no *mandamus* lies to restore or admit (h) a fellow or member of any (i) college, because these being private eleemosynary societies, and governed by particular laws of the founders, they who would take the benefit of them, must take it on such terms as the founder has thought proper to impose; and must therefore, in case of any grievance, apply themselves by way of appeal to their (k) proper visitors.

(h) *Andr.* 184; *Skin.* 454; 4 *Mod.* 112, 124, in the case of Phillips and Bury, fully debated and settled. (i) That the law is the same in the case of an hospital or college of physic, said to have been adjudged in Merrick's case, who was one of the College of Physicians; and in Ayloffe's case, *Carth.* 92; 3 *Mod.* 265. [But the law is not in these cases as here stated, for the Court of King's Bench have clearly a jurisdiction over hospitals and colleges of physic. *Rex v. Dr. Askew*, 4 *Burr.* 2186; *Rex v. Mayor of Gloucester*, *Mich.* 1 *W. & M.* cited in *And.* 184.] (k) That in lay foundations, whether of hospitals or colleges, the visitatorial power is either in the founder or his heirs, or the visitors appointed by the founder, and they have the sole power to execute justice within that foundation; but where the corporation is spiritual, there the bishop of the diocese is visitor. *Carth.* 93; 10 *Co.* 31; *Show.* 74.

And this seems to have been the better opinion of the judges, not only in those (l) cases where application was made for a *mandamus* before the party had appealed to the visitor, but also where after such application the sentence had been confirmed by the visitor; as in (m) Appleford's case, where, to a *mandamus* to restore him to a fellowship of New College, the return was, that by the founder's laws they might expel any one who had committed an enormous crime, and that Appleford had committed an enormous crime, and therefore they expelled him; that he appealed to the visitor, who

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was the Bishop of Winchester, who confirmed the expulsion, and concluded to the jurisdiction of the court: and this was held a good return, though it did not mention what manner of crime Appleford had committed, so that it might appear whether he was lawfully expelled or not; for it was not necessary to mention the crime, because the court had no authority to intermeddle with it.

(l) As Dr. Witherington's case, Sid. 71; Raym. 31, 68; Lev. 23; Keb. 2, 50; Dr. Robert's case, 2 Keb. 102; Dr. Patrick's case, Raym. 101; Lev. 65; Sid. 346; 2 Keb. 164, 199. (m) Mod. 82. [So Rex v. Bishop of Ely, 5 Term Rep. 475.]

||However, if visitors improperly decline to act, the court will compel them. Thus, where the founder of an eleemosynary corporation by deed, in pursuance of an act of parliament, described the objects of the charity, and by ordinances annexed directed that the members should be taken from certain specified places, in rotation, and appointed the bishop, dean, and archdeacon of Worcester visitors, who should see the ordinance truly executed; and an appointment of a member to a vacancy in the charity was made by the founder's heir not from the places specified, whereupon certain inhabitants of the places specified (being of the description in the foundation deed) appealed against the nomination to the visitors; the court held the appeal well lay, and granted a *mandamus* to the visitors to proceed and determine it, they having before declined to do so.

Rex v. Bishop of Worcester, 4 Maul. & S. 415; and see Rex v. Bishop of Ely, 5 Term Rep. 475.]

A *mandamus* to restore one Prohust to the place of chaplain of All Souls' college in Oxon, being turned out by the warden of that college, was granted upon suggestion, that the Archbishop of Canterbury was visitor of the college, and the see was now vacant by the deprivation of the bishop, by virtue of the act of parliament which enjoins the oath of allegiance; and for that Prohust had no other remedy, because the dean and chapter of Canterbury, who are guardians of the spirituality *sede vacante*, have (a) refused to meddle with this visitatorial power by way of appeal. But at another day, it being shown in behalf of the college, that the dean and chapter of Canterbury, and not the archbishop, are visitors of this college, because they were created, and stand instead of the prior and convent of Canterbury, who were visitors heretofore; and farther, that they were ready to hear the appeal; the court discharged the first rule, and ordered Prohust to apply himself by way of appeal.

Carth. 168, Prohust's case; Andr. 177. (a) Whether a *mandamus* will lie to a visitor to compel him to execute his jurisdiction, was said by my Lord Hardwicke in Dr. Bentley's case, Hil. 9 G. 2, not to have been determined, though a rule for that purpose to show cause was made, 12 Ann.; and he seemed to think, that if this power of a visitor be a jurisdiction, yet it is *forum domesticum*, and not any public jurisdiction; or rather a decision of the founder, upon his own private charity, than any jurisdiction at all. 15 Vin. Abr. 203, pl. 4. [It has been since determined, that a *mandamus* for this purpose will lie to a visitor. Rex v. Bishop of Lincoln, 2 Term Rep. 338, note.]

A *mandamus* was prayed to the mayor and jurats of Sandwich, governors of the hospital of the brothers and sisters of St. Bartholomew, to restore one who was a sister of the said hospital; and it was urged, that a *mandamus* ought to be granted, because the party had a corody and freehold in the hospital. But *per Cur.*, The king is the founder, and so hath the visitation, and therefore application must be made to him.

3 Keb. 360, Wheeler's case.

[A *mandamus* was granted, directed to the bishop of Chester, as warden

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of Manchester college, to admit a chaplain, upon the ground that the bishop being visitor of this college, which was of royal foundation, and having been also appointed warden, could not visit himself, and consequently the visitatorial power was suspended, and the remedy was in the Court of King's Bench to prevent a failure of justice. But the right of the Court of King's Bench to interfere in this case seems to be at least questionable: for where there is a defect of the visitatorial power in private eleemosynary lay foundations, it hath been since solemnly determined, that the right of visitation devolves upon the king, in his personal, not in his politic capacity, and must be exercised by him in his Court of Chancery.

Rex v. Bishop of Chester, 2 Stra. 797; Rex v. Master and Fellows of St. Catherine's Hall, 4 Term Rep. 233.

It is, in general, (a) a sufficient reason with the court to refuse a *mandamus*, that the party applying for it has another legal, specific remedy. (b) Therefore, they have refused it to the bank, (c) to compel them to transfer stock, because the party had a remedy by action on the case. So, to old churchwardens, (d) to deliver over the parish books to the new ones: for they might have a right to keep them, and that right might be tried by an issue at law. So, to the benchers of an inn of court (e) to call a person to the bar; || or to admit a person a member of their inn; (g) || for the proper remedy, in such case, is by appeal. So, to a mayor (h) to admit to the office of recorder; because there was a recorder *de facto*, and the party had another remedy by *quo warranto*. So, to a treasurer of a county (i) to reimburse constables' moneys expended by them for conveying rogues, &c., under 17 G. 2, c. 5; for the quarter sessions have jurisdiction under the act over the constables' accounts. So, where there were two claimants of the same perpetual curacy, (k) the court rejected an application for a *mandamus* to the bishop to license, because each had another specific remedy by *quare impedit*. And for the same reason, it should seem, notwithstanding some authorities to the contrary, that a *mandamus* ought not to be granted to admit to a prebend. (l) || And the court refused a *mandamus* where the question was whether a parishioner had a right to be buried in a churchyard in an iron coffin, which was a new and unusual mode; the mode of burying the dead being a matter of ecclesiastical cognisance. (m) || {Also it has, for the same reason, been refused {1} to the trustees of an incorporated church, to restore the prosecutor to the possession of a pew to which he claimed title; inasmuch as he had another remedy by an action on the case against the person disturbing him.}

(a) Note, for an obsolete remedy, as by assize, is considered as an exception to the rule. 1 Term Rep. 404; 3 Term Rep. 652. (b) See to this effect Rex v. Abp. of Canterbury, 8 East, 219; Rex v. Severn and Wye Comp., 2 Barn. & A. 646; Rex v. Margate Comp., 3 Barn. & A. 224; Rex v. Haythorne, 5 Barn. & C. 422, 429; Rex v. Stamford, &c. Canal Comp., 1 Maule & S. 32; *¶* Shipley v. Mechanics' Bank, 10 Johns. 484; *Ex parte* Nelson, 1 Cowen, 417; Boyce v. Russell, 2 Cowen, 444; People v. Brooklyn, 1 Wend. 318; People v. Mayor, &c. of N. York, 10 Wend. 293; American Asylum v. Phoenix Bank, 4 Conn. 172; Commonwealth v. Rosseter, 2 Binn. 262; Commonwealth v. Judges of C. P., 3 Binn. 275; Griffiths v. Cochran, 5 Binn. 87. *¶* (c) Rex v. Bank of England, Dougl. 524. (d) Rex v. Street, 8 Mod. 98; || 2 Chit. Rep. 255. || (e) Rex v. Gray's Inn, Dougl. 353. (g) || Rex v. Lincoln's Inn, 4 Barn. & C. 855. || (h) Rex v. Mayor of Colchester, 2 Term Rep. 259. (i) Rex v. Erle, 2 Burr. 1197. (k) Rex v. Bishop of Chester, 1 Term Rep. 396. (l) The case of Clarke v. Bishop of Sarum, 2 Stra. 1082; Andr. 20, 185, where such a *mandamus* is granted, is held not to be law in Powell v. Milbank, 1 Term Rep. 401, note. The cases of the King v. Dean and Chapter of Armagh, Rex v. Dean and Chapter of Norwich, 1 Str. 159; and Rex v. Dean and Chapter of Dublin, Idem, 536, are cited in the

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report in *Andrews v. Bishop of Sarum*, in support of the rule. But in the case of the Dean and Chapter of Norwich, Dr. Sherlock was prebendary by virtue of an act of parliament, and he had no means but a *mandamus* to get into his stall. In the case of the Dean and Chapter of Dublin, there was no determination on the point, but the majority of the judges inclined against the *mandamus*. That the court will not grant a *mandamus* where a *quare impedit* lies, appears also from *Rex v. Marquis of Stafford*, 3 Term Rep. 646. [(m) *Rex v. Coleridge*, 2 Barn. & A. 806. And see 5 Term Rep. 364.] {1} 2 Bin. 360, *Commonwealth v. Rosseter*. See farther 7 East, 353, *The King v. The Free Fishers, &c. of Whitstable*.]

|| And a *mandamus* will not be granted to (a) a mere trading corporation ; e. g. the bank, or to an assurance company to transfer stock, or to produce their accounts for the purpose of declaring a dividend of the profits, for the writ is confined to cases of a public nature.

(a) *Rex v. Bank of England*, 2 Barn. & A. 620 ; *Rex v. London Assurance Company*, 5 Barn. & A. 898. || β A *mandamus* will not lie to compel trustees of a turnpike road to repair it. *Reg. v. Oxford and Whitney Road Trustees*, 4 Perr. & D. 154. See *Second Street Road*, 1 Yeates, 155.g

Hence arises a difference between a *mandamus to admit* and a *mandamus to restore*. The former is granted merely to enable the party to try his right, without which he would have no legal remedy. But the court have always looked much more strictly to the right of the party applying for a *mandamus* to be restored. In these cases, he must show a *prima facie* title ; for if he has been before regularly admitted, he may try his right by bringing an action for money had and received for the profits. Therefore, in order to entitle himself to this extraordinary remedy, he must lay such facts before the court as will warrant them in presuming that the right is in him.

3 Term Rep. 578.] β See *Reg. v. Powell*, 1 Ad. & Ell. N. S. 352.g

β The court refused a *mandamus* to compel the steward to take a surrender in general terms, as, "all those tenements which A had surrendered on a particular day," although the tenements were particularly stated in such former surrender, and *semble* a custom to prepare all surrenders in the manor is good.

Reg. v. Lord of Manor of Bishopstoke, 8 Dowl. 608.

An application for a *mandamus* by consent of parties, in order to obtain the opinion of the court, declined to be heard.

Reg. v. Blackwall Railway Company, 9 Dowl. 558.

A *mandamus* will not be issued to magistrates commanding them to do an act subjecting them to an action, of which the event may be doubtful.

Rex v. Buckinghamshire, (Justices,) 3 Nev. & M. 68 ; *Rex v. Somersetshire*, (Justices,) 1 Har. & Woll. 82.

A *mandamus* to the commissioners of the customs to restore tobacco as wrecked goods, and upon which the lower rate of duty had been tendered, refused.

Rex v. Commissioners of Customs, 1 Nev. & P. 536 ; 5 Ad. & Ell. 380.

Where a criminal information had been filed against a town clerk for misconduct in his office, in the election of councillors of the borough, the court refused a *mandamus* to compel him to produce the voting papers in his custody, which had been used at the election.

R. v. Nichollatts, 5 Ad. & Ell. 376.

The Court of K. B. has no authority by *mandamus* to compel an inferior court of criminal jurisdiction to enter a verdict in a particular way.

R. v. Hewes, 3 Ad. & Ell. 725.

A *mandamus* to compel the swearing in of the opposing candidate, where

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one had been declared elected, and admitted a councillor, was refused, the office being full, in fact, and the remedy to try whether full, in right, is by *quo warranto*.

R. v Derby Councillors, 7 Ad. & Ell. 419; 2 Nev. & P. 589. But see Dew v. The Judges of the Sweet Spring District Court, 3 H. & M. 1.

The court refused to issue the writ to a board of guardians, commanding them to admit to the office of clerk, a party who alleged he had been elected by a majority of good votes; the court would not thus inquire into the title of the voters.

R. v. Dolgally Guardians, 3 Nev. & P. 542.

A *mandamus* is not a proper process to correct an erroneous judgment or decree of an inferior court.

Ex parte Jesse Hoyt, 13 Pet. 279.

It will not be issued to a district court to compel it to expunge amendments improperly made in the record returned to the Circuit Court, on a writ of error.

Spraggins v. County Court of Humphries, 1 Cooke, 160.

The Supreme Court of the United States has no jurisdiction to issue a writ of *mandamus* to a register of a land office, commanding him to enter an application in his office, in a case where a *mandamus* has been refused in the highest state court.

M'Clung v. Silliman, 2 Wheat. 389.

In New York, a *mandamus* will not be granted in the following cases, namely: to a court of common pleas, where the party may have a writ of error; (a) to compel an inferior court to punish a man for contempt, unless the civil rights of an individual are implicated in the proceedings; (b) to compel a court of common pleas to vacate a rule arresting a judgment; (c) to direct a feigned issue which had been awarded by the common pleas to try the validity of a senior judgment to be vacated; (d) to control the common pleas on a question of amending a formal defect which depends upon the rules of practice; (e) to control the mere chamber business of a judge of the common pleas; (g) to command a justice to proceed in a suit before him, in which he had given judgment of nonsuit, which was subsequently reversed in the common pleas; (h) to a court acting under a special commission, which expired by its own limitation previous to the motion for the writ. (i)

(a) Jansen v. Davison, 2 Johns. Ca. 72; *Ex parte* Nelson, 1 Cowen, 423; The People v. Superior Court of New York, 18 Wend. 675. (b) *Ex parte* Chamberlin, 4 Cowen, 49. (c) *Ex parte* Bostwick, 1 Cowen, 15. (d) The People v. Ulster C. P., 18 Wend. 628. (e) *Ex parte* Coster, 7 Cowen, 523. (g) *Ex parte* Brown, 5 Cowen, 31. (h) Anon. 9 Wend. 503. (i) The People v. Monroe Oyer and Terminer, 20 Wend. 108.g

3. What Removal or turning out an Officer will entitle him to a Mandamus.

It seems by the better opinion, that a member of a corporation, being only suspended, and not (k) totally removed, may have a *mandamus*; because, were it otherwise, they might always suspend, and thereby not only effectually keep him out, but also deprive him of all remedy of redress.

Lev. 162; Keb. 868; Raym. 152, The King v. Approved Men of Guildford. {Vide 7 East, 353, The King v. The Free Fishers, &c. of Whitstable.} (k) A *mandamus* to restore an alderman expelled from his priority and precedency of his place of alderman. 1 Lev. 119.

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A *mandamus* was granted to the College of Physicians in London, to restore Dr. Goddard to all the privileges and pre-eminences that belonged to him. The president of the college returns that they were incorporate, &c., by virtue of the statute H. 8, and that they made a by-law, that there should be a select number of thirty to attend in committees, and that Dr. Goddard was one of the thirty, and that they put him out for certain reasons, but that he remains fellow still. And all the court, except Mallet, held that this was a good return, for it was in the fellowship he had a franchise; but to be one of the thirty is no such thing as a man may sue to be restored to, for it is only a select number for the convenience of ordering their affairs.

Sid. 29; Lev. 19; Keb. 75, 84, Dr. Goddard v. College of Physicians.

|| Where a corporator who was entitled to share in the profits of a fishery, which the corporators worked in partnership, was suspended from the perception of the profits until he paid a fine imposed by a by-law; the court refused a *mandamus* to restore him to office, since he was not put out of his office, but only deprived of its profits, for which he might have a remedy by action, if unlawfully suspended, or, considering the corporators as partners, by a bill in equity.

Rex v. Free Fishers of Whitstable, 7 East, R. 353. See S. C. not S. P. 2 Maul. & S. 53; 17 Ves. 315.||

§ When a corporate body strikes off the name of one of its members, without giving him previous notice of their intention to do so, and affording him an opportunity of being heard in his defence, a *mandamus* to restore him will be granted.

Delacy v. Neuse River Nav. Co., 1 Hawks, 274. See Fuller v. Plainfield Academic School, 6 Conn. 532.

When the county commissioners had removed their clerk, and the cause of their removal was not stated on their records, as required by the statute, a *mandamus* will be issued to compel them to restore him.

Street v. Gallatin County, 1 Breese, 25; Taylor v. The Commonwealth, 3 J. J. Marsh. 306; Hardin County Court v. Hardin, Peck's R. 291.¶

(D) Where it lies to inferior Courts, and Magistrates, to oblige them to do that Justice which the Public Good requires, and the Laws enjoin.

THE Court of King's Bench having a superintendency over all inferior courts and magistrates, will oblige them to execute that justice which the party is entitled to, and which they are enjoined by law to do; and of this there are multitudes of instances; (a) as where the ordinary refuses to grant the probate of a will to an executor, or to grant administration to the next of kin, he may be compelled thereto by *mandamus*; for these being things enjoined by statute, the temporal courts will take care that due obedience is paid to them.

Styl. 7, 8; Lev. 186; Sid. 293; Comb. 158, 450; [1 Str. 552; 1 Bl. Rep. 640.] (a) And therefore where, to a *mandamus* to the judge of the prerogative court, to grant the probate of a will to a person named executor therein, the ordinary returned, that he was an absconding person, and insolvent; and that he had refused to give caution to pay legacies bequeathed to some of the testator's infant relations, a peremptory *mandamus* was granted; for the ordinary has no authority to interpose and demand caution of the executor, when the testator himself required none. Carth. 457; Salk. 299, pl. 11. The King v. Sir Richard Raines.

But a *mandamus* will not lie to oblige the ordinary to grant administration *durante minori ætate* of an infant to the next of kin, this being a matter out

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of the statutes, and therefore discretionary in the ordinary to whom to grant it; and if in such case he grants it to an improper person, or insists upon unreasonable security, the redress must be by appeal; or if in the last instance there be any remedy at common law, it must be by prohibition.

Hil. 4, G. 2, Smith's case, in B. R.; 2 Stra. 892, S. C.; Andr. 24, 366, S. C.; Barnard. K. B. 370, 425, S. C.

So, if the testator make J S his residuary legatee, who by the ecclesiastical law is entitled to administration upon the executor's renunciation, yet, if the spiritual court refuse to admit him thereto, they cannot be compelled by *mandamus*; for this is a matter purely of ecclesiastical cognisance, and out of the statutes; and therefore the party's redress must be by appeal.

Mich. 7, G. 2, in B. R. The King v. Bettesworth; 2 Stra. 956, S. C.; 2 Barnard. K. B. 334, S. C.; 2 Kel. 139, pl. 118, S. C.

[A *mandamus* issues *ex debito justitiæ* to oblige the ordinary and his registrar to deliver up an administration bond, for the purpose of enabling the next of kin, or a creditor, to put it in suit.

Rex v. Johnson and others, East, 29 G. 3; Archbishop of Canterbury v. House, Cowp. 140.]

§ The *mandamus* must be directed to one on whom, on legal principles, such writ must be directed.

Marbury v. Madison, 1 Cranch, 137.

In Maryland a writ of *mandamus* might be issued to an executive officer, commanding him to perform a ministerial act required of him by the laws; and, as it would lie in that state, it lies in analogous cases in the District of Columbia.

Postmaster-General v. The United States, 12 Pet. 524.

A *mandamus* may be directed to the cashier or to the board of directors of a bank, commanding them to allow one of the directors to examine the books of the bank.

The People v. Throop, 12 Wend. 183.g

¶ And the court will grant a *mandamus* to inspect the court rolls and books of a manor, on the application of a tenant of the manor who has been refused that permission by the lord, because they are of a public nature, and the tenants have an interest therein.(a) And where the lord forbid the tenant to cut underwood on the copyhold, the court granted a *mandamus* to permit the tenant to inspect the court rolls, so far as related to the cutting of underwood, the lord having refused it; (b) but they will not allow a party, though a tenant of the manor, to inspect the court rolls for the purpose of obtaining evidence in support of a prosecution against the lord.(c) The bishop's registry of presentations and institutions is kept for the use of all persons claiming livings in the diocese, and therefore a *mandamus* will be granted to allow inspection of it by a person claiming the right of patronage, though the bishop also claim the right.(d)

(a) The King v. Shelley, 3 T. R. 141; The King v. Lucas, 10 East, 235. (b) Rex v. Jower, 4 Maul. & S. 161. (c) Rex v. Earl of Cadogan, 5 Barn. & A. 903. (d) Rex v. Bishop of Ely, 8 Barn. & C. 112.¶

If, by the custom of a corporation, &c., a person serving an apprenticeship there is at the end of his term entitled to his freedom, and the mayor, &c., refuse to admit him thereto, they may be compelled by *mandamus*; for this is an act of public justice, which the superior court will see executed.

Lev. 91; Sid. 107, pl. 20; 5 Mod. 402; 12 Mod. 490; Ld. Raym. 337; 2 Show.

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Rep. 154, pl. 138; Carth. 448; [1 Burr. 137. And now by 12 Geo. 3, c. 21, "Where any person shall be entitled to be admitted to his freedom, and shall apply to the mayor or other officer who hath authority to admit freemen to be admitted a freeman, and shall give notice specifying the nature of his claim to such mayor or other officer, that if such mayor or other officer do not admit such person within *one month* from the time of such notice, the Court of King's Bench will be applied to for a *mandamus* to compel his admission; if such mayor or other officer shall, after such notice, refuse or neglect to admit such person, a writ of *mandamus* shall issue to compel such mayor, &c., to admit such person," &c.]

[A *mandamus* has been granted to admit a Quaker, having made his affirmation, into the Turkey Company, without taking the oath prescribed by 26 G. 2, c. 18.

Rex v. Turkey Company, 2 Burr. 999.]

So, it hath been held, that a *mandamus* lies to the justices of the peace, to oblige them to admit a person to take the oath of allegiance, and to subscribe according to the act of toleration, in order to qualify him to teach a dissenting congregation: And herein it is said, that the party ought to suggest whatever is necessary to entitle him to be admitted; and if that be not done, or if it be done, and if the act be false, that will be a good matter to return.

6 Mod. 228, 310, Peat's case; and vide 2 Salk. 572.

[So, a *mandamus* lies to the registrar of a bishop, or the justices at sessions, to register the certificate of a place for the meeting of protestant dissenters according to the act of toleration. And as the registrar and justices, in recording the certificate, are merely ministerial, it does not seem to be necessary for the parties certifying to show their having complied with the requisitions of the act.

Green v. Pope, 1 Ld. Raym. 125; Rex v. Justices of Derbyshire, 1 Bl. Rep. 606.]

So, a *mandamus* lies to the (a) justices of the peace, churchwardens and overseers of the poor, to oblige them to make rates for the relief of the poor.

Comb. 422, 478. [But a *mandamus* does not lie to make an equal rate, for the remedy is by appeal to the sessions. Rex v. the Guardians of the Poor in Canterbury, 1 Bl. Rep. 667; 4 Burr. 2200; Rex v. Churchwardens of Weobly, 2 Stra. 1259; Rex v. Churchwardens of Freshford, Andr. 24;] [Anon. 2 Chit. Rep. 254. But a rule *nisi* for a *mandamus* to pay a poor-rate was granted in a case where defendants had distrainable goods, it being sworn that the goods were fraudulently leased, and that the parish would be driven to try an action on the ground of the fraud. See Rex v. Company of Margate Harbour, 2 Chit. Rep. 256.] (a) To a justice of the peace to sign a poor-rate. 5 Mod. 275; 6 Mod. 229; Comb. 422, 478; Fol. 36, 37, 368; 2 Sess. Cas. 65, pl. 68; [1 Str. 393; 3 Dougl. on Elect. 142, note. So, to justices of the peace to make a warrant of distress to levy a rate. 1 Wils. 133;] [Anon. 2 Chit. Rep. 257; and also to permit parties who contributed to the county-rate to inspect and make copies of the previous rates. Rex v. Justices of Leicester, 4 Barn. & C. 891.]

So, *mandamuses* have been granted to oblige justices of the peace to discharge prisoners, pursuant to acts of parliament made for the relief of insolvent debtors.

2 Show. 74, pl. 57; Comb. 203. [So, to give judgment in an excise case. Rex v. Tod, 1 Stra. 530. So, to take security on articles of the peace. Rex v. Lewis, 2 Stra. 835; 1 Barnard. B. R. 166, S. C.; Fitzg. 85, S. C.]

[So, a *mandamus* has been granted to county justices, to receive and proceed upon a general traverse to a presentment by a justice of the peace upon view of a highway being out of repair. So, to appoint overseers. So, it has been granted to compel two justices to receive and proceed on a com-

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plaint against an overseer for not paying over the balance of the parish money in his hands, notwithstanding there has been an appeal to the sessions.

Rex v. Justices of Wilts, 3 Burr. 1530; 1 Bl. Rep. 467, S. C.; *Rex v. Horton*, 1 Term Rep. 374; *Rex v. Carter*, 4 Term Rep. 246.]

¶ The court will not grant a *mandamus* to compel a magistrate, after having heard the evidence and refused to convict, to rehear the case or remove the proceedings.

British and Foreign Patent Company, *ex parte*, 7 Dowl. 614.

When a judge acts in his judicial capacity, as on deciding on the propriety of issuing a warrant, the Supreme Court will not grant a *mandamus* to compel him to decide according to the dictates of any judgment but his own.

United States v. Lawrence, 3 Dall. 42. See *Ex parte Roberts*, 6 Pet. 216; *Ex parte Davenport*, 6 Pet. 661; *Life and Fire Ins. Co. of New York v. Wilson*, 8 Pet. 291; *Ex parte Martha Bradstreet*, 8 Pet. 588; *Life and Fire Ins. Co. of New York v. Adams*, 9 Pet. 573; *Postmaster-General v. Trigg*, 11 Pet. 173; *Ex parte Jesse Hoyt*, 13 Pet. 279.^g

¶ And a *mandamus* will lie to justices of the peace to nominate overseers of the poor, although the time mentioned in the statute 43 Eliz. has expired.(a) So, to appoint a surveyor of the highways, where the justices had not appointed at the time mentioned in the stat. 13 Geo. 3, c. 78, § 1.(b) But the court has no power to grant a *mandamus* to justices to compel them to come to a particular decision, as to make an order of maintenance on a particular parish;(c) nor will they grant a *mandamus* to compel them to act in any particular mode, unless they see clearly that the magistrates have neglected some duty imposed upon them by law:(d) much less to compel them to do that which may subject them to an action of trespass.(e) The court may compel the court of quarter sessions by *mandamus* to proceed to hear and decide an appeal; but when they have so determined it, the court cannot compel them to correct their judgment if it appears to be erroneous,(g) nor will they grant a *mandamus* to the court of quarter sessions to dismiss an appeal.(h) But though the court will not review a decision of justices on the merits, if they have decided according to a discretion vested in them by statute, yet if they refuse to hear an application on the ground of a conceived want of jurisdiction, and the court think they have jurisdiction, they will grant a *mandamus* to hear the application.(i) As the court have no jurisdiction to review the judgment of the sessions, except on a case stated, they will not grant a *mandamus* to rehear an appeal on the ground that the sessions rejected evidence on one side as inadmissible according to their practice, for they are the judges of their own practice.(k)

(a) *Rex v. Sparrow*, Stra. 1123. (b) *Rex v. Justices of Denbighshire*, 4 East, 132. (c) *Rex v. Justices of Middlesex*, 4 Barn. & A. 298. (d) *Rex v. Justices of North Riding of Yorkshire*, 2 Barn. & C. 290. (e) *Rex v. Justices of Buckinghamshire*, 1 Barn. & C. 485; *Rex v. Broderip*, 5 Barn. & C. 239. (g) *Rex v. Justices of Monmouthshire*, 4 Barn. & C. 844; and see *Rex v. Justices of Worcestershire*, 1 Chit. Rep. 649. (h) *Rex v. Justices of Wilts*, 2 Chit. Rep. 257; and as to *mandamus* to hear appeals where the question is whether the appeal is in time or not, see 1 East, 683, 686; 1 Maul. & S. 479; 4 Maul. & S. 327; 1 Barn. & A. 210; 4 Barn. & C. 62; 7 Barn. & C. 691. (i) *Rex v. Justices of Kent*, 14 East, 395; and see *Rex v. Justices of Cumberland*, 1 Maul. & S. 190. (k) *Rex v. Justices of Caernarvon*, 4 Barn. & A. 86; and see *Rex v. Justices of Leicestershire*, 1 Maul. & S. 442.]]

[So, a *mandamus* has been granted (l) to the keepers of the common seal

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of the University of Cambridge, commanding them to affix it to the appointment of high steward: to the warden of a college,^(m) to compel him to put the common seal to an answer of the fellows in chancery, contrary to his own separate answer: to commissioners of the land-tax to elect a clerk.⁽ⁿ⁾

(l) *Rex v. Vice-Chancellor, &c. of Cambridge*, 3 Burr. 1647; 1 Bl. Rep. 547, S. C. (m) *Rex v. Wyndham, Cowp. 377.* (n) 1 Term Rep. 146.]

So, where by the statutes 19 Car. 2, c. 3, § 25, and 22 Car. 2, c. 11, § 61, for erecting Newgate market, power is given to the mayor and aldermen of London to empanel a jury, who shall assess and adjudge what satisfaction and recompense shall be given to the owners of the grounds; and that the verdict of such jury, on that behalf to be taken, and the judgment of the said mayor and court of aldermen thereupon, and the payment of the money so awarded or adjudged, &c., shall be binding and conclusive to and against the owners, &c.; and there being 15,000 feet of the grounds of J S taken away for this purpose, for which a jury being empanelled assessed and awarded two shillings a foot, but the mayor and court of aldermen refused to give sentence or judgment thereupon; a *mandamus* was awarded to compel them to it.

Vent. 187; Raym. 214, Amherst's case.

And this general jurisdiction and superintendency of the King's Bench over all inferior courts, to restrain them within their bounds, and to compel them to execute their jurisdiction, whether such jurisdiction arises from a modern charter, subsists by custom, or is created by (a) act of parliament, being *in subsidium justitiæ*, has of late been exercised in variety of instances; as, (b) a *mandamus* granted to the quarter sessions to give judgment for abating a nuisance.

Andr. 183. (a) A *mandamus* to the president and fellows of St. John's College, Cambridge, to oblige them to turn out certain fellows of the college, whose places became void for not taking the oaths of supremacy and allegiance, pursuant to the statute of 1 W. & M. c. 1, and c. 8. Skin. 359, pl. 1; 368, pl. 15; 393, pl. 30; 546, pl. 9; 4 Mod. 233, S. C. (b) Hil. 3 Geo. 1; Andr. 183; 2 Ld. Raym. 1334; Ses. Cas. 248. So, to receive an appeal, Ses. Cas. 248; [Dougl. 191; 3 Term Rep. 504;] *¶ Rex v. Justices of Flintshire*, 7 Term Rep. 200.]]

So, a *mandamus* was granted to the court of Sandwich, to give judgment in an action of assault and battery.

Brooke v. Ewers, Mich. 5 Geo. 2, Stra. 113; Ses. Cas. 248; Andr. 183; *Rex v. Day, Say. Rep. 202*, S. P.

So, a *mandamus* was granted to the sheriff's court in London, to give final judgment upon a writ of inquiry.^(c)

Mich. 7 Geo. 1, *Baily v. Bourn*, Stra. 392; Fortesc. Rep. 198; Ses. Cas. 249; Andr. 183, 184. *¶*(c) But the Court of K. B. will not interfere by *mandamus* to regulate the practice of an inferior court, on the ground that an inferior court is the proper judge of its own practice. See *Ex parte Morgan*, 2 Chit. Rep. 250.]]

{So a *mandamus* may be granted to an inferior court, to give judgment and not grant a new trial, when a verdict has been given on the merits; such a court not having power in that case to grant a new trial.

1 Johns. Ca. 179, *The People v. Justices of Chenango*; 2 Cain. Er. 319, S. C.; 1 Johns. Ca. 241, *Weavel v. Lasher*; 2 Johns. Rep. 371, *Haight v. Turner*.}

So, a *mandamus* was granted to the bailiff of Andover, to give judgment in a cause there depending; but the court in this case required an affidavit of their refusal, else it should be presumed that the court would do right.

Trin. 2 G. 2, *Barnard. K. B. 59*; Andr. 184; Ses. Cas. 248.

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¶ Words of permission when tending to promote the public benefit are always held to be compulsory; thus, where the words of the charter of a manor court were that the steward and suitors "*should have power*" (a) to hold a court of record for the recovery of debts, a *mandamus* was granted to compel them to hold it, although it appeared that no such court had been holden for above thirty years.

Rex v. Steward of Havering Atte Bower, 5 Barn. & A. 691; Rex v. Mayor and jurats of Hastings, 5 Barn. & A. 691, note. (a) But the words "shall and may" are only imperative when the clause is for the public good or benefit. Rex v. Com. of Flockwold Enclosure, 2 Chit. Rep. 251. ¶ See 1 Vern. 153; 2 D. & R. 172; 4 B. & A. 271; 1 B. & C. 35, 85; 2 T. R. 172; 5 Johns. Ch. R. 101; 5 Cowen, 193; 14 S. & R. 429; 1 Pet. R. 46.g

So, a *mandamus* was granted to the corporation of Liverpool, to hold an assembly for doing the public business, which was making leases.

Mich. 8 Geo. 1, Andr. 184; Barnard. K. B. 82.

But though these kind of writs are daily awarded to judges of courts to give judgment, or to proceed in the execution of their authority, yet are they never granted to aid a jurisdiction, but only to enforce the execution of it; nor are they ever granted where there is another proper remedy, and therefore will not lie to an officer of an inferior court; (b) as, to a serjeant at mace, an apparitor, &c., to compel them to execute their duty; for these are servants to their respective courts, and punishable by the judges of them; and for the superior court to interpose in obliging such inferior officers, would be to usurp the authority of the court, which has a proper jurisdiction over its own officers, and which alone is answerable to the superior court for the execution of such authority; and therefore where a *mandamus* issued to the vice-master of Trinity College, Cambridge, commanding him to execute a sentence of deprivation, pronounced by the Bishop of Ely, as visitor of the college, against Dr. Bentley, the master of that college; and it appeared on the face of the writ, and by the return, that the bishop himself or the king were visitors, the court held, that no *mandamus* would lie; for taking the bishop to be general visitor, as the writ supposes, he is the proper person to carry his own sentence into execution, having power *tam in capite quam in membris*; and if the vice-master refuses obedience to his mandate, he may pronounce sentence of deprivation against him, and he will be immediately ousted by the judgment; or, taking the crown to be visitor, the vice-master may be punished by commissioners appointed by the crown; one of which ways the court held to be the proper one to compel the vice-master to do his duty.

[(b) Therefore, it will not be granted to compel obedience to an order of sessions. Rex v. Bristow, 6 Term Rep. 168;] Hil. 9 G. 2, in B. R. The King v. Dr. Walker, ante.

A *mandamus* lies to deliver up the ensigns of an office, or the papers or records of a public nature, to a successor; as, (c) a *mandamus* to deliver the mace, and other ensigns of mayoralty, to the succeeding mayor: so, (d) a *mandamus* to a town-clerk, to deliver several books which belonged to the corporation.

Sid. 31; [Crawford v. Powell, 3 Burr. 1013; 1 Bl. Rep. 239;] ¶ Rex v. Monday, Cowp. 539. ¶ Danvers v. Essex, 6 Pick. 20; Carpenter v. Bristol, 21 Pick. 258; Dodge v. Essex, 3 Metc. 380.g (c) 5 Mod. 314. (d) Comb. 102; 2 Stra. 948; 2 Barnard. K. B. 235, S. P.; Rex v. Ingram, 1 Bl. Rep. 50.

A *mandamus* lies to oblige corporations to choose proper officers, which if they neglected to do, this by the common law was a forfeiture of their

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charter ; and though, by the common law, upon the death of a mayor within his year, which was the act of God, and an ordinary contingency, the Court of King's Bench was authorized to grant a *mandamus* immediately to fill up the vacancy ; yet, upon an omission to elect at the charter-day, or upon the removal of an officer unduly chosen, there was no power to compel an election before the day came round again to supply those defects.

Vide tit. *Corporations*.

§ Where trustees of a turnpike had made a new road through private grounds, held, that it was equally their duty to make proper fences ; the want of funds was no answer to a *mandamus* requiring such trustees to make them.

Reg. v. Luton Roads' Trustees, 1 Gale & D. 248.g

By the 11 G. 1, c. 4, it is enacted in the following words : " Whereas in many cities, boroughs, and towns corporate, within that part of Great Britain called England, Wales, and Berwick-upon-Tweed, the election of the mayor, bailiff or bailiffs, or other chief officer or officers, is by charter, or ancient usage, confined to a particular day or time, without any provision how to act or proceed in case no election be then made ; and it frequently happens that by such charter, or usage, particular acts are required to be done at certain times, in order to and for the completing of such elections ; and by the contrivance or default of the person or persons who ought to hold the court or preside in the assembly where such elections are to be made or such acts to be done, or by accident, it hath sometimes happened, and may frequently do so, if not timely prevented, that no courts or assemblies have been held, or elections made, or such acts done within the time fixed for that purpose ; in which cases, if elections of such officers could not afterwards be made, or in consequence of such omission the corporation should be dissolved, great mischiefs might ensue ; for remedy and prevention whereof be it enacted, That if in any city, borough, or town corporate, within that part of Great Britain called England, Wales, and Berwick-upon-Tweed, no election shall be made of the mayor, bailiff or bailiffs, or other chief officer or officers of such city, borough, or town corporate, upon the day or within the time appointed by charter or usage for such election ; or such election, being made, shall afterwards become void, whether such omission or avoidance shall happen through the default of the officer or officers who ought to hold the court or preside where such election is to be made, or by any accident, or other means whatsoever ; the corporation shall not thereby be deemed or taken to be dissolved or disabled from electing such officer or officers for the future ; but in any case, where no election shall be made as aforesaid, it shall and may be lawful for the members or persons of such city, borough, or corporation, who have right to vote, or be present at, or to do any other act necessary to be done, in order to or for the completing of such election ; and they, and such of them, as shall be hindered by any reasonable impediment or excuse, are hereby required respectively to meet or assemble together in the town hall, or other usual place of meeting, for making such election within such city, borough, or town corporate, upon the day next after the expiration of the time within which such election ought to have been made, unless such day shall happen to be Sunday, and then upon the Monday following, between the hours of ten in the morning and two of the afternoon of the same day ; and that the members or persons having right to vote at or to do any other act necessary

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to be done in order to such election, or such of them as shall be so assembled or met together, shall forthwith proceed to the election of a mayor or bailiff, or other chief officer or officers, for such city, borough, or corporation, and to do every act necessary to be done, in order to or for the completing of such election, in such manner as was usual in or in order to the election of such officer or officers, upon the day or within the time appointed by charter or usage for such election; and in case upon such day of meeting hereby appointed for such election, the mayor, bailiff or bailiffs, or other proper officer or officers, who ought to have held the court or presided at the assembly for such election, or doing any other act necessary to be done in order to such election, if the same had been made or done on the day fixed, or within the time limited by charter or usage for that purpose, shall be absent; then such other person, having a right to vote, being the nearest then present in place or office to the person or persons so absenting himself or themselves, shall hold the court, or preside in the meeting or assembly hereby appointed, and shall have the same power and authority, in all respects therein, as belongs to the mayor, bailiff or bailiffs, or other chief officer or officers of the same city, borough, or town corporate, at any court or assembly for the election of officers for such place, or for doing any other act necessary to be done in order to such election."

And by § 2, it is further enacted, "That if it shall happen that in any city, borough, or town corporate, within that part of Great Britain called England, Wales, and Berwick-upon-Tweed, no election shall be made of the mayor, bailiff or bailiffs, or other chief officer or officers of such city, borough, or town corporate, upon the day or within the time appointed by charter or usage for that purpose; and that no election of such officer or officers shall be made pursuant to the directions hereinbefore prescribed; or such election, being made, shall afterwards become void as aforesaid; in every such case it shall and may be lawful for his majesty's Court of King's Bench, upon motion to be made in the said court, to award a writ or writs of *mandamus*, requiring the members or persons of such city, borough, or town corporate, having a right to vote at or to do any other act necessary to be done in order to such election, to assemble themselves upon a day and at a time to be prefixed in such writ or writs,^(a) and to proceed to the election of a mayor, bailiff or bailiffs, or other chief officer or officers, as the case shall require, and to do every act necessary to be done in order to such election, or to signify to the said court good cause to the contrary; and thereupon to cause such proceedings to be had and made, as in other cases of writs of *mandamus* granted by the said court for election of officers of corporations; and of the day and time appointed, in and by any such writ or writs of *mandamus*, for holding such assembly, public notice in writing shall, by such person as the court shall appoint, be affixed in the market-place, or some other public place within such city, borough, or town corporate, by the space of six days before the day so appointed; and such officer and other person respectively shall preside in such assembly as ought to have presided at the election of such mayor, bailiff or bailiffs, or other chief officer or officers, or at the doing any other act necessary to be done in order to such election, in case the same had been made or done upon the day hereinbefore prescribed for that purpose."

¶ (a) The court will not fix any precise day for an election, but leave it to the proper officer to do. *Rex v. Mayor of Bridgewater*, 2 Chit. Rep. 256.]

§ 3. "And whereas in certain boroughs and towns corporate within that
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part of Great Britain called England, Wales, and Berwick-upon-Tweed, the mayor, bailiff or bailiffs, or other chief officer or officers, is or are to be nominated, elected, or sworn at a court-leet, or view of frankpledge, or some other court; and by reason of the contrivance or default of the lord, or his steward, or such other officer, by or before whom such court ought to be held, in not holding the same, or by some accident it hath happened, and may hereafter happen, that no due nomination, election, or swearing of such mayor, bailiff or bailiffs, or other chief officer or officers, hath been or shall be had or made; be it further enacted by the authority aforesaid, That in every such case it shall and may be lawful to and for his majesty's Court of King's Bench, upon motion to be made in the said court, to award a writ of *mandamus*, requiring the lord, or his steward, or other officer, by or before whom such court ought to be held, to hold, or cause to be holden, such court-leet or other court, and to do every other act necessary to be done by him, in order to such nomination, election, or swearing, at such day and time as shall be for that purpose judged proper by the said Court of King's Bench, and shall be appointed in such writ; or to signify to the said court good cause to the contrary; and thereupon to cause such proceedings to be had and made as in other cases of writs of *mandamus*, granted by the said court for holding of any court; and of the day and time appointed, in and by any such writ of *mandamus*, for holding such court, public notice in writing shall, by such person as the said Court of King's Bench shall appoint, be affixed in the market-place, or some other public place within such borough or town corporate, by the space of six days before the day so appointed; and where a nomination of persons, in order to the election of any such mayor, bailiff or bailiffs, or other chief officer or officers, is to be made at such court-leet, or other court; in every such case, after such nomination made, all and every other act and acts necessary to be done, in order to such election, shall be had, made, and done at such assembly, and in such manner and form as the same ought to have been had, made, and done, in case such election had been made upon the day next after the expiration of the time prescribed for such election by the charter or usage of such borough or corporation, according to the directions hereinbefore mentioned."

§ 9. It is further enacted, "That where any writ of *mandamus* shall issue out of the Court of King's Bench in any of the cases aforesaid, the person or persons, to whom such writ shall be directed, shall make his or their return to the first writ of *mandamus*."

[This being a beneficial law for the subject, the court have been very liberal in the construction of it, and therefore have granted a *mandamus* for the election of a mayor, though there had not been any legal mayor for four years preceding.

Bull. N. P. 201.

So, they have granted a *mandamus* where there was a mayor *de facto* at the time, it appearing clearly there had not been a due election. But where it is at all doubtful whether the prior election be legal, the court will not grant such a *mandamus* till the validity of the prior election has been determined in a proper manner by information.

Bull. N. P. 201; Case of the Borough of Tintagel, *infra*, (E), 2 Stra. 1003; Case of Aberystwith, 2 Stra. 1157; Case of the Corporation of Scarborough, *Ibid.* 1160; *Rex v. Mayor, &c. of Cambridge*, 4 Burr. 2008; *Rex v. Newsham*, Say, Rep. 211. But the mayor *de facto* must be made party to the rule to show cause. *Rex v. Bankes*,

(E) Of the Authority by which it issues.

3 Burr. 1452; 1 Bl. Rep. 445, 452; ||Rex v. St. Martin's, 1 Term Rep. 149; and see Rex v. Mayor of Truro, 3 Barn. & A. 592; || s Strong, petitioner, 20 Pick. 484.g

So, they have granted it to go to the election, not only of the head officer, but of other annual officers (a) who were constituent parts of the corporation.(b)

Case of the Corporation of Scarborough, 2 Str. 1180. See Rex v. Woodrow, 2 Term Rep. 732. ||(a) They will not, however, grant a *mandamus* to compel a corporation to elect members of an indefinite body. Rex v. Pateman, 2 Term Rep. 777; Rex v. The Mayor of Fowey, 2 Barn. & C. 590. (b) The statute 11 Geo. 1, c. 4, is not confined to annual officers. See Rex v. The Mayor and Burgesses of Thetford, 8 East, 278.||

So, they have granted it to a steward of a court-leet, to hold a court-leet and swear a jury, that they may present a person duly elected mayor, that is, as duly elected mayor.

Rex v. Willis, Andr. 279.]

||A *mandamus* will be granted to the directors of the East India Company, to despatch to their governments in India despatches altered and approved by the Board of Commissioners for Indian affairs, provided the alterations by the Board be such as by the 33 Geo. 3, c. 52, they are authorized to make: where, however, one of the grounds for not transmitting the despatches was, that the alterations made did "not relate to the civil or military government or revenues of the British territories in India," and were consequently unauthorized by the act, it was held that the directors were bound to apply for the decision of the privy Council on that point, according to the 16th section of the act, and that the Court of King's Bench had no authority to decide that question; and the rule for a *mandamus* was accordingly enlarged in order to give time for such appeal.

Rex v. Directors of East India Company, 4 Maul. & S. 279.||

(E) Of the Authority by which it issues: And herein of the discretionary Power in the Court of granting or refusing it.

THIS general jurisdiction and superintendency is now only exercised by the Court of King's Bench, as the supreme court, for restraining and keeping all inferior courts and magistrates within their proper bounds, and obliging them to execute that justice with which they are invested.

Vide tit. *Courts and their Jurisdiction*. s Parker v. The Judges, &c. 12 Wheat. 561.g

And though a *mandamus* may issue out of Chancery, yet on a motion to the Lord Keeper to grant a mandatory writ to the chief justice of the King's Bench, to command him to sign a bill of exceptions, and a precedent produced, where in a like case such a writ had issued out of Chancery to the judge of the sheriffs' court in London; the Lord Keeper denied the motion, for that the precedent produced was to an inferior court, and he would not presume but the Chief Justice of England would do what should be just in the case.

Vern. 175.

But though the Court of King's Bench be intrusted with this jurisdiction of issuing out *mandamuses*, yet they are not obliged to do so in all cases wherein it may seem proper, but herein may exercise a discretionary power, as well in refusing as granting such writ; as, where the end of it is merely a private right; where the granting it would be attended with manifest hardships and difficulties, &c.

|| See Rex v. The Com. of Excise, 2 Term Rep. 385; Rex v. Clear, 4 Barn. & C. 899, and see *ante*, (A).||

(F) To whom to be directed.

[So, they will not grant it to restore a person, where it is *confessed* he was *rightly* removed, even though he had no notice at the time.

Rex v. Mayor, &c. of Axbridge, Cowp. 523.]

So, ever since the statute 11 G. 1, c. 4, for obliging corporations to elect officers, it hath been held, that this court hath a discretionary power of refusing a writ for that purpose, but may first receive information about the election, and, if dissatisfied about the right, may send the parties to try it in an information.

Hil. 8 G. 2, The King v. Mayor and Burgesses of Tintagel in Cornwall, 2 Stra. 1003, 1157; Andr. 280.

Also, in a doubtful case, the Court of King's Bench may award a *mandamus* to be considered of further on the return, which may give more light, and discover more fully the justness of granting or refusing it, and on such return may either establish or quash the writ.

Sid. 169; Lev. 23; 2 Lev. 14; 2 Show. 74; Carth. 169; 10 Mod. 49.

§ The Supreme Court of the United States has power to issue a *mandamus* directed to a Circuit Court of the United States, commanding the court to sign a bill of exceptions, in a case tried before that court.

Ex parte Crane, 5 Pet. 190.

The Circuit Court has power to issue a *mandamus* to a collector, commanding him to grant a clearance.

Gilchrist v. Collector, 1 Hall's Am. Law Journal, 429.

The power of the Circuit Courts of the United States to issue a *mandamus* is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction.

McIntire v. Wood, 7 Cranch, 504; McOluney v. Silliman, 6 Wheat. 349; Smith v. Jackson, Paine, C. C. R. 453.

The Circuit Court may issue a *mandamus* to a state court which refuses to transfer a cause under the act of Congress.

Spriggins v. County Court of Humphries, 1 Cooke, 160. See Brown v. Crippen, 4 Hen. & M. 173.

In Pennsylvania the practice has been not to issue writs of *mandamus* except from the court which sits in the district in which the person resides to whom it is directed.

9 S. & R. 72.g

(F) To whom to be directed.

THE writ is to be directed to him who by law is obliged to execute it, or to do the thing thereby required; and therefore (a) where a *mandamus* was granted to the mayor, &c. of Norwich, it was moved, that the sense of the mayor differed from the majority of the corporation, and that he would execute the writ; whereas the corporation were for returning an excuse, &c., and they prayed, that the mayor might be ordered to deliver the writ to the rest of the corporation; *sed non allocatur*; for he is the head and principal, and (b) take your course against him.

(a) Salk. 432, pl. 10, 701, pl. 6; 2 Ld. Raym. 1244. [The court will not specify to whom, by name, a *mandamus* shall be directed. 2 Burr. 784; Ibid. 798;] § Marbury v. Madison, 1 Cranch, 137.g (b) That if the mayor had made any return, contrary to the votes of the majority concerned, it was at his peril; and that the way to punish him was by information in B. R. Carth. 500.

[Where the *mandamus* was directed to the mayor, aldermen, and commonalty of Ripon, and they returned that they were incorporated by the

(F) To whom to be directed.

name of the mayor, *burgesses*, and commonalty of Ripon, the court held the writ bad, because directed to the corporation by a wrong name.

Rex v. Mayor, &c. of Ripon, 2 Salk. 433.

The writ must be directed either to that part of the corporation who are to do the act, or to the corporation at large; for if it be directed to a part of the corporation who are not to do the act, it shall be quashed. Therefore, where a *mandamus*, to admit a person to the office of town-clerk, was directed to the mayor and aldermen of Hereford, and in fact the mayor only was to admit, the writ was quashed.

Rex v. Mayor, &c. of Abingdon, 2 Salk. 699; *Reg. v. Mayor, &c. of Hereford*, Ibid. 701; || *Rex v. Smith*, 2 Maul. & S. 598. ||

So, where the *mandamus* was directed to the mayor, aldermen, and *common council* of Norwich, to proceed to the election of a town-clerk, the court granted a *supersedeas*, it appearing, that the right of election was in the mayor and aldermen, and the writ was not directed to them, neither was it directed to the corporation by their corporate name.

Rex v. Mayor, &c. of Norwich, 1 Stra. 55.

But, where the power of amotion was in the mayor, aldermen, and *others of the common council*, the mayor and aldermen being part of the common council, and the writ was directed to the mayor, aldermen, and common council, it was moved to quash it for this direction, because it seemed to infer that the mayor and aldermen were no part of the common council: the court said, Here is nobody in this direction who must not join in the act: this is only repeating the several constituent parts of the corporation; and the mentioning the entire common council after the mayor and corporation, is but a repetition *quoad* the mayor and aldermen.

Pees v. Mayor, &c. of Leeds, 1 Stra. 640.

|| And the *mandamus* must not only be directed to the corporation, or select body, in their proper name, but also in their proper capacity; and the application for it must state plainly in what capacity it is intended that the writ should be directed to them.

Papillon and Dubois, Skin. 64; *Rex v. Westlove*, 3 Barn. & C. 685; S. C. 5 Dow. & Ry. 599. ||

If a *mandamus* be directed to the two bailiffs of a town, to swear in other bailiffs, and they object, that having sworn in others, and being now no longer bailiffs, and the writ not being directed to them in their natural capacities, they are not obliged to pay any obedience thereto; the court will notwithstanding oblige them to return the writ; for if the persons sworn in by them had no right to be chosen, they still continue bailiffs, and ought to obey the king's writ.

Mod. 133, *The Queen v. The Town of Clitheroe*.

But where a *mandamus* was directed to the churchwardens of W to restore A to the office of sexton, and served upon the late churchwardens, after their office was expired; and a rule was made to show cause why an attachment should not go, for not obeying the *mandamus*; upon the whole matter being disclosed by affidavit, the court allowed as a good reason for their not returning the writ, that they, at the time of the writ delivered to them, were not churchwardens.

Trin. 5 Geo. 2, in B. R. *The King v. Churchwardens of Wrexham*, 15 Vin. Abr. 214, pl. 6.

A *mandamus* to the mayor, aldermen, and capital burgesses of D, viz.,
2 P

(H) Of the Manner of enforcing Obedience, &c.

whereas A and B, &c. removed the party complaining from his office of burgess, commanding them to command A and B to restore him, was quashed, for that it is absurd that the writ should be directed to one person to command another.

2 Salk. 436, pl. 18, *The Queen v. The Mayor, &c. of Derby*.

[The writ need not set out that the person to whom it is directed is the person to do the act for which the *mandamus* is granted; for if it is misdirected, it should be so returned.

Rex v. Ward, 2 Stra. 893.]

§ The delivery of a *mandamus* directed to a county court, to such of the justices as are sitting in open court, is sufficient service of the writ.

Smith v. Dyer, 1 Call, 562.

A *mandamus* will not lie against the visitors of a private eleemosynary institution.

Bracken v. William and Mary College, 3 Call, 573.g

(G) By whom to be returned.

THE writ is to be returned by him to whom it is directed; and if any other return it in his name, without his privity and consent, an action on the case lies against him: also, it is an offence for which the court will grant an attachment.

Skin. 368, pl. 15; *Carth*. 500; *Comb*. 422; 2 *Show*. 504, pl. 465.

If a *mandamus* be directed to the mayor, &c., and the mayor, who is the most principal and proper person, return and bring in the writ; the court, upon affidavits, will not examine whether there was the sense of the majority, but will receive it, and leave the parties to punish the mayor for the misdemeanor, if he be guilty; but a peremptory *mandamus* will be granted if the return be falsified.

Carth. 499, *The King v. Mayor, &c. of Abingdon*; 1 *Ld. Raym*. 559, S. C.; 2 *Salk*. 431, pl. 9, S. C., and leave given by the court to file an information against the mayor.

(H) Of the Manner of enforcing Obedience to the Writ, and compelling a Return.

ON every *mandamus* there regularly issues an *alias* and *pluries*, to oblige the party to return the writ; but the Court of King's Bench may make a peremptory rule to return the first writ, and, in case of disobedience, grant an attachment: also, by the statute 9 Ann. c. 20 and 11 G. 1, c. 4, persons who are by law required to make returns to *mandamuses*, in such cases as are within these statutes, must make their return to the first writ of *mandamus*.

2 *Salk*. 429, pl. 4, 434, pl. 16; *Ld. Raym*. 391; 6 *Mod*. 25; *Skin*. 669, pl. 7; 2 *Ld. Raym*. 848, 1233.

If an attachment issues for not returning a *mandamus*, and the sheriff, who is to serve the process, takes bail thereupon, this is such a misdemeanor for which an attachment will be granted against him; for these are not like attachments in Chancery, for want of an answer, which are only as attachments of process, but are writs on contempt, in nature of executions, and so not bailable by the sheriff.

Mich. 9 Geo. 2, *The King v. Baskerville, Sheriff of Shropshire*.

If a *mandamus* is awarded for electing an officer, and there is an equality

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of votes, so that the electors cannot agree, it is said, that they shall be all brought up as in contempt, and laid by the heels, till they do agree.

6 Mod. 152.

[A *mandamus* was directed to the two bailiffs, one of whom was for obeying the writ, but the other would not, nor join in the return. The court granted an attachment against both; for they said, it would be endless to try in all cases which was in the right, and it would be always used for a handle of delay.

Case of the Bailiffs of Bridgenorth, 2 Stra. 808; 1 Barnard. B. R. 53, S. C. Where a writ was directed to the mayor and jurats of Rye to admit and swear a jurat, and the mayor claimed an exclusive right to the nomination of him, and the jurats denied any such right in the mayor, so that they could never join in a return, it was consented to try the right in a feigned issue. *Rex v. Mayor, &c. of Rye*, 2 Burr. 798.]

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As every *mandamus* issues upon a supposal of some breach and disobedience of the law, or neglect of duty in the person to whom it is directed, the return thereto must be certain to every respect; (a) and therefore it is said not to be sufficient to offer such matter as the party may falsify in an action, but also such matter must be alleged, that the court may be able to judge of it, and determine, whether the party's conduct be agreeable to law or not.

2 Salk. 432, pl. 11; Ld. Raym. 559; Vent. 111. [(a) But certainty to a certain intent in general is all that is requisite here, which means what, upon a fair and reasonable construction, may be called certain, without recurring to possible facts, which do not appear. If the return be certain upon the face of it, that is sufficient, and the court cannot intend facts inconsistent with it, for the purpose of making it bad. If presumptions were to be allowed, certainty in every particular would be necessary, and no man could draw a valid and sufficient return. Besides, presumption and intendment, as far as they go, must be in favour of returns, not against them. Per Buller, J., Dougl. 159.] [See *Rex v. Mayor of Monmouth*, 4 Barn. & A. 497; *Rex v. Mayor of Carmarthen*, 1 Maul. & S. 697.] [The return need contain only a full and certain answer to all the averments made by the petition, and a fair legal reason for disobeying the *mandamus*. *Springfield v. Hampden*, 10 Pick. 59. In point of form it requires the same certainty and precision necessary in declarations and other pleadings. *Brosius v. Reuter*, 1 Har. & J. 551.]

β In a return to a *mandamus* the defendant must either deny the facts stated in the writ, or show other facts sufficient to defeat the relator's claim.

Commercial Bank of Albany v. Canal Commissioners, 10 Wend. 25.]

Therefore, if to a *mandamus* to the Lord President and Council of the Marches, to admit a person to the exercise of office of deputy secretary, the return is, that *non fuit tempore receptionis brevis deputatus constitutus*; this is naught; for if he were made his deputy before, the return was true, unless he made him his deputy at the very instant of the receipt of the writ.

Vent. 110, *The King v. Clapham*.

To a *mandamus* to admit a person alderman, the party may return, that he was not qualified, or that he was not elected: also, several causes may be returned, but they must be consistent; (b) and therefore if the return admits a good election, and afterwards avoids it by the matter repugnant, this is naught.

2 Salk. 436, pl. 10; 2 Ld. Raym. 1244, *The Queen v. Mayor, &c. of Norwich*. [(b) See acc. *Wright v. Fawcett*, 4 Burr. 2041; *Rex v. Churchwardens of Taunton St. James's*, Cowp. 413. Where several causes returned to a *mandamus* are inconsistent, the whole must be quashed, because the court cannot know which to believe, and it is

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an objection to the whole return. It is like a declaration in which two inconsistent counts are joined; there, the plaintiff cannot have judgment. But where a return consists of several independent matters not inconsistent with each other, some of which are good at law, and some bad, the court may quash the return as to such as are bad, and put the prosecutor to plead to or traverse the rest. *Rex v. Mayor, &c. of Cambridge*, 2 Term Rep. 456; *Rex v. Mayor, &c. of York*, 5 Term Rep. 66; *Rex v. Archbishop of York*, 6 Term Rep. 493.]

A *mandamus* to swear one into the place of town-clerk; the return was, that upon the election B had eighteen voices, and the party who sued the *mandamus* but seventeen; and that they swore in B: it was held a bad return, being argumentative, when it should be express and direct, that he was not chosen.

6 Mod. 309. See *Ld. Raym.* 225, 559; [*Rex v. Ilchester*, 4 Dow. & Ry. 330.]

A *mandamus* was granted to restore the recorder of Barnstaple, directed to the mayor of the corporation; and he returned, *quod non constat nobis* that he was ever elected; and the return was adjudged insufficient, and restitution awarded.

Raym. 153.

So, where to a *mandamus* to restore a town-clerk, it was returned, that he *nunquam debito modo admissus fuit*; it was held a bad return, being a negative pregnant, and involving matter of law, when the plain fact only should be returned, so as to enable the court to adjudge upon it, and the party to bring his action, in case it were false.

Sid. 209; *Keb.* 655, 716, 733.

[A return to a *mandamus* to restore a parish clerk was held bad, because, though it appeared that the offences charged were sufficient grounds of removal, it was not stated that he had been summoned to answer the charge before his removal.

Rex v. Gaskin, 8 Term Rep. 209; and see 1 Bing. 357.]

[So, where a writ of *mandamus*, to certify the election of a recorder, stated, that the corporation, being duly assembled, proceeded to the election of a recorder; a return, that they were not duly assembled to proceed to the election of a recorder, was holden bad, as being a negative pregnant.

Rex v. Mayor, &c. of York, 5 Term Rep. 66.]

But if the *mandamus* suggests that he was *debite electus*, a return *quod non fuit debite electus* is good, because it answers the suggestion in the writ.

Carth. 170, *Lambert's case*, 2 Salk. 433, pl. 13; 5 Mod. 11, S. P. [2 *Stra.* 1235, S. P.; 1 *Show.* 253, S. P.; *Andr.* 105, S. P., on a *mandamus* to restore. But see 2 *Stra.* 895, and *Dougl.* 82. A return to a *mandamus* stating in the words of the writ, that the prosecutor was not DULY ELECTED, admitted, and sworn, was holden to be bad. *Scius*, perhaps, if it had been not duly elected, or admitted, or sworn. *Rex v. Lyme Regis*, *Dougl.* 79.]

[If a writ set forth all the proceedings of the election, and conclude, "by reason whereof A was elected;" it is a bad return to say "that he was not elected:" the defendant should traverse one of the facts alleged.

Rex v. Mayor, &c. of York, 5 Term Rep. 66.

Where an amotion is returned, the return must set out all the necessary facts precisely, to show that the person is removed in a legal and proper manner, and for a legal cause. It is not sufficient to set out conclusions only; the facts themselves must be set out precisely, that the court may be able to judge of the matter. And so it is as to the cause of amotion; that must be set out in the same manner, that the court may judge of it.

Per Lord Mansfield, 2 *Burr.* 731.

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Therefore, where to a *mandamus* to restore J S to the place of common councilman of L, the defendants returned generally the cause of the amotion by the common council, who were in due manner met and assembled, the court held the return to be bad; for that they were so duly assembled was a conclusion of law; that they should have set out the facts, viz. that they had as a select body the power of amotion: that all the members were summoned by regular and proper notice: and that J S himself was also regularly summoned and heard in his defence.

Per Lord Mansfield, 2 Burr. 731.

So, if the amotion were by a part of a corporation, the return should show how they have such authority, whether by charter or prescription; for as the power of amotion is by the general law in the whole corporation at large, it should appear how the select part is entitled to it.

Rex v. Mayor, &c. of Doncaster, Say. Rep. 37; [*Rex v. Feversham*, 8 Term Rep. 356.]

{It should also appear on the return that the body removing had *proved* the charge for which the person was removed. To state merely that he was present when the charge was made, and did not deny it, is not sufficient.

8 Term, 352, *The King v. The Company of Fishermen of Faversham*.

Also the return is insufficient, if it does not state that the party had been summoned to answer the charge before he was removed.

8 Term, 209, *The King v. Gaskin*.}

But the power of amotion being generally in the whole corporation, it is obvious, that if it is stated, that the party was removed by the corporate body at large, it is unnecessary to aver that the power was vested in them.

Rex v. Lyme Regis, Dougl. 149.

A return in general terms is bad; as, that the party had obstinately refused to obey the rules and orders of the corporation, contrary to the duty of his office, without stating what the rules and orders were.

Rex v. Mayor, &c. of Doncaster, 2 Ld. Raym. 1564.

So, a return of removal for neglect of duty, without stating the particular instances of neglect, has been holden to be bad.

Say. Rep. 37.

On a *mandamus* to restore to the office of a capital burgess, if the return state the ground of disfranchisement to have been, the non-attendance of the prosecutor at a meeting to which he was summoned for the election of a capital burgess, an averment, that the right of such election is in the capital burgesses being the common council, does not assert with sufficient certainty, that he had a right to concur in the election, and ought to have obeyed the summons, because, consistently with such an averment, he might not have that right, it not appearing thereby that all the capital burgesses are members of the common council.

Rex v. Lyme Regis, Dougl. 177.

If a writ be directed to a corporation by a wrong name, they may return this special matter, and rely upon it; but if they answer the exigency of the writ, they cannot take advantage of the misnomer.

2 Salk. 434, 435.

If the supposal of the writ be false in not truly stating the constitution

(K) Of traversing the Return, and taking Issue thereon.

of the corporation, it will not be sufficient for the return to state it truly; the defendants must also deny the supposal of the writ.

2 Salk. 431.]

{The return to a *mandamus*, directed to an inferior court to give judgment on an indictment, will not be quashed merely because it states an *erroneous* judgment given below; but a writ of error must be brought to reverse that judgment.

7 Term, 467, *The King v. The Justices, &c. of Yorkshire.*}

||Where a *mandamus* commanded defendant to take upon himself the office of common councilman in a borough, and the defendant returned, that by a by-law persons refusing to fill the office were subject to a fine, and that defendant had paid the fine, the return was held bad; since it did not show that the fine was in lieu of service, and a peremptory *mandamus* was awarded.

Rex v. Bower, 1 Barn. & C. 585.

To a *mandamus* to a commissary to admit A B into the office of churchwarden, reciting that he had been duly elected, it is a good return that A B was not duly elected.

Rex v. Williams, 8 Barn. & C. 681.||

β To a *mandamus* to restore one to his standing as a member of a corporation, it is not a sufficient return that he was tried and expelled "by a select number of the society," without showing by what authority this select number acted.

Green v. Afr. Meth. Episc. Society, 1 S. & R. 254.g

(K) Of traversing the Return, and taking Issue thereon.

THE party to the return of a *mandamus* could not traverse nor interplead, which is one reason why the utmost certainty was required in such return.

Vent. 111; 2 Salk. 432, pl. 8; 1 Str. 58; 1 Show. 335.

But now by the 9 Ann. c. 20, reciting that divers persons had illegally intruded themselves into and taken upon them to execute the office of mayors, bailiffs, port-reeves, and other offices within cities, towns corporate, boroughs, and places; and the great difficulty of determining, where the office was annual, the right to the same, within the compass of the year, or where it was not annual, the difficulty of determining the right, before the persons had done divers acts prejudicial to the peace and order of such city, &c., and reciting the great difficulty persons illegally turned out, or refused to be admitted, lay under, and the dilatoriness and expense attending the proceedings on writs of *mandamus*; it is therefore enacted, "That as often as, in any of the cases aforesaid, any writ of *mandamus* shall issue out of the King's Bench, the courts of sessions of counties palatine, or out of any the courts of the grand sessions in Wales, and a return shall be made thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of *mandamus* to plead to or traverse all or any the material facts contained within the said return; to which the person or persons making such return shall reply, take issue, or demur; and such further proceedings, and in such manner, shall be had therein, for the determination thereof, as might have been had if the person or persons suing such writ had brought his or their action on the case for a false return; and if any issue shall be joined on such proceedings, the person or persons suing such writ

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shall and may try the same in such place as an issue joined in such action on the case should or might have been tried; and in case a verdict shall be found for the person or persons suing (a) such writ, or judgment given for him or them on demurrer, or by *nil dicit*, or for want of a replication or other pleading, he or they shall recover his and their damages and costs, in such manner as he or they might have done in such action on the case as aforesaid; such costs and damages to be levied by *capias ad satisfaciendum*, *feri facias*, or *elegit*, and a peremptory writ of *mandamus* shall be granted without delay, for him or them for whom judgment shall be given, as might have been, if such return had been adjudged insufficient; and in case judgment shall be given for the person or persons making such return to such writ, he or they shall recover his or their costs of suit, to be levied in manner aforesaid." (b)

Ld. Raym. 481. (a) Where defendants shall recover costs, vide § 5 of this statute. [And as to costs where the writ of *mandamus* is obeyed, see 12 Geo. 3, c. 21; and Tidd's Pract. 985, 8th edit.] (b) By § 7 of this statute, the statutes of amendment and jeofails are extended to proceedings on writs of *mandamus*.—If in a proceeding under the statute no damages are given by the jury, the want of it cannot be supplied by a writ of inquiry; but in such case the party may bring an action for a false return; for the act does not take away the party's right to bring such action, but only provides that in case damages are recovered, by virtue of that act, against the persons making the return, they shall not be liable to be sued in any other action, for making such return. Stra. 1051.—There are many cases to which the statutes do not extend.—In all those cases the proceedings must be according to the course of the common law.

(L) Of the Party's Remedy for a false Return.

It is clearly agreed, that for a false return to a *mandamus* an action on the case lies; as, if upon a *mandamus* to restore T S to his place of Burgess of P, the mayor, &c. return a good cause, the matter of which is false, an action lies for the false return.

11 Co. 99, Bagg's case. [An action will lie for a *suppressio veri* in a return, as well as for an *allegatio falsi*. Dougl. 149.]

Also, it hath been adjudged, that where the return is made by several persons, the action may be either joint against all, or several, being founded on a tort or injury; as, if made by the mayor and aldermen, the action may be brought against the mayor only; and if upon evidence it appears that he voted against the return, but was overruled by the majority, the plaintiff will be nonsuited. (c)

Carth. 171, 172, Sir Peter Rich v. Pilkington, Lord Mayor of London; 6 Mod. 152, S. P. (c) Where several join in an application for a *mandamus*, they must all join in the action for a false return. 1 Ld. Raym. 125.

[The return need not be under the seal of the corporation, nor need the mayor sign it; and if an action be brought against the mayor for a false return, it will be a sufficient evidence against him, that the *mandamus* was delivered to him, and has such a return, unless he can show the contrary.

Rex v. Mayor of Exeter, 1 Ld. Raym. 223; Bull N. P. 209.

In an action for a false return the plaintiff set out, that he was chosen upon the first of October, according to the custom. Upon evidence it appeared, that the custom was to choose upon the 29th of September, and that the plaintiff was then chosen; and this was holden sufficient to support the declaration, for the day in the declaration is but form.

Vaughan v. Lewis, Carth. 228.

(M) Of awarding a peremptory *Mandamus*.

In an action for a false return, it is not material whether the writ issued properly or not.

Green v. Pope, 1 Ld. Raym. 126.]

Also, if the matter concerns public government, and no particular person is so far interested as to maintain an action, the court will grant an information against the particular persons that made the return.(a)

Salk. 374, pl. 16; *Ld. Raym.* 584. (a) The return must be filed and allowed before the information can be moved for. *¶Rex v. Lancaster*, 1 Dow. & Ry. 485.]]

[Clerical mistakes in returns may be amended after they are filed.

Rex v. Lyme Regis, Dougl. 135;] *¶*and see *Willcock on Corporations*, part 2, pl. 272, *et seq.*]]

{But after a verdict on a traverse to the return, the court would not allow the defendants to amend the return by setting forth a different constitution of the corporation.

7 Term, 699, *The King v. Mayor, &c. of Grampond.*}

(M) Of awarding a peremptory *Mandamus*.

If the return be insufficient, or falsified in an (b) action on the case, the court regularly grants a (c) peremptory *mandamus*, either to admit,(d) restore, or discharge, &c. the party, as the case requires.

11 Co. 99; 1 Str. 145, 609. {See a case in which a peremptory *mandamus* was issued without compelling a return to the alternative writ, that having been duly served. 1 Johns. Rep. 64, *The People v. Judges of Ulster county.*} (b) That on falsifying the return, in an action on the case, no motion can be made for a peremptory *mandamus* till four days are past after the return of the *postea*; because the defendant has so long to move an arrest of judgment. 3 *Salk*. 430, 431. (c) Not to be granted in the first instance. *Skin*. 669, pl. 7. (d) But it is said, that if the court does not see cause of restitution, though there be no good return to the writ, yet they will not grant a peremptory *mandamus*. 7 Mod. 83, 84. *¶*And if the court have given their opinion against a return, but are inclined to reconsider the matter, they will, it seems, award a peremptory *mandamus nisi*, which issues of course, unless they make known their opinion to the court before the expiration of the same term. *Rex v. Tappenden*, 3 East, 192.]]

¶But where a return to a *mandamus* to restore a party to a corporate office was defective in form, but on the whole it appeared that there was good ground for the removal, the court refused to award a peremptory *mandamus*; the only effect of which would be to compel the corporation to restore an officer whom they would be bound immediately to remove in a more formal manner.

Rex v. Griffiths, 5 Barn. & A. 731.

The action which falsifies the return is to be brought in that court out of which the *mandamus* issued; and therefore, where in an action on the case in C. B. for a false return to a *mandamus*, judgment was given for the plaintiff on demurrer, yet the Court of B. R. refused to grant a peremptory *mandamus*; because every *mandamus* recites the fact *prout nobis constat per recordum*, which cannot be said in this case, as the court cannot take notice of the records of the Common Pleas.

2 *Salk*. 428, pl. 1; 1 Ld. Raym. 216; *Skin*. 670, pl. 8, S. C.

[The judgment of the Exchequer Chamber, whereby the judgment of B. R. *pro defendente* was reversed, being affirmed in parliament, the plaintiff moved for a peremptory *mandamus*, insisting that he had now falsified the return, and, consequently, set aside the defendant's excuse. But it was objected, that no peremptory *mandamus* ought to go, unless, besides the reversal of the judgment given for the defendant, there had been also a new

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judgment given for the plaintiff; that a peremptory *mandamus* is a judicial writ, and must be founded upon some judgment establishing the right of the party who applies for it. *P. C. Philips v. Bury*, 2 Salk. 431; *Cro. Jac.* 206; *Yelv.* 74; 2 *Ventr.* 295, P. 10 Ann.; *Lidd v. Rod*, Tr. 7 Ann.; *Hicks v. Sherburn*, 1 Br. P. C. 328. But *per Curiam*,—A peremptory *mandamus* ought to go; for this is not a judicial writ founded upon the record, but is a mandatory writ, which the court always grant, when they are satisfied of the party's right. The reversal of our judgment is a declaration by the superior court that the plaintiff had a right; and there is no occasion for any new judgment. We every day grant peremptory *mandamuses* on producing the *postea*, which shows a formal judgment is not necessary. A peremptory *mandamus* was awarded.

Foot v. Prowse, 2 Str. 697.

But a peremptory *mandamus* is not grantable pending a writ of error.

Ruding v. Newel, 2 Str. 983.

It is enacted by stat. 9 Ann. c. 20, § 2, that "where any *mandamus* shall issue to admit or restore any burgesses, &c., and a return shall be made, and a verdict be found for the persons suing such *mandamus*, or judgment be given for them, a peremptory *mandamus* shall be granted without delay, as if such return had been adjudged insufficient."

Since this statute a *mandamus* is in nature of an action, special replications and pleadings therein being admitted, and costs given to either side that prevails, and error lies upon a judgment given therein. Yet it hath been solemnly determined, that no writ of error will lie on a peremptory *mandamus*; for such a construction would entirely defeat the end of the statute, and prevent the officer, who was chosen annually, from having any fruit of the *mandamus*.

Dean, &c. of Dublin v. Dowgatt, 1 P. Wms. 348; 8 Mod. 27, S. C.; 1 Str. 536, S. C.; 2 Br. P. C. 554, S. C.; *Pender v. Herle*, 3 Br. P. C. 178, S. P., upon the authority of the above case of *Dean, &c. of Dublin v. Dowgatt*.]

Where a debtor died in prison, and the jailer refused to deliver the body to his friends for interment until a claim was paid, the court ordered a peremptory *mandamus* to issue.

Wakefield, Bailiff, ex parte, 1 Gale & D. 566.

Peremptory *mandamus* was granted on motion, the return to an alternative *mandamus* being insufficient.

People v. Seymour, 6 Cowen, 579.

On motion for a peremptory *mandamus*, the decision is made solely upon the return of the alternative writ.

People v. Hudson, 7 Wend. 474. See *People v. Delaware*, 2 Wend. 255.g

MARRIAGE AND DIVORCE.

MARRIAGE is a compact between a man and a woman for the procreation and education of children; (a) and seems to have been instituted as necessary to the very being of society; for, without the distinction of families, there can be no encouragement to industry, or any foundation for the care of acquiring riches. All well-ordered societies have therefore guarded the marriage rite with religious solemnities, and ordained that the contract should be indissoluble (b) during the joint lives of the parties. And the reason of this latter provision is, because children gradually succeeding one another, the parents have hardly done with the care of their education before they are themselves unfit for a second marriage. It is also fit that marriages should continue during life, that the mutual care of the parents may be employed in making provision for their children; and that the love and respect of the children may be returned to both parents without distraction or confusion. Besides, the common interest could not be so well provided for, if there were a prospect that the marriage was any otherwise to be determined but by death only; for each person would be injuriously drawing out of the common stock, to the injury of their joint concern, and to the prejudice of the education of their offspring: nor can such a joint interest be well and commodiously carried on without a mutual friendship and endearment, which must be lessened and destroyed by the prospect that the contract may be determined by the humour of either party. Hence it is, that fornication and all other lusts are unlawful, because children are begotten without any care or preparation for their education; and the crime of adultery receives this further aggravation, that it not only entails a spurious race on the husband, for whom he is under no obligation to provide, but likewise destroys that peace and mutual endearment which ought always to subsist in the marriage state.

§ (a) This definition of marriage is exceedingly incorrect; any compact, whether lawful or unlawful, between a man and a woman, for the procreation of children, is, according to this definition, a marriage. The following definition is extracted from *Bouv. L. D. h. v.*—"Marriage is a contract made in due form of law, by which a free man and a free woman reciprocally engage to live with each other during their joint lives, in the union which ought to subsist between husband and wife. By the terms free man and free woman in this definition, it is meant that they are free and not slaves, but also that they are clear of all bars to a lawful marriage." § For some useful information on this head of law, see Poynter on the Law of Marriage and Divorce. And see Sir William Scott's learned and luminous judgments, 1 Hagg. C. Rep. 230; 2 *Ibid.* 62, 417, 300; and Burn's *Eccl. Law*, tit. *Marriage*. (b) This principle, which had been departed from as to marriages of minors, without consent, by the old marriage act, 26 Geo. 2, c. 33, § 11; 1 Addams, R. 473; 3 Phill. R. 256, has been restored by the new act, 4 G. 4, c. 76, § 16; and see 8 Barn. & C. 35.]

[Some ancient nations appear to have been more sensible of the importance of marriage institutions than we are. The Spartans obliged their citizens to marry by penalties, and the Romans encouraged theirs by the *jus trium liberorum*. (c) A man who had no child was entitled by the Roman law only to one half of any legacy that should be left him, that is, at the most, could only receive one half of the testator's fortune. With us, the

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laws hold out no temptation to marriage, and prudence will, in general, recommend celibacy.]

β (c) The *senatus consultum Tertullian*, enabled the mother who had always been free to inherit when she had had three children, and, when the mother had been enfranchised or made a freed woman, she had the same faculty, after she had had four children. *Inst. de Senatusc. Tertull.*; Troplong, de l'influence du Christianisme sur le Droit civil Romains, p. 336.g

We shall consider what is enjoyed or forbidden with respect to marriage under the following heads:—

(A) What Persons may marry, and particularly within the Levitical Degrees.

(B) Of Espousals and Marriage Contracts: And herein of the Difference between Contracts *in presenti* and *futuro*, and the Remedies for the Violation thereof.

(C) Of the Solemnization and Ceremonies requisite to a complete Marriage: And herein of the Offence of performing the Ceremony without due Authority or License.

[(D) Of Foreign Marriages.]

(E) Of Offences against the Rights of Marriage: And herein,

1. *Of the Offence of a forcible Marriage.*

2. *Of the unlawful Abduction of an unmarried Girl under the Age of Sixteen from her Parents and Guardians.*

3. *Of the Offence of procuring an improvident Marriage; and therein of Marriage-Brokerage Contracts and Agreements.*

(F) Marriage how long to continue: And herein of the several Kinds of Divorces; And herein,

1. *Of Elopement.*

2. *Of the Offence of taking away a Wife, and of criminal Conversation.*

3. *Of the several Kinds of Divorces.*

(A) What (a) Persons may marry, and particularly within the Levitical Degrees.

(a) At what age persons may contract and intermarry, vide head of *Infancy and Age*.—Of marriages by idiots and lunatics, vide head of *Idiots and Lunatics*. ¶ And see stat. 15 G. 2, c. 30; 51 G. 3, c. 37; 1 Ves. & B. 140; 1 Hagg. C. Rep. 414; ¶ β *Wrightman v. Wrightman*, 4 Johns. Ch. 343; *Jenkins v. Jenkins* Heirs, 2 Dana, 103; *Johnson v. Kincade*, 2 Iredell, 470.g

¶ It is enacted by 4 G. 4, c. 26, § 16, “That the father, if living, of any party under twenty-one years of age, such parties not being a widower or widow; or if the father shall be dead, the guardian or guardians of the person of the party so under age lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them, shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent.” (b) But by sect. 17, “In case the father or fathers of the parties to be married or of one of them so under age as aforesaid shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them whose consent is made necessary as aforesaid to the marriage of such party or parties shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably or from undue motives refuse or withhold his, her, or their consent to a proper marriage, then it shall and may be lawful for any person desirous of marrying in any of the before-mentioned cases to apply by petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the great

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seal of Great Britain for the time being, master of the Rolls, or Vice-Chancellor of England, who is and are respectively hereby empowered to proceed upon such petition in a summary way; and in case the marriage proposed shall, upon examination, appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the great seal for the time being, master of the Rolls, or Vice-Chancellor, shall judicially declare the same to be so; and such judicial declaration shall be deemed and taken to be as good and as effectual, to all intents and purposes, as if the father, guardian or guardians, or mother of the person so petitioning, had consented to such marriage."

Bastards, it is presumed, are within this clause of the statute. See *Rex v. Hodnett*, 1 T. R. 96; *Priestley v. Hughes*, 11 East, 1. (b) *Per* Lord Tenterden, C. J., in *Rex v. Birmingham*, 8 Barn. & C. 35: "The language of this section is merely to require consent, it does not proceed to make the marriage void if solemnized without consent." Under the former marriage act, 26 G. 2, c. 33, § 11, the marriage was null and void.]]

[The marriages of the royal family being regulated by 12 G. 3, c. 11, are excepted from the restraints of this act. (a) By the 12 G. 3, c. 11, it is enacted, "That no descendant of the body of King George the Second, male or female, (other than the issue of princesses who have married, or may hereafter marry, into foreign families,) shall be capable of contracting matrimony without the previous consent of his majesty, his heirs or successors, signified under the great seal, and declared in council, (which consent, to preserve the memory thereof, is hereby directed to be set out in the license and register of such marriage, and to be entered in the books of the privy council;) and that every marriage or matrimonial contract of any such descendant, without such consent first had and obtained, shall be null and void, to all intents and purposes whatsoever."

(a) See § 30.

§ 2. "Provided, that in case any such descendant, being above the age of twenty-five years, shall persist in his or her resolution to contract a marriage disapproved of or dissented from by the king, his heirs or successors, that then such descendant, giving notice to the king's privy council, which notice is hereby directed to be entered in the books thereof, may, at any time from the expiration of twelve calendar months after such notice given to the privy council as aforesaid, contract such marriage; and his or her marriage with the person before proposed, and rejected, may be duly solemnized without the previous consent of his majesty, his heirs or successors; and such marriage shall be good, as if this act had never been made, unless both houses of Parliament shall, before the expiration of the said twelve months, expressly declare their disapprobation of such intended marriage."]

By the statute of (a) 32 H. 8, c. 38, it is enacted, "That no reservation or prohibition (God's law except) shall trouble or impeach any marriage without the (b) Levitical degrees; and that no person, of what estate, degree, or condition soever he be, shall be admitted to any of the spiritual courts within the king's realm, or any of his grace's other lands and dominions, to any process, plea, or allegation contrary to the statute."

(a) For the general exposition of this statute, vide Co. Lit. 24, 235; 2 Inst. 683; 4 Hob. 181; || 1 Black. Com. 435. (b) But the statute does not restrain the ecclesiastical courts from divorces upon other accounts; as, upon the account of insufficiency, adultery, pre-contract, &c. Vaugh. 206, &c.

Since this statute it hath been clearly agreed, that if the spiritual courts proceed to impeach or dissolve a marriage out of the Levitical degrees, that then the temporal courts are to prohibit them, for by that statute, all mar-

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riages that are out of those degrees are declared to be good and lawful; and therefore, if the spiritual court molest persons in doing that which is declared lawful to be done by the statutes of the realm, they are by the temporal courts to be prohibited, because they exceed their jurisdiction, thus bounded by the temporal law; but where the law has not bounded them, their jurisdiction still continues; and therefore within the Levitical degrees they are still judges of incest.

Vaugh. 206, &c.

We must likewise observe, that if a person marries his cousin within the Levitical degrees, yet they continue husband and wife till a sentence of divorce be pronounced.

Roll. Abr. 340, 357; Vaugh. 208, 220.

The degrees prohibited by the Levitical law are such as are said to be against the law of nature, and such as are against the divine positive law.

Those against the law of nature are all marriages between the ascending and descending line *in infinitum*; and this is said to be contrary to the law of nature, because it tends to the destruction of the natural will of the Creator, which designed the preservation and continuance of such inhabitants of the world as he originally created; and all acts of men that tend to the destruction of such *species*, as murder of an innocent person, are said to be against the law of nature; and therefore incest between the ascending and descending line is contrary to the law of nature; for the mother would never have preserved and educated the female issue, if it had been admitted to the father to have had access to them: and fathers would never have educated and preserved their male issue, if they might have ascended the bed of their mothers. There is also another reason why this is called unnatural, and that is, because it destroys the natural duties between parents and children; for the parent could never preserve or maintain that authority that is necessary for the education and government of his child, nor the child that reverence that is due to the parent in order to be educated and governed, if such indecent familiarities were admitted. There likewise seems to be a natural reason against this or any near intercourse between collaterals, which is drawn from that which is observed in brute creatures; viz. that it is necessary to cross the strain, in order to continue the *species*. It may be, that there being the same tone and figure in the blood, and a similar conformation of vessels, the circulation of it becomes torpid and inactive: whereas a new mixture of others of the same kind, where there is a different figure and motion of the blood and spirits, may add a new vigour and ability to the animal economy.

Grot. de Jure, lib. 2, c. 5; Vaugh. 221, 242, &c. *β* See Troplong, De l'influence du Christianisme sur le Droit civil des Romains, ch. 5, p. 191.*g*

Those prohibited by the positive divine law are all collaterals to the third degree; and though this be not contrary to the law of nature, yet it seems established on very strong reasons; for if a concourse between brothers and sisters might be allowed, or their marriages be tolerated, the necessity there is that they should be educated together, and the frequent opportunities they have with each other, would fill every family with lewdness, and create heart-burnings and unextinguishable jealousies between brothers and sisters, where the family was numerous; and it would confine every family to itself, and hinder the propagating common love and charity among mankind, because there would be a danger of taking a wife out of any family, if women

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were liable to be corrupted by such vicious freedoms. This prohibition is likewise carried to uncles and aunts, nephews and nieces; because, upon the death of the father and mother, they come into the education of children *loco parentum*; and, by consequence, it was necessary to propagate the same reverence of blood in such near degrees, that the uncle might have the same regard and command as a father, and a niece the same duty as a daughter: it was also necessary, in order to perfect the union of marriage, that the husband should take the wife's relations in the same degree to be the same as his own without distinction, and so *vice versâ*; for if they are to be the same person as was intended by the law of God, they can have no difference in relations; and, by consequence, the prohibition touching (a) affinity must be carried as far as the prohibition touching consanguinity.

Vaugh. 222. [Mr. Hume observes, that "the natural reason why marriage in certain degrees is prohibited by the civil law, and condemned by the moral sentiments of all nations, is derived from men's care to preserve purity of manners: while they reflect, that if a commerce of love were authorized between the nearest relations, the frequent opportunities of intimate conversation, especially during early youth, would introduce an universal dissoluteness and corruption. But as the customs of countries vary considerably, and open an intercourse, more or less restrained, between different families, or between the several members of the same family, so we find that the moral precept, varying with its cause, is susceptible, without any inconvenience, of very different latitude in the several ages and nations of the world. The extreme delicacy of the Greeks permitted no converse between persons of the two sexes, except where they lived under the same roof; and even the apartments of a step-mother, and her daughters, were almost as much shut up against visits from the husband's sons, as against those from any strangers or more remote relations. Hence, in that nation, it was lawful for a man to marry, not only his niece, but his half-sister; a liberty unknown to the Romans, and other nations, where a more open intercourse was authorized between the sexes." Hist. vol. iv. 110.] (a) According to the text, xviii. Levit. ver. 16, "*The nakedness of thy brother's wife shall thou not uncover, it is thy brother's nakedness.*" ¶ And see Blackmore v. Brider, 2 Phill. R. 359. Elliott v. Gurr, ed. 18.]]

The law in Leviticus, cap. xviii. ver. 6, is, *That none of you shall approach to any that is near of kin, to uncover their nakedness*; which words, being general, must be understood and expounded by the examples from the 6th to the 20th verse; among which we find many prohibitions to collaterals in the third degree, both in affinity and consanguinity; but there is no example of collaterals in the fourth degree, either in affinity or consanguinity, and therefore the law of marriage opens to relations in the fourth degree; and the Jewish lawyers, in computing their degrees, computed them according to the natural order of things; that is from the *propositus* up to the common stock, and so down to the other relations; which is the fair and natural order of computing proximity; and in this order of computation, cousin-germans are held to be of the fourth degree, and to have liberty to marry.

Selden, Ux. Hebraica, lib. i. c. 4. β See Montesq. Esp. des Loix, liv. 26, c. 14; Troplong, De l'influence du Christianisme sur le Droit civil des Romains, c. 5, p. 191.γ

This likewise was the ancient sense of the Christian church, and even of the church of Rome in the time of Pope Gregory; for in writing to Austin, bishop of Canterbury, he says, *In quartâ generatione contracta matrimonia minime solverentur*; but afterwards, when they found that dispensations for incestuous marriages brought great profit to the church of Rome, and knowing it had obtained universally in the Christian church, that it was lawful to marry in the fourth degree, Pope Alexander II. began a new computation of degrees; and he said, that the secular computation, which was the computation of the civil law, was not properly adapted to the decisions touching

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incestuous marriages, but they ought to compute up to the common stock, where the relation joined, because there the blood was connected; and therefore they computed the degrees according to the distance of the person remotest from the common stock; for according as the remotest was distant from the common stock, so they computed the relation between the parties; so that the first cousins, that are in the fourth degree by the received computation in the Mosaic and civil law, were now by the canonical computation thrown into the second degree; and by this alteration of the computation of degrees, they forbade not only first cousins but second and third cousins to marry, unless they obtained dispensations.

Vaugh. 210. β As to the mode of computing the degrees of consanguinity by the common, the civil, and the canon law, see Bouv. L. D., *Consanguinity, Degree, and Line.*

The intention of the statute above mentioned was to restore every thing according to the prohibition expressed in the law of God; and plainly, the Levitical computation of degrees was in the manner they computed in the civil law; and agreeably hereunto hath been the resolution in our law.

Hence it hath been adjudged, that the marriage of two sisters, one after the other, was incestuous, being in the second degree; although it was objected, that the verse in xviii. Levit. being, *Thou shalt not take a wife to her sister to vex her, &c.*, the prohibition relating to polygamy, to jealousy and vexing, the reason thereof ceased with the death of the first wife; in the same manner as if Moses had said, *Thou shalt not take a wife to her sister to vex her, besides the other in her lifetime.* But herein the court held, that though the vexing, in one part of the text, related to the life of the wife, yet by another part it is made unlawful for ever; and that from these words, *None of you shall approach to any that is near of kin to him, to uncover their nakedness*; which makes the nearness of kin the chief cause of the prohibition, and is the reason that runs through the whole chapter; and that therefore the vexing refers only to the life of the wife, but the incestuous copulation is the same after her death, the nearness of kin still continuing.

Vaugh. 302, Hill v. Good; Carth. 271, S. P. admitted.

So, it hath been resolved, that marrying the sister's daughter is incestuous, being in the third degree.

Raym. 464, Watkinson v. Mergatron, 2 Jon. 191, S. C. ||And see Burgess v. Burgess, 1 Hagg. C. Rep. 384.||

So, it hath been resolved in variety of books and cases, that the marriage with the wife's sister's daughter was incestuous, being likewise in the third degree; and the degree of affinity being the same with that of consanguinity.

Moor. 907; Cro. Eliz. 228; 4 Leon. 16, S. C.; Man's case, 2 Lev. 254; 3 Keb. 660; Hob. 181; Noy, 29; Sid. 434; 2 Jon. 118; 2 Show. 70; 5 Mod. 448; 3 Lev. 364; 2 Lutw. 1075. ||This was determined otherwise in Richard Parson's case, Tr. 2 Jac. in Com. Pleas, Co. Lit. 235 a; but a consultation was granted two years afterwards, and the case is said to have been expunged from the first institute by order of the king in council. Burn's Eccl. Law, iii. 402, 3d edit. And see Co. Lit. 235 a, note (1).||

But upon a prohibition, for proceeding against a person in the ecclesiastical court who had married the widow and relict of his great uncle, it was adjudged, that such marriage, being in the fourth degree, was out of the Levitical law, and therefore lawful. ||And accordingly, after the opinion of all the judges taken by the king's special command, a prohibition was granted.||

Vaugh. 206; 2 Vent. 9, Harrison & ux. v. Dr. Burwell; ||Gibs. 413; Co. Lit. 235 a, note (1).||

(B) Of Espousals and Marriage Contracts, &c.

On a motion for a prohibition to the court of the Bishop of Oxon, for presenting J S for incest, who had married the daughter of his brother of the half blood, it was resolved that no prohibition should go; for the court said, though the brothers were not of the whole blood, yet were they brothers, and therefore the marriage incestuous: they agreed, that if the father marries the mother, and the son the daughter, this was lawful enough; and North cited the case of the Earl of Manchester, who had married his great aunt's husband's second wife; and this was held by divines and civilians a good marriage, for *affinis mei affinis non est mihi affinis*.

M. 30 Car. 2, in C. B. Oxenham & ux. v. Gayre.

On a motion for a prohibition, for proceeding against a person in the ecclesiastical court, who had married his sister's bastard daughter; it was urged for the prohibition, that though the Levitical law forbids a man to approach to any near of kin to uncover their nakedness, yet that this cannot be intended of a bastard, because he is of kin to no person whatsoever, (a) &c., but the court inclined not to grant a prohibition.

5 Mod. 161, Hains v. Jescott; Comb. 356, S. C. [Com. Rep. 2, S. C.; 1 Ld. Raym. 68, S. C. (a) This objection of being *nullius filius*, and therefore having no consanguinity, must be understood only as to civil purposes, and is to be confined chiefly to inheritances, 1 Term Rep. 101, for there is a relation as to moral purposes; and hence a bastard cannot marry his own mother or bastard sister. 3 Salk. 66.]

(B) Of Espousals and Marriage Contracts: And herein of the Difference between Contracts *in presenti* and *futuro*, and the Remedies for the Violation thereof.

SWINBURNE defines espousals in this manner, *sponsalia sunt mutua re promissio nuptiarum ritè inter eos, quibus jure licet, facta*; which comprehends, 1st, That this promise must be mutual; 2d, That it must be done *ritè*, or duly; 3d, That it must be entered into by them who may lawfully marry.

Swinb. of Espousals, § 11. β See Wood's Inst. 57; Dig. 23, 1, 1; Code, 5, 1, 14; Nov. 115, ch. 3, 1, 1; Ayl. Parerg. 245.g

Such contracts are divided into contracts *in presenti* and contracts *in futuro*.

A contract *in presenti*, or *per verba in presenti*,—as, *I marry you, you and I are man and wife*, &c.—is by the civil law esteemed *ipsum matrimonium*, and amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement, it being as much a marriage in the sight of God as if it had been *in facie ecclesie*, with this difference, that if they cohabit before marriage *in facie ecclesie*, they are for that punishable by ecclesiastical censures, (b) and if after such contract either of them lies with another, such offender shall be punished as an adulterer.

Swinb. 74; 2 Salk. 438, pl. 3; 6 Mod. 155. β Jewell's Lessee v. Jewell, 1 How. S. C. R. 219.g (b) Also a marriage in fact or reputation is held good in the temporal courts, but when the validity of the marriage shall be tried in the spiritual courts, and not by verdict, vide tit. *Bastardy*. In debt on a bond, the defendant pleaded *ne unques accouple* in loyal matrimony; plaintiff demurred, and had judgment; for it alters the trial; for instead of trying *per pais*, it puts the trial on a certificate from the ordinary. Secondly, It admits a marriage, but denies the legality of it: whereas a marriage *de facto* is sufficient, and whether loyal or not loyal, is no ways material. 2 Salk. 437, pl. 2. So, in an assault and battery by baron and feme, the defendant pleaded *ne unques accouple* in loyal matrimony; and on demurrer the plea was held naught. Comb. 473. So, in trespass for taking his wife, and the like plea, which was held naught. Comb. 131. [In general, common reputation, and cohabitation as man and wife, or the acknowledgment of the parties, may be admitted as evidence of marriage in the temporal courts. Comb. 202; Cowp. 232; 2 Bl. Rep. 877; Espin. N. P. Ca. 213. A jury

(B) Of Espousals and Marriage Contracts, &c.

also are the proper judges of the fact of a marriage denied by an answer in Chancery, and always lean to support the proof of it in favour of a just creditor, suing for a debt contracted during cohabitation. 2 Ves. 270. And it is for the most part incumbent on those who would impeach a reputed marriage, to show wherein its irregularity consists. Burr. Set. Ca. 232; 1 Salk. 119.]

A contract *in futuro*, as, *I will marry you, &c.*, may be enforced in the spiritual court,^(a) but such contract either party may release: also, if either party marry another person, such second marriage dissolves the contract.

Swinb. § 10, 11. ¶(a) This remedy, both in the case of contracts *per verba de presenti*, and contracts *per verba de futuro*, is taken away by 4 G. 4, c. 76, § 27, as it was by the former marriage act.¶

But it hath been resolved, that an action will lie at common law for the violation of such an executory contract *per verba de futuro*, for the temporal loss to the party; and though the party hath a remedy in the spiritual court. But it seems, that by bringing an action at common law, and that appearing on record, the remedy in the spiritual court is actually released; for now in lieu of a performance of the contract he shall recover damages: also, the defendant showing that he hath been sued for the same matter in the spiritual court, and producing a sentence against the plaintiff, the plaintiff, notwithstanding any proof of his, will be nonsuit; because the spiritual court were the proper judges, whether it were a precontract or not.

Leon. 147; Roll. Abr. 22; Cro. Eliz. 79; Styl. 295; Carter, 233; Dickinson v. Holecroft, Salk. 24, pl. 6; 5 Mod. 411; 6 Mod. 172; Salk. 120, pl. 1, 121; 2 Stra. 938.

Such promises are good, though the time of marriage be not agreed on; but in such case it is necessary, to entitle the party to his action, to allege that he offered to marry her, and that she refused.

Carth. 467.

In an action against husband and wife, the plaintiff declared, that he promised to marry the defendant's wife, while sole, and that she the same time promised to take him for her husband; and averred, that he tendered himself, and that she refused, &c. It was objected, that marriage was no advancement to a man, though it was to a woman; also, that no time was laid when this agreement was to have been executed: but the court overruled both objections.

Carth. 467; Salk. 24, pl. 6, S. C.; Harrison v. Cage et ux., 5 Mod. 411; 2 Salk. 437, pl. 2, S. P. and the distinction as to whether a man or a woman exploded.

This action must be founded on reciprocal promises; and, therefore, if the promise be on one side only it does not bind, being only *nudum pactum*.

Salk. 24, pl. 6.

But if a man of full age and a female of fifteen promise to intermarry, and afterwards the man marries another, an action lies against him; for though such promise may be said to be voidable as to the infant, yet it shall be binding on the person of full age, who shall be presumed to have acted with sufficient caution: otherwise this privilege allowed infants, of rescinding and breaking through their contracts, which was intended as an advantage to them, might turn greatly to their prejudice.

Trin. 5 & 6 Geo. 2, Holt v. Ward; 2 Stra. 850, 937; Barnard. K. B. 209; Fitzgib. 175; 3 Atk. 306.

If A contracts himself to B, and after marries C, and B sues A upon this contract in the spiritual court,^(b) and there sentence is given that A shall marry and cohabit with B, which he does accordingly; they are baron and

(C) Of the Solemnization, &c. requisite to a Marriage.

feme,(c) without any divorce between A and C, for the marriage of A and C was a mere nullity.(d)

Moor, 169; 4 Co. 29, S. C.; Sid. 13, S. C. cited and denied by Twisden; and vide Salk. 120, pl. 1, 121. ¶(b) The spiritual court has no jurisdiction since 4 G. 4, c. 76. § 27.¶ (c) But if a woman maketh a contract of matrimony with J S, and then marieth with J D, who is seised of lands, and dieth, she shall have dower of his lands; because such marriage was not void, but voidable only by reason of the precontract. Moor, 226, Perk. 34. (d) But now vide 26 Geo. 2, c. 33.

It hath been held, that the clause in the statute of frauds and perjuries, 29 Car. 2, c. 3, § 4, relating to marriage agreements, extends as well to a promise to marry, as to the payment of marriage portions.

2 Lev. 65, but Skin. 196, pl. 10, seems *cont.*; and Stra. 34; Ld. Raym. 387; 2 Eq. Ca. Abr. 248, are expressly so. A promise to marry another, if broken, where the promises are mutual, and the parties might legally contract, subjects the person breaking such promise to an action for damages, notwithstanding the statute; for such actions are every day maintained.

(C) Of the Solemnization and Ceremonies requisite to a complete Marriage: And herein of the Offence of performing the Ceremony without due Authority or License.

In order to make the marriage complete, so as to entitle the wife to dower, the issue to inherit, &c., the same must be celebrated *in (a) facie ecclesiæ*; and therefore the private contract, without the priest's blessing, makes no marriage, though such contract may be enforced in the spiritual court.

Roll. Abr. 357; Moor, 169. As to the loyalty of marriage, and of the different kinds of trial, vide tit. *Bastard*. (a) Before the time of Pope Innocent the Third there was no solemnization of marriage in the church; but the man came to the house where the woman inhabited, and led her home to his own house, which was all the ceremony then used. Moor, 170. Per Goldingham, doctor of the civil law, *arguendo*. [Marriages in England during the usurpation were solemnized before justices of the peace, but for what purpose this novelty was introduced, except to degrade the clergy, does not appear.] β General reputation, cohabitation, and acknowledgment, are sufficient evidences of marriage in all cases, except in actions for criminal conversation and prosecutions for Bigamy. Sellman v. Bowen, 8 Gill. & Johns. 50. See BIGAMY, vol. 2, p. 110; and also Rose v. Clark, 8 Paige, 574; Armstrong v. Hughes, 2 B. Monroe, 70; Felts v. Foster, Tayl. 121; Jenkins v. Bisbee, 1 Edw. 377; Purcell v. Purcell, 4 Hen. & Murf. 511; Forrshill v. Murray, 1 Bland, 481, 482.g

Also, though the marriage be solemnized *in facie ecclesiæ*, yet if it were without consent, it is void; and therefore if a man takes E S to wife by *duress*, the same is void, though solemnized *in facie ecclesiæ*.

Roll. Abr. 340; Co. Lit. 33; 6 Co. 22; Keilw. 52; Dyer, 13; Cro. Car. 488, 493; Sid. 65. [It is only mentioned as a doubt in Roll's Abridgment, whether marriages by duress are not merely void: surely they are not so before sentence. They are marriages *de facto*. Cro. Car. 493. And Mr. Noy held them good, Dy. 13, in marg.]

A and B, being sabbatarians, were married by one in their own way, who used the form of the Common Prayer, except the ring, but was a mere layman; the wife dying, the husband took out administration to her; but upon application of her sister the letters of administration were repealed, and the sentence of appeal affirmed by the delegates; for the husband, demanding a right due to him as husband, must bring himself within the rules prescribed by that jurisdiction to whom he applies: also, the constant form of pleading marriage is, that it was *per presbyterum sacris ordinibus constitutum*; and an act of parliament was made confirming the marriages contracted during the usurpation.

Salk. 119, pl. 14, Heydon v. Gould; and vide 2 Salk. 438, pl. 3; 3 Lev. 376; 2 Show. 300, pl. 303.

(C) Of the Solemnization, &c., requisite to a Marriage.

A marriage solemnized by a person in priest's orders is good and binding, though there was no publication of banns or license to dispense therewith: but herein it seems agreed, that not only the party performing the ceremony, but also the parties married, being lay persons, are punishable by ecclesiastical censures, and for acting contrary to such ancient canons as have been received and allowed in this kingdom; but it seems agreed, that the canons of 21 Jac. 1 bind not the laity, not having been universally received, and being made only in convocation, where the laity are not represented.

5 Co. 32; Co. Lit. 344; Jon. 259; 2 Salk. 673; 6 Mod. 189; 2 Stra. 1056; 2 Atk. 650. β As to who is to be considered a minister, see *Kibbe v. Antram*, 4 Conn. 134. A clergyman, in the celebration of marriage, is a public officer; and his acts in that capacity are admissible as *prima facie* evidence of his character. *Goshen v. Stonington*, 4 Conn. 209. See *State v. Hodgskins*, 1 Apple. 155. γ

¶ By 4 Geo. 4, c. 76, § 7. No minister shall be obliged to publish the banns of matrimony between any persons whatsoever, unless they shall, seven days at the least before the time required for the first publication, deliver or cause to be delivered to him a notice in writing of their true Christian (a) and surnames, (b) and of the houses of their respective abodes within such parish, chapelry, or extra-parochial place, where the banns are to be published, and of the time during which they have inhabited or lodged in such houses respectively.

The use of matrimonial banns is said to have been first introduced in the Gallican church, though something like it obtained even in the primitive times, and it is this Tertullian is supposed to mean by *trinundina promulgatio*. ¶ (a) The suppression of one of two Christian names in the publication of banns, for the purpose of imposition, has been held to nullify the marriage. *Pouget v. Tomkins*, 1 Phill. (Cons.) 419; and see *Fellowes v. Stewart*, 2 Phill. (Ar.) 257; *Meddowcroft v. Gregory*, 2 Phill. (Cons.) 365; *Stanhope v. Baldwin*, 1 Add. (Cons.) 193; *sed vide* *Diddear v. Faucit*, 3 Phill. (Ar.) 580. (b) Publication of banns in case of an illegitimate child in the name of her mother, as well as that of her father, held valid. *Sullivan v. Sullivan*, 3 Phill. (Ar.) 45; 2 Hagg. 238, and publication in the man's reputed name has been held sufficient. *Rex v. Billingham*, 3 Maul. & S. 250, *ibid.* 537. ¶ β Publication of banns in false names, knowingly and artfully, nullity of marriage pronounced for. *Brealey v. Reid*, 2 Curt. 833; *Wright v. Elwood*, 1 Curt. 662; *Dormer v. Williams*, 1 Curt. 870. γ

§ 2. All banns of matrimony shall be published in the parish church, or in some public chapel, wherein banns of matrimony have been usually published, of the parish or chapelry wherein the persons to be married shall dwell.

And where the persons to be married shall dwell in divers parishes or chapelries, the banns shall be published in the church or chapel belonging to such parish or chapelry wherein each of the said persons shall dwell.

§ 12. And where both or either of the persons to be married shall dwell in any extra-parochial place, (having no church or chapel wherein banns have been usually published,) then the banns shall be published in the parish church or chapel belonging to some parish or chapelry adjoining to such extra-parochial place.

All parishes, where there shall be no parish church or chapel thereto, or none wherein divine service shall be usually celebrated every Sunday, may be deemed extra-parochial places for the purposes of this act, but for no other purpose.

§ 26. Provided, that after the solemnization of any marriage under a publication of banns, it shall not be necessary, in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published, nor

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shall any evidence in such case be received to prove the contrary in any suit touching the validity of such marriage.

By 4 Geo. 4, c. 76, § 13, amended by 5 Geo. 4, c. 92, if the church or chapel in which banns have been usually proclaimed and marriages solemnized be under repair or rebuilding, then it shall be lawful for banns to be proclaimed and marriages solemnized in any place within the limits of such parish or chapelry which shall be licensed by the bishop of the diocese for the performance of divine service during such repair; or if no such place shall be so licensed, then in the church or chapel of any adjoining parish or chapelry wherein marriages have been usually solemnized; and all banns of marriage proclaimed and marriages solemnized in any place so licensed within the limits of any parish or chapelry shall, during the repair or rebuilding of the church or chapel of such parish or chapelry, be considered as proclaimed and solemnized in the church or chapel of such parish or chapelry, and shall be so registered accordingly.

See *Stallwood v. Tredger*, 2 Phill. (Ar.) 287.

By 4 G. 4, c. 67, § 2. And the banns shall be published upon three Sundays preceding the solemnization of marriage, during the time of morning service, or of the evening service, if there be no morning service, in such church or chapel, on any of those Sundays, immediately after the second lesson. And by § 6, of the same act, a book shall be provided for the registration of such banns.

Whilst the marriage is contracting, the minister shall inquire of the people by three public banns concerning the freedom of the parties from all lawful impediments. And if any minister do otherwise, he shall be suspended for three years.

Lindw. 271. See 4 G. 4, c. 76, § 21.

By 4 G. 4, c. 76, § 8. And in case the parents or guardians, or one of them, of either of the parties, who shall be under the age of twenty-one years, shall openly and publicly declare, or cause to be declared, in the church or chapel where the banns shall be so published, at the time of such publication, his dissent to such marriage, such publication shall be void.

§ 9. And wherever a marriage shall not be had within three months after the complete publication of banns, no minister shall proceed to the solemnization of the same until the banns shall have been republished on three several Sundays, in the form and manner prescribed in the act, unless by license duly obtained according to the provisions of the act.||

And where the parties dwell in divers parishes, the curate of the one parish shall not solemnize matrimony betwixt them without a certificate of the banns being thrice asked from the curate of the other parish.

Rubr.

||And by the 4 Geo. 4, c. 76, § 12. Where the banns shall be published in any church or chapel belonging to any parish adjoining to any extra-parochial place as aforesaid, the minister publishing such banns shall in writing, under his hand, certify the publication thereof, in such manner as if either of the parties to be married dwelt in such adjoining parish.

And by § 3, of the same statute, the bishop of the diocese, with the consent of the patron and the incumbent of the church of the parish in which any public chapel having a chapelry thereunto annexed may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorize, by writing

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under his hand and seal, the publication of banns and the solemnization of marriages in such chapel for persons residing within such chapelry or extra-parochial place respectively; and such consent, together with such written authority, shall be registered in the registry of the diocese.

And notice of the right to publish banns and solemnize marriages must, by § 4, be placed in some conspicuous part of the same chapel.

And by § 5 it is further provided, that all the provisions then or thereafter in force, relative to marriage registers, shall be extended to chapels authorized as aforesaid.||

As to licenses, some have questioned the bishop's power to grant licenses for marrying without banns first published; because this is dispensing with an act of Parliament: for the marriage office, which requires banns, is part of the statute law. But this power of dispensing is granted to the bishop by statute law, too, viz. by the 25 H. 8, c. 21, by which all bishops are allowed to dispense, as they were wont to do; and such dispensations have been granted by bishops ever since Archbishop Mepham's time at least.

Johns. 194.

By Can. 101 no faculty or license shall be granted for solemnization of matrimony, without publication of banns, by any person exercising any ecclesiastical jurisdiction, or claiming any privileges in the right of their churches; but only by such as have episcopal authority, or the commissary for faculties, vicars-general of the archbishops and bishops, *sede plenâ*; or, *sede vacante*, the guardian of the spiritualties, or ordinaries exercising of right episcopal jurisdiction in the several jurisdictions respectively.

||And by the 4 Geo. 4, c. 76, § 18. No surrogate deputed by any ecclesiastical judge, who hath power to grant licenses of marriage, shall grant any such license before he hath taken an oath before the said judge, faithfully to execute his office according to law to the best of his knowledge; and hath given security by his bond in the sum of 100*l.* to the bishop of the diocese, for the due and faithful execution of the said office.||

And no license shall be granted but to such persons only as be of good quality.

Can. 101.

And no license shall be granted but upon good caution and security taken.

Can. 101.

Which security shall contain these conditions: 1st, That at the time of granting such license there is not any impediment of precontract, consanguinity, affinity, or other lawful cause to hinder the said marriage. 2d, That there is not any controversy or suit depending in any court before any ecclesiastical judge touching any contract or marriage of either of the said parties with any other. 3d, That they have obtained thereto the express consent of their parents (if they be living); or otherwise, of their guardians or governors. Lastly, That they shall celebrate the said matrimony publicly in the parish church or chapel where one of them dwelleth, and in no other place, and that between the hours of eight and twelve in the forenoon.

Can. 102.

And for the avoiding of all fraud and collusion in the obtaining of such licenses and dispensations; before such license shall be granted, it shall appear to the judge by the oaths of two sufficient witnesses, (one of them to be known either to the judge himself or to some other person of good

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reputation then present, and known likewise to the said judge,) that the express consent of the parents or parent (if one of them be dead), or guardians or guardian of the parties, is thereunto had and obtained; and furthermore, that one of the parties shall personally swear that he believeth that there is no let or impediment of precontract, kindred, or alliance, or of any other lawful cause whatsoever, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony, according to the tenor of the aforesaid license.

Can. 103.

But if both parties who are to marry, being in widowhood, do seek a faculty for the forbearing of banns, then the clauses before mentioned requiring the parents' consents may be omitted; but the parishes where they dwell shall both be expressed in the license, as also the parish named where the marriage shall be celebrated. And if any commissary for faculties, vicars-general, or other the said ordinaries, shall offend in the premises, or any part thereof, he shall, for every time so offending, be suspended from the execution of his office for the space of six months; and every such license or dispensation shall be held void to all effects and purposes, as if there had never been any such granted; and the parties marrying by virtue thereof shall be subject to the punishments which are appointed for clandestine marriages.

Can. 104.

This clause, saith Dr. Burn, declaring the license void to all effects and purposes, as if there had never been any such granted, seemeth to render it a matter of great importance that the aforesaid pre-requisites be strictly observed; for although before the statute of 26 G. 2, only the license in such case was void, and the parties marrying by virtue thereof were liable to be punished, as for a clandestine marriage, yet now by that statute the marriage also will be void, (a) and the other consequences of clandestine marriages will ensue.

2 Burn's E. L. 427. ¶ The penal clauses of 26 G. 2, c. 33, are embodied in the 4 G. 4, c. 76. See the next and following sections; (a) but not by the new act, 4 Geo. 4, c. 76.¶

By the 5 W. c. 21, § 3, for every skin or piece of vellum or parchment, or sheet or piece of paper, upon which any license for marriage shall be engrossed or written, shall be paid a stamp duty of 5s. (b)

¶ (b) Increased by 55 G. 4, c. 184, to 10s.; and in the case of special licenses to 5L.¶

¶ By the 4 Geo. 4, c. 76, § 10. No license of marriage shall be granted by any archbishop, bishop, or other ordinary, or person having authority to grant such licenses, to solemnize any marriage in any other church or chapel than in the parish church, or in some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such license.

§ 11. And if a *caveat* be entered against the grant of any license for a marriage, no license shall issue until the matter of the *caveat* has been examined by the judge out of whose office the *caveat* is to issue, and he is satisfied he ought not to obstruct the grant of the license.

And in pursuance of Can. 102, it is enacted by 4 Geo. 4, c. 76, § 14, "for avoiding all fraud and collusion in obtaining of licenses for marriage, that before any such license be granted, one of the parties shall personally

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swear before the surrogate, or other person having authority to grant the same, that he or she believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court to bar or hinder the proceeding of the said matrimony, according to the tenor of the said license; and that one of the said parties hath, for the space of fifteen days immediately preceding such license, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized; and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required under the provisions of this act has been obtained thereto: Provided always, that if there shall be no such person or persons having authority to give such consent, then upon oath made to that effect by the party requiring such license, it shall be lawful to grant such license, notwithstanding the want of any such consent."

Proviso, "That it shall not be required of any person applying for any such license to give any caution or security, by bond or otherwise, before such license is granted; any thing in any act or canon to the contrary thereof notwithstanding."

By § 19 of this act, whenever a marriage shall not be had within three months after the grant of a license by any archbishop, bishop, or any ordinary or person having authority to grant such license, no minister shall proceed to the solemnization of such marriage until a new license shall have been obtained, unless by banns duly published according to the provisions of the act.

And it is provided, by § 26 of the same statute, (a) that where the marriage is by license, it shall not be necessary, in support of such marriage, to give any proof that the usual place of abode of one of the parties, for the space of fifteen days as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in such case be received to prove the contrary in any suit touching the validity of such marriage. That is to say, adds Dr. Burn, speaking of the old act, this shall not avail so as to render the marriage null and void; but nevertheless the surrogate, who granteth such license contrary to the tenor of this act, seemeth to incur the violation of his oath and forfeiture of his bond given to the spiritual judge, and is liable to be otherwise punished for his contempt of the law.

[(a) Re-enacting § 10, of 26 G. 2, c. 33, except as to the length of residence.]
2 Burn's Eccl. Law, 428.

Also this act, 4 G. 4, c. 76, § 20, shall not extend to deprive the Archbishop of Canterbury, and his proper officers, of the right which had hitherto been used in virtue of the statute of the 25 H. 8, c. 21, of granting special licenses to marry at any convenient time or place.

By which statute of 25 H. 8, power is given to the Archbishop of Canterbury to grant faculties, dispensations, and licenses, as the pope had done before. And by the same statute it is enacted, that all children procreated after solemnization of any marriages, to be had by virtue of a license of dispensation from the Archbishop of Canterbury, shall be admitted, reputed, and taken legitimate in all courts and other places, and inherit the inheritance of their parents and ancestors.

[[By § 29, of the 4 Geo. 4, c. 76. "If any person shall, after the passing of the act, with intent to elude it, knowingly and wilfully insert, or cause to be inserted, in the register-book of such parish or chapelry as aforesaid any

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false entry of any matter or thing relating to any marriage, or falsely make, forge, alter, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or act or assist in falsely making, altering, forging, or counterfeiting any such entry in such register; or falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited as aforesaid, or assist in falsely making, altering, forging, or counterfeiting any such license of marriage as aforesaid; or utter or publish as true any such false, altered, forged, or counterfeited register as aforesaid, or a copy thereof, or any such false, altered, forged, or counterfeited license of marriage, knowing such register or license of marriage respectively to be false, altered, forged, or counterfeited; or if any person shall, from and after the passing of the act, wilfully destroy, or cause or procure to be destroyed, any register-book of marriages, or any part of such register-book, with intent to avoid any marriage, or to subject any person to any of the penalties of this act; every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall suffer the punishment of transportation for life, according to the laws in force for the transportation of felons.”||

In all cases where banns shall have been published the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published, and in no other place.

And by Can. 63, every minister who shall celebrate marriage between any persons contrary to the canons aforesaid, or any part thereof, under colour of any peculiar liberty or privilege claimed to appertain to certain churches and chapels, shall be suspended for three years by the ordinary of the place where the offence shall be committed; and if any such minister shall afterwards remove from the place where he hath committed the fault, before he be suspended, then shall the bishop of the diocese, or ordinary of the place where he remaineth, upon certificate, under the hand and seal of the other ordinary from whose jurisdiction he removed, execute that censure upon him.

By a constitution of Archbishop Reynolds, matrimony shall be solemnized reverently, and in the face of the church.

And by the words, in the beginning of the office of matrimony, it is supposed to be done in the face of the congregation.

||By the 4 Geo. 4, c. 76, § 21, which incorporates §§ 8 & 9, of the 26 G. 2, c. 33. “If any person shall solemnize marriage in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon, unless by special license from the Archbishop of Canterbury; or shall solemnize matrimony without due publication of banns, unless license of marriage be first had and obtained, from some person or persons having authority to grant the same; or if any person, falsely pretending to be in holy orders, shall solemnize matrimony according to the rites of the Church of England, every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be adjudged to be guilty of felony, and shall be transported for fourteen years;” the prosecution for which felony is by the same section to be commenced within three years after the offence committed. And by § 22, “If any persons shall knowingly or wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special license as aforesaid, or shall knowingly and wilfully intermarry, without due publica-

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tion of banns or license of marriage from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be *null and void* to all intents and purposes whatsoever." By § 31 it is provided, that this act shall not extend to any marriages among Quakers or Jews, where both the parties shall be Quakers or Jews; (a) and by § 33 this act is only to extend to England. (b)

¶ (a) The marriages of Jews are tried by evidence of the laws of the Jews, as in case of marriages in a foreign country. See Sir W. Scott's learned judgment, *Lindo v. Belisario*, 1 Hagg. C. Rep. 216; affirmed in Court of Arches, *Ibid.* App. 7; and that Quakers' marriages are good, according to their own forms of public declaration at their monthly meetings, see *Ibid.* App. 9, in note. ¶ (b) Whether clandestine marriages in Scotland of English parties, who resort thither to evade the English law, shall be sustained in England, hath been doubted; and very learned men have questioned, notwithstanding that such marriages are valid by the law of Scotland, whether they are effective in England. Where parties are bound, by the laws of their own country, to execute any important act or contract with certain solemnities, it is doubted whether they can elude their own law by going purposely to another country where such solemnities are not essential, and then returning immediately when the act is done. It is a question of public law; and the most celebrated writers on public law have holden, that such an act is fraudulent, it is *fraudem facere legi*, which the laws of all nations disallow. In the case of *Robinson v. Bland*, 2 Burr. 1079, which was a security given in France for money there lost at play, wherein the locality of the transaction came in question, there is an *obiter* observation of Lord Mansfield very remarkable. "As to the money won at law, by the rule of the law of England, no action can be maintained for it. To this it has been objected, that the contract was made in France; therefore the law of France must prevail, and be the rule of determination: by which law it is alleged, that the money is there recoverable before the marshals of France, who can enforce obedience to their sentences by imprisonment. I admit that there are many cases where the law of the place of the transaction shall be the rule; and the law of England is as liberal in this respect as other laws are. It has been laid down at the bar, that a marriage in a foreign country must be governed by the law of that country where the marriage was had; which, in general, is true: but the marriages in Scotland of persons going from hence for that purpose were instanced by way of example. They may come under a very different consideration, according to the opinion of Huberus, p. 33, and other writers. No such case has yet been litigated in England except one, of a marriage at Ostend, which came before Lord Hardwicke, who ordered it to be tried in the ecclesiastical court: but the young man came of age, and the parties were married over again; and so the matter was never brought to a trial." 2 Burn's Eccl. Law. 438. But in Buller's N. P. 113, there is a short note of a case, wherein this point was afterwards determined, upon an appeal to the delegates, viz. *Crompton v. Bearcroft*, Dec. 1, 1768. The appellant and respondent, both English subjects, and the appellant being under age, ran away without the consent of her guardian, and were married in Scotland; and on a suit brought in the spiritual court to annul the marriage, it was holden that the marriage was good. ¶ See this case stated 2 Hagg. C. R. 444; and the same was decided in Chancery, on certificates of Scotch law, in *Grierson v. Grierson*, Lib. Reg. A. 1780, F. 552. Sir W. Scott's judgment in *Dalrymple v. Dalrymple*, 2 Hagg. C. R. 99. If Gretna Green marriages were invalid according to English law, and depended for validity solely on the Scotch law, there would seem ground to doubt the soundness of the decisions holding them valid; for it is apprehended that, when parties merely pass into Scotland to make the contract of marriage, and immediately return to England, the law of England properly governs the contract, according to Lord Mansfield's observations in *Robinson v. Bland*, *supra*, and according to the rational principle laid down by Huber, *de Conf. Legum*, l. 1, tit. 3, § 10.—"Proinde et locus matrimonii contracti non tam is est ubi contractus nuptialis initus est, quam in quo contrahentes matrimonium exercere voluerunt; ut omni die fit homines in Frisia, indigenas; aut incolas ducere uxores in Hollandia, quas inde statim in Frisiam deducunt. *Jus Frisium in hoc casu est jus loci contractus*;" and see another passage to the same effect, *ibid.* p. 538, and Co. Lit. 79 a, note 1, and 2 Addams' R. 23. But by the law of England, unaffected by the marriage act, a marriage in the form used at Gretna Green is a good marriage, and the

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provisions of the marriage act cannot affect such marriage, since they are expressly confined to England; and this, according to Sir George Hay, was the ground of decision in *Crompton v. Bearcroft*, in which nothing appears to have been laid before the court to show that the marriage was valid in Scotland. Vid. 2 Hagg. C. R. 430. Sir W. Wynne, however, (2 Hagg. C. R. 443,) states, that the case was determined by the delegates, on the ground that the marriage was good by the law of Scotland. In *Ilderton v. Ilderton*, 2 H. Bl. a marriage celebrated in Scotland was held to entitle the woman to dower in England. This was not the case of a marriage by parties going to Scotland to evade the English law. See post (D), *Of Foreign Marriages*, and (F) as to *Divorces*.]

The above act of 4 Geo. 4, c. 76, having enacted, that the ceremony shall be solemnized in no other place than a public church or chapel, *wherein banns may be lawfully published*, except by special dispensation from the Archbishop of Canterbury; and the 26 Geo. 2, c. 33, § 8, having specified the place to be a church or chapel *where banns have been usually published*; it followed, that marriages solemnized in chapels erected since the 26 Geo. 2, c. 33, were invalid. (a) The 6 Geo. 4, c. 92, was therefore passed, which enacts, "That all marriages already solemnized in any church or public chapel, in that part of Great Britain called England and Wales, and the town of Berwick-upon-Tweed, erected since the making of the said act of 26 Geo. 2, c. 33, and consecrated, shall be as good and valid in law as if such marriages had been solemnized in parish churches or public chapels, having chapelries annexed, and wherein banns had been usually published before or at the time of passing the said 26 Geo. 2, c. 33."

(a) Note.—The 21 Geo. 3, c. 53, the 44 Geo. 3, c. 77, and the 48 Geo. 3, c. 127, brought in to confirm such marriages, were merely retrospective.

And § 2, "That it shall and may be lawful for marriages to be in future solemnized in all churches and chapels erected since the passing of the said 26 Geo. 2, c. 33, and consecrated, in which churches and chapels it has been customary and usual before the passing of this act to solemnize marriages; and all marriages hereinafter solemnized therein shall be as good and valid in law as if such marriages had been solemnized in parish churches or public chapels, having chapelries annexed, and wherein banns had usually been published, before or at the time of passing the said act."

6 Geo. 4, c. 92. By §§ 3 & 4, of this statute, registers of marriages solemnized as aforesaid in chapels where banns had not been usually published before 26 Geo. 2, c. 33, are made valid evidence, and are required within three months after the passing of this statute to be removed to the parish church.

By 4 Geo. 4, c. 76, § 28, incorporating § 15 of the 26 G. 2, c. 33, all marriages shall be solemnized in the presence of two credible witnesses at the least, besides the minister who shall celebrate the same; and, immediately after the celebration of every marriage, an entry thereof shall be made in the register directed by the acts to be kept; in which entry it shall be expressed, that the marriage was celebrated by banns or license, and if both or either of the parties married by license be under age, not being a widower or widow, with consent of the parents or guardians, as the case shall be; and such entry shall be signed by the minister with his proper addition, and also by the parties married, and attested by such two witnesses; which entry shall be made in the form prescribed by this section. ||

If the marriage has been regularly solemnized, any subsequent irregularity in the entry shall not affect its validity.

St. Devereux v. Much Dewchurch, Burr. Set. Ca. 506; Bull N. P. 114, S. C.

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¶The above statute, 4 G. 4, c. 76, has introduced a new and strong provision, by enacting, that if marriages be solemnized between parties under age, contrary to the act, by false oath or fraud, the guilty party shall forfeit all property accruing from the marriage; and it contains directions both as to the proceedings in equity for the forfeiture, and also for securing, under the direction of the court of equity, the forfeited property for the benefit of the innocent party, or of the issue of the marriage.¶

The statute 26 G. 2, c. 33,(a) does not take away the evidence of presumption from cohabitation; though if the evidence be clear that the marriage was not celebrated according to the requisitions of the act, (as, where in a marriage by license, one of the parties is under age, and no consent has been had,) it is totally void,(b) and no declaratory sentence in the ecclesiastical court is necessary.

Rex v. Preston next Feversham, Burr. Set. Ca. 486; 1 Bl. Rep. 192, S. C.; Bull. N. P. 114, S. C.] ¶Faremouth v. Watson, 1 Phill. (Prer.) 355. (a) So also of 4 Geo. 4, c. 76. (b) Not so now under 4 Geo. 4, c. 76; see Rex v. Birmingham, 5 Barn. & C.¶

Also, by the (c) 7 & 8 W. 3, c. 35, § 2, it is enacted, "That every parson, vicar, or curate, who shall marry any persons in any church or chapel exempt or not exempt, or in any other place whatever, without publication of the banns of matrimony between the respective persons, according to law, or without license for the said marriages first had and obtained, shall for every such offence forfeit the sum of 100*l*."

(c) For the punishment on jailers permitting such marriages, vide 10 Ann. c. 19, § 176; and on persons erecting offices for making insurances on marriages, 10 Ann. c. 26, § 109.

And by § 3 of the said statute it is enacted, "That every parson, vicar, or curate, who shall substitute or employ, or knowingly and wittingly shall suffer and permit, any other minister to marry any persons in any church or chapel to such parson, vicar, or curate belonging or appertaining, without publication of banns or licenses of marriage first had and obtained, shall for every such offence forfeit the sum of 100*l*: the aforesaid respective forfeitures to be recovered by action of debt, bill, plaint, or information, in any of his majesty's courts of record, wherein no essoign, wager, or protection of law, or any more than one imparlance shall be allowed; one moiety thereof to his majesty, his heirs and successors, and the other moiety to him or them who shall inform or sue for the same."

And by § 4 of the said statute it is enacted, "That every man so married without license, or publication of banns as aforesaid, shall forfeit the sum of 10*l*., to be recovered, together with costs of suit, in manner as aforesaid, by any person who shall inform or sue for the same; and likewise, that every sexton or parish clerk who shall knowingly or wittingly aid, promote, and assist at such marriages, so celebrated without banns or licenses as aforesaid, shall forfeit the sum of 5*l*., to be recovered with costs of suit, in manner as aforesaid, by any person who shall inform or sue for the same."

[It has been determined, that notwithstanding the statute, the ecclesiastical court is still at liberty to impose spiritual censures upon any persons marrying without license or publication of banns. Middleton v. Croft, 2 Stra. 1056; Vin. Abr. tit. *Canons*, pl. 14, S. C.; 2 Atk. 650, S. C.]

β Where the alleged husband cohabited with a woman entitled to a pension, *pendente viduitate*, residing in Scotland, and reputed as man and wife, but on view of the receipt of the pension, she yearly made the solemn declara-

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tion of continuing widowhood, held, on exceptions to the master's report, that he was warranted in finding that no valid marriage had taken place.

Robertson v. Crawford, 3 Beav. 102.

Upon the following questions, 1st, Whether, "if before any sexual connexion between the parties, they, in the presence of her family and friends, agreed to marry, and did afterwards live together as man and wife," it was a legal marriage and the tie indissoluble even by mutual consent; and, 2d, Whether, "if the contract be made *per verba de presenti*, and remains without cohabitation, or, if made *per verba de futuro*, and be followed by consummation," it amounts to a valid marriage, which by the parties (being competent as to age and consent) cannot be dissolved, and is equally binding as if made *in facie ecclesiæ*; the court, being equally divided, gave no opinion.

Jewell v. Jewell, 1 How. S. C. Rep. 219, 233, 234.

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THE marriage act, 4 Geo. 4, c. 76, § 33, is, by the last section, expressly confined to England. The 4 Geo. 4, c. 91, declares and enacts, that marriages solemnized by a minister of the church of England in the chapel or house of any British ambassador (a) in the country to which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject resident in such factory, or solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, shall be as valid as if solemnized within his Majesty's dominions according to forms of law; but it is expressly provided, that the act shall not in any wise affect any marriages which have been or shall be solemnized beyond sea, except those above specified. Marriages, therefore, contracted in foreign countries are free from the English law of marriage, and when questioned in this country, are to be governed by the law of the country where they take place. In the case of Dalrymple v. Dalrymple, (b) as to the validity of a Scotch marriage, Lord Stowell says, "This cause being entertained in an English court must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of Miss Gordon's marriage-rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." This principle, which is laid down by the writers on the civil and canon law, (c) has long been recognised in the courts of this country, (d) both at Westminster and Doctor's Commons; and it is obvious that the greatest inconveniences and incongruities must flow from adopting any other rule. The doctrine was fully recognised, in 1752, in the Consistory Court of London, in the case of Scrimshire v. Scrimshire. (e) Scrimshire, of the age of eighteen, married, in France, Miss Jones, of the age of fifteen. The marriage being solemnized in a private house, and by a priest not authorized by the law of France, and without the consent of parents, was declared null by a sentence of the Parliament of Paris; and on a suit by the lady for restitution of conjugal rights in the Consistory Court here, Sir Edward Simpson, in an elaborate judgment, showed that the validity of the marriage must be tried by the law of France; and admitting the French

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sentence, not as a bar, but as evidence of the law of France, held the marriage void, and dismissed the suit. So, where an English minor, sent to St. Omer's for Education, went to Furnes, in the Austrian Netherlands, and there was married by a priest, in the Dutch language, to a woman of St. Omer's: on proof, by practising advocates, that the marriage was invalid by the laws of Holland and Flanders, on account of the incompetency of the minister, the minority of the man, and the absence of banns, the marriage was declared invalid in the Consistory Court.

(a) How far foreigners in the suite of foreign ambassadors in this country marrying in ambassadors' chapels may be exempt from the regulations of the marriage act, see *Pertreis v. Tondear*, 1 Hagg. C. R. 136; and see 2 Hagg. 386, note †. (b) 2 Hagg. C. R. 59. (c) Voet. in Dig. lib. 23, *de Ritu Nuptiarum*, tit. 2, n. 85, fo. 55, Sanchez, *de Matrim.* lib. 3, *de Claud. Consensu*, disp. 18, § 10; Mynsingerus, *Singul. Observat.* cent. 5, obs. 20, n. ult. Gaylius, lib. 2, obs. 123. (d) Kelyng, R. 79; 2 Salk. 651; 6 Mod. 195, S. C., and *per* Lord Hardwicke, 1 Atk. 50, Amb. 313. (e) 2 Hagg. C. Rep. 395; *Middleton v. Janverin*, 2 Hagg. C. R. 437; and see *Harford v. Morris*, *Ibid.* 423.

Lord H, an Englishman, was married in Sicily to the Princess of B, not according to the ceremonial rites of the country, but by a priest in a private house, and in the presence of two witnesses, before whom the parties declared themselves husband and wife. On a suit here for restitution of conjugal rights by the wife, it was proved, by the depositions of four advocates, that according to the decree of the council of Trent, which was the recognised law of Sicily, the marriage, though illicit, was still valid and indissoluble, being an expression of mutual consent to contract matrimony in the presence of the parish priest and of two witnesses. It also appeared, that by various civil ordinances, and by the Pragmatic Sanction of the reigning king, Ferdinand, tit. *de Delictis*, parties guilty of such a marriage were, if noble, liable to imprisonment for five years, the husband in a fortress, the wife in a convent; but that this punishment in no way affected the indissolubility of the marriage. Lord H, under this law, had been sent to a fortress, from which he escaped; and the princess to a convent, from which she was released on giving bail to appear at a distant day, which had not yet arrived. In a suit by the wife for restitution of conjugal rights, Sir William Scott held the marriage clearly valid, and refused the prayer of the husband to stay his sentence of cohabitation till the period of separation would expire, when the princess was bound to appear; saying, "that the court could not borrow the criminal law of Sicily, and incorporate it into its own rules."

Herbert v. Herbert, 2 Hagg. C. R. 263.

§ A marriage which took place between a British subject domiciled in England and a female ward of court was celebrated in the presence of the British consul, and in the English church at Antwerp, by a clergyman of the church of England, who had been appointed chaplain to the church, and was paid by the British government. Held that the marriage was invalid, as certain ceremonies prescribed by the laws of Belgium had not been observed.

Kent v. Burgess, 11 Sim. 361.

The case of *Dalrymple v. Dalrymple*, above referred to, was decided on the same principle. There was no question but the Scotch law must govern the marriage which took place in Scotland; and the sole question was, Whether, according to the law of Scotland, the marriage was valid or otherwise? Although the law of a foreign country is not strictly a subject of inquiry in this work, yet as the law of Scotland is peculiarly connected

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with England, and as it is, on the subject of marriage, with little variation, the general canon law of Europe,^(a) and consequently correspondent with the marriage law of England as it stood before the marriage act, we shall be excused for stating the result of this important case. In April, 1804, J. W. H. Dalrymple, of the age of nineteen, a cornet in the dragoon guards, being at Edinburgh with his regiment, and Johanna Gordon, a gentleman's daughter, above twenty-one, became attached to each other, and entered into a mutual promise of marriage, without date, which was endorsed "a sacreed promise," and left in her possession, in these terms, "I do hereby promise to marry you as soon as it is in my power, and never marry another, J D. I promise the same, J G." On the 28th May, 1804, they signed the following declaration. "I hereby declare Johanna Gordon is my lawful wife; and I hereby acknowledge J. W. H. Dalrymple as my lawful husband." By another paper signed by both, and dated 11th July, 1804, Mr. D reiterates the above declaration, and promises "that he will acknowledge Miss Gordon as his lawful wife the moment he has it in his power;" and she promises that "nothing but the greatest necessity (necessity which — situation alone can justify) shall ever force her to declare this marriage." The two last papers were enclosed in an envelope, inscribed "sacreed promises and engagements." In various letters produced, Mr. D calls Miss G his wife, and describes himself as her husband; speaks of her drawing on him for money, "for it is her right;" calls *her* sister his sister; and alludes to "our marriage." Mr. D removed from Scotland to England about the 21st July, 1804. During his stay in Scotland, it was proved by servants that he was frequently admitted in the evening, by order of Miss Gordon, to her father's house, when he went up stairs to the dressing-room adjoining the young ladies' bed-room; and, on more than one occasion, he was seen coming away from the house early in the morning. The terms of many of his letters to Miss Gordon, during his stay in Scotland, apparently referred to a marital intercourse as taking place between them, and, together with the other evidence, left no doubt on the mind of Sir W. Scott that the alleged marriage was consummated. Mr. D remained in England till 1805, when he sailed for Malta, and remained abroad, with the exception of a month or two, till May, 1808. On his departure he wrote to Miss G, renewing his injunctions of secrecy as to the marriage; and a correspondence was subsequently kept up till the autumn of 1806, when he directed his friend and agent not to forward her letters to him, as he would not read them, and to intercept any letters she might write to General D, his father. On the death of the father, in 1807, Miss G asserted her marriage rights, and furnished Mr. D's friend and agent with copies of the above papers, which she denominated, according to the style of the Scotch law, her "*marriage lines*." Soon after his return, in May, 1808, Mr. D, contrary to the strenuous advice of his friend, married Miss L M, in England, according to established forms. Miss G, then finding that Mr. D was not amenable to the Scotch courts, proceeded in the Consistory of London for restitution of conjugal rights, resting her claim on the above documents, on the defendant's letters, and on the evidence of the servants as to a marital intercourse having occurred. The plaintiff's letters to the defendant were not put in by her, nor were they called for on behalf of the defendant.

2 Hagg. C. R. 59. ^a When valid where made, the contract of marriage is, in general, valid everywhere. Corrie's case, 2 Bland, 488; Fornhill v. Murray, 1 Bland,

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485; Story, Conf. Laws, § 87; Shelf. on Mar. & Div. 140. But rights dependent on the nuptial contract are governed by the *lex loci contractus*. Decouche v. Savetier, 3 Johns. Ch. R. 190; 2 Bland, 488; Dumaresly v. Fishly, 3 Marsh. 369. *(a)* Per Sir W. Scott, 2 Hagg. C. R. 81.

On the part of the plaintiff, six experienced and eminent Scotch advocates, *(a)* who were examined to prove the law of Scotland relative to marriages, concurred in pronouncing the marriage valid: three of them, Mr. Erskine, Mr. Hamilton, and Mr. Ramsay, conceiving, 1st, that the first undated promise, in conjunction with the subsequent *copula*, which they inferred from the letters and evidence to have taken place, constituted a marriage by the law of Scotland; and, 2d, that the engagement of the 28th May, 1804, (which most of them considered unweakened by the subsequent paper of 11th July,) constituted a contract of marriage *de presenti*, whether the *copula* had occurred or not. Mr. Ramsay also conceived the marriage valid, on the ground of the acknowledgment of a prior marriage contained in the defendant's letters, calling plaintiff "wife," and himself her "husband," which acknowledgment alone he conceived sufficient to constitute a marriage in Scotland. *(b)* Mr. Cay conceived that the *copula* was an ingredient essential to the validity of the marriage, viewing it in either of the above lights; and Mr. Craigie and Mr. Hume seem to have thought that, in the absence of the plaintiff's letters to the defendant, (which a Scotch court would call for,) the marriage could only be rested on the ground of the promise followed by *copula*; and that without those letters a matrimonial contract, *per verba de presenti*, was not sufficiently made out. On the part of the defendant, four depositions of high legal authority were produced. Mr. John Clerk, formerly solicitor-general of Scotland, attached much weight to the circumstance of the defendant not being domiciled in Scotland, but an Englishman accidentally in the country with his regiment; and thought that, though clearly subject to Scotch law while in the country, yet the same circumstances which would infer consent to marriage in a domiciled inhabitant, would carry no such inference against an English officer following the habits of his country; that the papers and letters did not constitute a marriage, but were certainly strong, though not decisive, evidence that one had been contracted; and that even admitting that they might be conclusive against Mr. Dalrymple, if unmarried, yet that they were clearly not so against Mr. D's wife, (Miss L M,) who would be a necessary party to any proceedings in Scotland, and who could not be deprived of her *status* except upon evidence competent and sufficient against her. That the papers lost much of their weight as evidence of a marriage, since no marriage ceremony was ever performed, either in a church or privately; and that he was of opinion, that according to Scotch law more was necessary than mere declarations in writing that the parties were married; and that, though they thereby consented to marry, they did not thereby become married persons, but only formed a contract to marry, from which either party might resile, as in case of imperfect obligations; for which he cited M'Lauchlane v. Dobson, in the Faculty Collection, and Lord Justice Clerk M'Queen's opinion thereon. That if the writings were intended to constitute a present marriage, *per verba de presenti*, then arose a question of law, whether they were a *habilis modus* of conveying such consent, as to which lawyers differed. He was of opinion they were not, though some lawyers thought that any intelligible form of expressing consent would constitute marriage; as in the case of M'Adam v. Walker, 4th March, 1807, Faculty Collection, where a

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man declared the woman to be his wife before several witnesses, for the purpose of constituting a marriage *de præsenti*, and in the course of the same day he shot himself, no *copula* having followed the marriage (he had children by her before.) The marriage there was sustained by the court, but an appeal was pending to the Lords, and he thought the decision erroneous.(c) That supposing a marriage had not been contracted, and that Mr. D had only come under an obligation to marry Miss G, such obligation was necessarily defeated by his subsequent marriage. Mr. Cathcart concurred with Mr. Clerk in thinking stronger evidence necessary to establish a marriage in the case of a stranger accidentally in Scotland than in the case of domiciled persons, and clearly thought that the writings and letters (even in the case of two domiciled parties) would not be sufficient to constitute a marriage, unless subsequent copulation or cohabitation took place. That by the ancient law and canons, in 1242, marriage *in facie ecclesiæ* was indispensable, which was law till the reformation, when marriage continued to be celebrated by clergymen deprived of their functions; and the difficulty of proving solemnization at a distant period occasioned the statute of 1503, which introduced the presumption that if the marriage were not objected to in the life of the man, the woman should have her tierce if she showed that she was, by habit and repute,(d) his wife; that cohabitation, therefore, was not admitted to constitute marriage, but only to raise a presumption that a marriage had been solemnized; that the various penal statutes against clandestine marriages showed that celebration by a clergyman, or by some one assuming the functions of that office, was necessary to constitute marriage; and that he was not acquainted with a single instance in which it had been ultimately decided in Scotland, that the bare declaration of parties without celebration, *rebus integris*, constituted marriage, unless in the case of M'Adam v. M'Adam,(e) in which great difference of opinion prevailed in the Court of Session, and which was under appeal. But he admitted, that if parties had acted upon the faith of the declarations by consummation or cohabitation, this must bar *penitentia*, and render the consent of equal force as if given *in facie ecclesiæ*. Mr. Gillies agreed with the two last witnesses as to the weight of the circumstance of the defendant being an officer on service, not domiciled in Scotland; and was of opinion that the writings and letters, unless followed by copulation or cohabitation, would not constitute a valid marriage; that taken by themselves, they only amounted to an obligation to marry at a future time, which was rendered ineffectual by the defendant's subsequent marriage. Sir Ilay Campbell, late lord president of the Court of Session, differing from Mr. Cathcart, expressly says, that the solemnities of regular marriage are not, by Scotch law, indispensable, though required as matter of order: that irregular marriages may be contracted, 1st, by cohabitation, and general habit and repute; 2d, by a promise with subsequent *copula*; 3d, by formal acknowledgments *per verba de præsenti*, either in writing, or declared before witnesses, though not in presence of a clergyman; but they must be attended with *personal intercourse, if not subsequent, at least prior*, otherwise they resolve into a mere *stipulatio sponsalitia*, which may be resiled from, *rebus integris*. He thinks that the second and third grounds of marriage are made out in the case before him, subject to the proof of *copula*, which is disputed, and to the judge's consideration of all the circumstances, such as the youth and inexperience of Mr. D, and the indefinite obligation of secrecy entered into between the parties; and he consi-

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ders it no objection on the part of the defendant, that he was not domiciled in Scotland, but only transiently there with his regiment.

(a) See their depositions at length, 2 Hagg. C. R. append. (b) A declaration must be made with intent to constitute a marriage, or it will not have that effect. Therefore, where a man, in order to get lodgings in respectable houses, and save a woman from rude treatment, acknowledged her for his wife, the circumstances were held by the House of Lords insufficient to infer marriage, reversing the decision of the Court of Session. *Cunningham v. Cunningham*, 2 Dow. P. R. 482. (c) The decision was affirmed in the House of Lords, *M'Adam v. Walker*, 1 Dow. R. 148. (d) It seems the repute must be a general and not a divided one in order to raise the presumption of marriage. *Cunningham v. Cunningham*, 2 Dow. P. R. 482. (e) It appears that none of the judges objected to the marriage in this case on the ground of there being no proof of subsequent *copula*, but some entertained doubts of Mr. M'Adam's sanity at the time of the marriage. *Hutcheson*, Justice of P. Jurisd. b. iii. ch. 8.

Sir William Scott, after taking a minute view of the writings and letters, and referring to the opinions of the advocates as to the character of these documents, concluded that they unquestionably fell under the denomination, not of promises to marry, but of acknowledgments and declarations of actual marriage. The law, therefore, respecting promises might be entirely thrown aside. He then elaborately reviewed the advocates' opinions, the text writers (a) on the Scotch law of marriage, and the decided cases respecting declarations or acknowledgments of marriage, and pronounced his judgment, that the "rule of the Scotch law remained unshaken; that the contract *de presenti* does not require consummation in order to become *very matrimony*;" and that therefore the marriage was valid, even though personal intercourse were unproved; but that assuming the law to be otherwise, and that the *copula* was necessary to render a contract *de presenti* a marriage, he still thought that fact established by the evidence, and that in this view of the case, according to the consent of all the legal authorities, the marriage was undoubtedly valid. (b) This judgment was affirmed on appeal, on 19th January, 1814, by the court of delegates.

(a) See *Cragii Jus Feudale*, lib. 2, dieg. 18, s. 17 & 19; *Stair's Inst. lib. 1, tit. 4, s. 6*; *Maxwell's Inst. b. 1, tit. 6, s. 3*; *Erskine, Inst. b. 1, tit. 6, s. 5*; *Kaimes's Elucidat. p. 32*. (b) See *Montague v. Montague*, 2 Addams, R. 375.

In an action for goods sold the defendant pleaded coverture; and being a British subject, proved her marriage to one H, another British subject, at Versailles, (whither they went from Paris to be married,) and that the ceremony was performed by a clergyman of the church of England according to the rites of that church, at an hotel, and followed by cohabitation. The plaintiff, to show the marriage invalid, called the French vice-consul, who produced a copy of the "*Cinq Codes*," purporting to be published by authority of the French government. He stated it to be a part of the library of his office, and similar to those copies on which the tribunals of France acted. *Abbot, C. J.*, (by consent of the parties) received this evidence of the law of France, (c) from which it appeared that many forms were required in and prior to the ceremony of marriage which had not been complied with. *Abbott, C. J.*, said he had a difficulty in pronouncing the marriage void, unless there was a nullifying clause; on which the vice-consul was re-examined, and stated, that from his knowledge of French law, marriages contrary to these regulations were absolutely void, notwithstanding subsequent cohabitation and reputation of being man and wife. On this *Abbot, C. J.*, held, that the marriage, not being celebrated at the British ambassador's, was within the operation of the general law, and if invalid

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in France was so in England. And the issue on the coverture was accordingly found for the plaintiff.

Lacon v. Higgins, 3 Stark. Ca. 178; S. C. Dow. & Ry. N. P. Ca. 38. (c) It would appear at least doubtful whether this marriage was null and void by the French law. The vice-consul's statement is certainly not correct, that all marriages contrary to art. 63, 64, and 74, of the civil code are void. The breach of art. 63 (which requires two publications of the parties' names, &c., at eight days interval before the door of the town-hall) is punishable by fine on the civil officers and parties, by art. 192; and art. 193, in imposing a similar fine for the breach of the much more essential condition of art. 165, ("The marriage shall be celebrated *publicly* before the *civil officer* of the domicile of one of the parties,") expressly says the penalty shall be enforced, "*though the contraventions should not be judged sufficient to pronounce the nullity of the marriage,*" thereby implying that some contraventions, even of art. 165, would not produce nullity. And it has been decided (*Cour de Cass., Juin, 1803*), that non-compliance with art. 74, by residing six months in the place of marriage, does not render the marriage void. But the marriage in the text being not celebrated by the *civil officer*, nor *publicly*, nor in the domicile of either of the parties (contrary to art. 74, and 165,) would rather seem to be void. By art. 191, "Every marriage which has not been contracted publicly, and has not been celebrated before the competent *public civil officer*, may be attacked by the parties themselves, by the fathers and mothers and ancestors, and by all those having a vested and actual interest in it, and also by the public authorities;" and though cohabitation followed in this case, it would seem that it would not even fall within the restriction of art. 196, which provides, "that when there is an actual marriage, and the act of celebration before the *civil officer* is produced, the *parties themselves* cannot demand the nullity of the act," for in this case there was no celebration before the *civil officer*. However, French lawyers differ as to the question. The late M. Portalis (*Exposé des Motifs*, p. 255,) says, "The most grave of all nullities is that which arises from the marriage not being celebrated publicly and in presence of the civil officer. There is *no marriage* but only *illicit commerce* between parties who do not form their engagement in the presence of the competent civil officer." M. de Malleville, on the other hand, says, that the nullity resulting from the contravention of article 165 is not radical, but depends on circumstances to be estimated by the judge. And M. Pailliet is also of this opinion. *Pailliet, Manuel de Droit François*, p. 85. As the evidence in the above case was received by *consent*, the case is not to be considered as a decision of the very learned judge, that a foreign law can be proved by the opinion of an unprofessional person, such as a vice-consul. That a foreign law, if written, is to be proved by a copy of the law properly authenticated. See *Picton's Ca.* 30; *Howell's Sta. Tri.* 491; *Boehtlink v. Schneider*, 3 Esp. Ca. 58; *Millar v. Heinrich*, 4 Camp. 155. If unwritten by persons professionally conversant with the law, *Ibid.*; and *Dalrymple v. Dalrymple*, 2 Hagg. C. R. 81.

But though the marriages of British subjects resident in a foreign country are governed by the law of the country, yet marriages of British subjects resident in a British settlement, subject to British dominion, are, in the absence of special provisions, governed by the marriage law of England as it stands, independent of the marriage act, which does not extend to any place out of England. Thus, where two British subjects were married at Madras by a Catholic priest in a private room, according to the rites of the Catholic church, and afterwards cohabited, it was held, that as this was a valid marriage according to English law, independent of the marriage act, it was valid according to the law to which the parties were subject at Madras; and it mattered not that they had not obtained the license of the governor, as was customary in the case of marriages of Protestant Europeans.^(a) And the principle extends to British subjects in any foreign place occupied by a British military force. Their contracts are governed by the British law, which the British troops carry with them.^(b)

(a) *Lautour v. Teesdale*, 8 Taunt. 830. See *Lloyd v. Pettigean*, 2 Curt. 251.
(b) *Rex v. Inhabitants of Brampton*, 10 East, 282; *Ruding v. Smith*, 2 Hagg. C. R. 371; *Burn v. Farrar*, *Ibid.* 369; and 4 G. 4, c. 91, *ante*. It is, perhaps, doubtful whether this act is *prospective*, but it is *declaratory*.

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Although the validity of the marriage contract is to depend on the law of the country where it is entered into, yet it is not quite clear to what extent the consequences flowing from the contract are to be governed by that *lex loci*. In some Continental courts various questions have been discussed as to the law which was to regulate in one country the effects of a marriage formed in another; such as questions as to the liability of the wife to the husband's debts, her right to dower, to communion of goods, and other matters. The only questions of this kind, of which we are aware, in England, have respected the legitimacy or illegitimacy of the children, and the dissolubility or indissolubility of the marriage; (as to which last point, see *infra*, head F.) Huber de *Conflictu Legum*,^(a) lays it down: "*Porro non tantum ipsi contractus ipsaque nuptiæ certis locis rite celebratæ ubique pro justis et validis habentur, sed etiam jura et effecta contractuum nuptiarumque in iis locis recepta, ubique vim suam obtinebunt.*" And he gives us an instance: "*In Hollandiâ conjugēs habent omnium bonorum communionem, quatenus aliter pactis dotalibus non convenit; hoc etiam locum habebit in bonis sitis in Frisiâ, licet ibi tantum sit communio quæstus et damni, non ipsorum bonorum. Ergo et Frisiâ conjugēs manent singuli rerum suorum etiam in Hollandiâ sitarum domini.*" And he afterwards says it had been disputed among the doctors, "*An immobilia bonâ etiam alibi sita, in tali specie communicentur; quod nos adfirmandum putamus.*" From some decided cases, this rule would appear to have been adopted by our courts, and the legitimacy of the children would seem to depend on the *lex loci* of the marriage contract. Thus,^(b) where W. Sheddon of New York entered into a regular marriage in America with a woman who had before borne him a son, and he died leaving an estate in Scotland undisposed of by will, it was held by the Court of Sessions in Scotland, and affirmed by the House of Lords, that his son could not inherit the Scotch estate, since by the law of America the marriage of his parents after his birth did not render him legitimate: and the same rule was followed in the case of the Strathmore peerage,^(c) where the son of Lord S, born in England, where his parents were domiciled before their marriage, was held not entitled to inherit the Scotch estates by the subsequent marriage of his parents in England, since according to English law such marriage did not render him legitimate. But the Court of King's Bench, in a late case, has held, that the question of legitimacy of a child for the purpose of inheriting land in England must depend upon the law of the country where the land lies.^(d) A child born in Scotland, of parents domiciled in that country, was accordingly held not entitled to inherit lands in England by the marriage of his parents in Scotland after his birth; though according to Scotch law such marriage rendered him legitimate.^(e) The court decided this case on the ground, that though the validity of the marriage was to be determined by the *lex loci contractus*, the right of the issue to inherit land in England depended on the *lex loci rei sitæ*; that English land was not inheritable by every legitimate child,^(g) but only by a child legitimate *sub modo*, viz., born after wedlock, *hæres ex justis nuptiis procreatus*; and that the statute of Merton, which by its title declares "He is a bastard that is born before the marriage of his parents," was not restricted to those born in England.

(a) Prælectiones Jur. Civ. lib. 1, tit. 3. (b) Sheddon v. Patrick, stated 5 Barn. & C. 444. (c) *Ubi supra*. (d) Doe v. Vardill, 5 Barn. & C. 438. A writ of error is now depending in the House of Lords. (e) The rule of the Scotch law, that subsequent marriage renders legitimate previously born children, was admitted in the argument to

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be subject to this limitation, that they are begotten and born whilst the father and mother are unmarried, and that they remain unmarried till their intermarriage, 5 Barn. & C. 439; and see Co. Lit. 245, a, note (1). But see 5 Shaw & Dunlop's Reports, p. 611; and it is clear that in some countries where the civil and canon law are adopted on this subject, an intermediate marriage is no bar to the legitimation by subsequent nuptials. Pothier, in treating of the effects of this legitimation, which, he says, (unlike legitimation by letters of the sovereign,) renders the children as perfectly legitimate as if born after wedlock, expressly mentions the case of the father contracting a valid marriage after the birth of his illegitimate children, and then, on his wife dying, marrying the mother of those children. In such case he takes it for granted, that all the children are legitimate, and that the only question is, which are to be considered the eldest; and he lays it down, that the children of the first marriage come first, since the others, though born before them, are only children of the second nuptials. Pothier, *Traité du Contrat de Mariage*, part 5, chap. 2, § 3. And see further as to this sort of legitimation, Vinnius Inst. l. 1, tit. 10, § 13, *De legitimatione*—Heineccius Elem. Jur. Civ. p. 50, and authorities there cited. (g) Huber, in speaking of "personal qualities," which everywhere follow the individual on whom they are by law impressed, does not instance that of legitimacy. His rule is, "*Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personæ alibi gaudent vel subiectæ sunt, fruuntur et subiciantur*;" and he expressly disapproves the opposite principle for which some contend, that the individual is to enjoy those rights in other countries which belong to his "personal quality," by the law of the country where the quality is impressed upon him. "Thus," says he, "those who with us are in tutelage or '*curâ*,' as minors, *fili families*, prodigals, married women, are accounted everywhere persons subject to tutelage, and shall enjoy and be subject to the law which belongs to tutelage in each separate place." The only limitation which he puts upon the universal recognition of the "personal quality" by foreign laws is, "*si nulum inde civibus alienis creetur præjudicium in jure sibi quæsito*." He does not draw a clear distinction between cases where the right claimed affects *movables*, and where it affects *immovable* property. He is clear, indeed, that a Frieslander having lands in Groningen cannot dispose of them by will, since such disposition is against the laws of Groningen, though allowed in Friesland. "The Frisick law not availing to affect property constituting an integral part of a foreign territory," though between two countries *both* allowing by law of testamentary disposition, the question, whether the testament is valid or not, would depend on the law of that country wherein it is made. But then he says, that a citizen having attained to twenty years, and thereby become *major* by the law of his own country, may exercise all the rights of majority, and alienate *immovable property* even in those places where the age of legal majority is twenty-five years. Thomasius, who annotates on this passage, dissents however from the doctrine, and admitting Huber's rule, "*Qualitates personales*," &c., thinks it is confined to personal contracts and to movables, and that the individual in the above case could not affect real property in the foreign country till twenty-five. And in accordance with this principle is the language of Hertius de Collisione Legum, sec. ix. § 9. "*Quilibet advena in percipiendâ hæreditate succedit, non secundum suæ personæ, sed secundum jura terræ Saxoniz, etiam cujuscunque terræ sit, sive Bavariz, Franciz, vel Suevicæ nationis*;" and see Erskine's Inst. l. iii. t. 8, § 10.

In a late case of precisely similar circumstances, where the question was whether the son was legitimate, so as to be able to inherit lands in Scotland, the Court of Sessions decided that he was.

Munro v. Ross, 5 Shaw & Dunlop's Reports, 605. An appeal is depending in the House of Lords.]

¶ Two Protestants, residents at Rome, one a minor, abjured, and were then admitted into the Catholic church, and married clandestinely, according to the ritual of that church; it appeared that the acts of abjuration and of marriage were duly performed according to the Roman law; held that such marriage was valid.

Swift v. Kelly, 3 Knapp, 257; Swift v. Swift, 3 Knapp, 303.g

(E) Of Offences against the Rights of Marriage: And herein,

1. *Of the Offence of a forcible Marriage.*

By the 9 Geo. 4, c. 31, § 19, which repeals the 3 Hen. 7, c. 2, and the 39 Eliz. c. 9, it is enacted, "That where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive, or next of kin to any one having such interest, if any person shall from motives of lucre take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding or abetting, such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or be imprisoned, with or without hard labour, in the common jail or house of correction, for any term not exceeding four years."

Upon this statute no decisions have as yet taken place, but in the construction of the repealed statute, 3 Hen. 7, c. 2, which is in *pari materid* with it, the following points have been resolved. ||

That the indictment for this offence must set forth, both that the woman hath lands or goods, or that she was heir apparent, and that the taking was for lucre; and also that she was married or defiled; for the enacting clause, in saying, that what person takes any woman *so* against her will, plainly restrains the taking to such as is within the preamble; (b) but it needs not set forth, that the taking was with an intention to marry or defile.

Hob. 182; Cro. Car. 485; Dalis. 22; And. 115; 3 Inst. 68; Savil, 59; 12 Co. 20, 110; Stat. Tri. vol. v. fol. 468, Swandson's case. (a) Yet these words *ad intentione ad ipsam mariland.* are usually inserted in indictments upon this statute; and it is safest so to do. Hale's Hist. P. C. 660.

It is said in Hale, that to make the offence felony within the statute, 3 H. 7, c. 2, the taking must be against her will; but herein, by Hawkins, that is no manner of excuse, that the woman at first was taken away with her own consent; because if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her will, as if she had never given any consent at all; for till the force was put upon her she was in her own power.

Hal. Hist. P. C. 660; Hawk. P. C. c. 42, § 5.

That it is not material, whether a woman taken against her will be at last married or defiled with her consent, or not, if she were under the force at the time; because the offender is in both cases equally within the words of the statute, and shall not be construed to be out of the meaning of it, for having prevailed over the weakness of a woman, whom by so base means he got into his power.

Cro. Car. 493; 3 Keb. 193; Vent. 243; Brown's case, 1 Hawk. P. C. c. 42, § 6.

That those who after the fact receive the offender, but not the woman, are not principals within this statute; because the words are, *receiving wittingly the same woman so taken, &c.*, but it seems clearly that they are accessories after the offence, according to the known rules of common law.

3 Inst. 61; Dalis. 22; Stra. P. C. 44; Hal. Hist. P. C. 661; 1 Hawk. P. C. c. 42, § 7.

That those who are only privy to the marriage, but not ways parties to the forcible taking away, or consenting thereto, are not within the statute.

Hal. Hist. P. C. 660; 1 Hawk. P. C. c. 42, § 8.

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That where a woman is taken by force in the county of A, and married in the county of B, the offender may be indicted and found guilty in the county of B, because the continuing of the force there amounts to a forcible taking within the statute.

Cro. Car. 448; Hob. 183; Hale's Hist. P. C. 660. *¶* *Aliter* if she consent before arriving in the county of B. Gordon's case, 1 Russell on Cri. 572. *¶*

It hath been adjudged, as is the constant practice at this day, that on an indictment for a forcible marriage, grounded on this statute, the wife may be a witness against the husband; for it being by force, it cannot be said a marriage *de jure*, so as to make them one person in law.

Cro. Car. 488; Vent. 243; 4 Mod. 8; 4 St. Tr. 455. But had she freely, without constraint, lived with him that thus married her, any considerable time, her examination in evidence might be more questionable. Hale's Hist. P. C. 661. *¶* But see Wakefield's case, mentioned in Russell on Cri. 2d vol. p. 605, 606, in which Mr. Baron Hulloock ruled, that even assuming the young lady to be at the time of the trial the lawful wife of one of the defendants, she was a competent witness for the prosecution. And that she may be a witness for the prisoner, see 1 Ry. & Moo. 354. *¶*

2. *Of the unlawful abduction of an unmarried Girl under the Age of Sixteen from her Parents or Guardians.*

¶ By the 9 Geo. 4, c. 31, § 20, repealing 4 Ph. & Mar. c. 8, it is enacted, "That if any person shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, or by both, as the court shall award."

This section was introduced in consequence of the case of the King v. Wakefield, mentioned in vol. 2, of Russell on Cri. 605. See the trial published by Murray. The marriage of Miss Turner with Wakefield was annulled by a special act of Parliament, it being considered doubtful, whether it could be invalidated by the English and Scotch law. But see Harford v. Morris, 2 Hagg. C. R. 423, where the marriage of a ward twelve years and a half old by her guardian, under circumstances of forcible and fraudulent abduction to a foreign country, was held void by the delegates. *¶*

[On the former statute it had been resolved, that the marriage must be clandestine, and to the disparagement of the heiress.

Hicks v. Gore, 3 Mod. 84.

That a bastard under the care of her putative father is within the act.

Rex v. Cornforth, 2 Stra. 1162; 1 Bott, P. L. by Const, 405, pl. 536, S. C.

That the offence is within the jurisdiction of the Court of King's Bench.

Rex v. Moor, 2 Mod. 128; 2 Lev. 179, S. C.; 1 Freem. 444, S. C.; 3 Keb. 708, S. C.]

3. *Of the Offence of procuring an improvident Marriage, and therein of Marriage-Brokerage Contracts and Agreements.*

It is of such consequence that all marriages should proceed from free choice, and not from any compulsion or sinister means, that it hath been held a matter indictable, or an offence for which the court will grant an information, to procure an improvident or an unequal marriage.

Lev. 257; 5 Mod. 221. *¶* It is a doctrine of the courts of equity that all marriage-brokerage contracts are utterly void as against public policy; and they are, therefore, incapable of confirmation. 1 Fonb. Eq. b. 1, c. 4, s. 10, note (s); 1 Story, Eq. Jur. § 263; Newl. contr. 469; Bouv. L. D. *Marriage-Brokerage.*

And on this foundation, that marriage ought to be free, marriage-brokerage

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bonds and contracts have been declared to be void, and decreed to be given up and cancelled.(a)

[(a) And this though entered into after marriage; *Toth.* 27; 1 Ch. Rep. 87.]

So, though it was decreed in Chancery, that a bond of 1000*l.* penalty, for the payment of 500*l.*, given for procuring a marriage between persons of equal rank, fortune, &c., was good; yet, upon an appeal to the House of Lords, the decree was reversed, for that such bonds to match-makers are of dangerous consequence, and tend to the betraying and ruining persons of fortune and quality, and are not to be countenanced in equity; and that marriage ought to be procured by the mediation of friends and relations; and that such bonds would be of evil example to executors, guardians, trustees, servants, and others who have the care of children.

Show. Par. Ca. 76, *Hall v. Potter*.

And the court will not only decree a marriage-brochage bond to be delivered up, but a gratuity of fifty guineas, actually paid, to be refunded; for that such bargains are in no shape to be countenanced.

Abr. Eq. 90; *Smith v. Bearing*, 2 Vern. 392. [And see *Williamson v. Gihon*, 2 Sch. & Lef. 357.]

[The defendant had a lease made by Thomas Thynne of the impropriation of Thame for two lives in reversion, after another lease for life of Mr. Thynne, of Egham. On the death of Mr. Thynne without issue, the estate came to Lord Weymouth, who had made a lease, under which the plaintiff claimed. The plaintiff's bill was to set aside the defendant's lease, upon surmise that the consideration of the lease was the defendant's undertaking to procure a marriage between Mr. Thynne and Lady Ogle. It was objected that the Lord Weymouth, being a remainder-man, claimed by settlement paramount, and came not in privy of estate; and therefore neither he nor his lessee were entitled to controvert, whether the lease was made on good consideration or not. But by the Court,—If the lease was gained by fraud, or an unjust consideration, it is to be deemed void, and the estate to be discharged of it, as if no such lease had been made. An issue was directed to be tried at the bar of the Court of Common Pleas, whether the lease was made in consideration of defendant's assisting to effect or procure the said marriage. Two verdicts were given in favour of the defendant, whereupon the bill was dismissed. Upon an appeal to the Lords in Parliament, the decree was reversed, and, without regard to the verdicts, the lease was set aside.

Stribblehill v. Brett, 2 Vern. 445. Lord Hardwicke, speaking of this case, says, "the Lords did a very extraordinary thing, determining contrary, and without regard to the verdicts. They must have been of opinion the issues were directed in some improper shape; for it cannot be supposed, they set it aside as a marriage-brochage contract upon the proofs." 1 Ves. 509.

Upon motion for an injunction to restrain the defendant either from bringing an action on a promissory note given by the plaintiff to the defendant in 2000*l.* for undertaking to procure him a marriage with a lady, or that the defendant may be restrained from assigning it over to any other person, Lord Hardwicke said, As it is not only charged by the bill to be a marriage-brochage agreement, but the charge is supported by an affidavit, I will make an order upon the defendant to keep the note in his own possession, and not to assign or endorse it over to any person whomsoever; but I will not extend the injunction so far as to prevent him from proceeding at law.

Smith v. Ayckwell, 3 Atk. 566; *Ambl.* 66, S. C.; [Debenham v. Oxe, 1 Ves. 276; *Hylton v. Hylton*, 2 Ves. 549.]

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On a treaty of marriage between P B and Miss H, then about twenty years old, articles were entered into, to which the intended husband and wife, the defendant, who was the intended wife's servant, and R A, were made parties. The first clause therein was for securing an annuity of 100*l.* to the defendant out of the wife's estate; but every other provision therein for the benefit of the wife and issue of the marriage was made revocable by the wife, after the marriage should be had. About the same time with the articles, a bond was given by P B before the marriage to pay the defendant 1000*l.*, which bond was afterwards delivered up to be cancelled, but at what particular time did not appear. A recovery was suffered to the use of the articles. And subsequent to the marriage, a new grant was made to the defendant of this annuity; which was continued to be paid for some time after the wife's death. A bill was brought to set it aside; and Lord Hardwicke directed three issues: 1st, Whether the bond was executed in consideration of, or as a premium for, defendant's procuring or assisting plaintiff in his marriage, or on any other and what consideration? 2d, Whether the 1000*l.* were thereby made payable at or on the marriage, or at any other and what time? 3d, Whether the annuity or rent-charge was granted in consideration of the bond, or procuring or assisting plaintiff in his marriage, or for any other and what consideration?

Cole v. Gibson, 1 Ves. 506. [And see *Arundell v. Trevillian*, 1 Ch. Rep. 87.]

And as contracts of this kind are avoided on reasons of public inconvenience, it hath been therefore adjudged, that they will not admit of subsequent confirmation by the party.

Shirley v. Martin, Excheq. 14th Nov. 1779; 3 Cox's P. Wms. 74, note. [And see *Roche v. O'Brien*, 1 Ball & Be. 358; *Hatch v. Hatch*, 9 Ves. 299, and *St. John v. St. John*, 11 Ves. 537; *King v. Burr*, 3 Meriv. 693.]

So, any private agreement or treaty infringing the open and public agreement on the marriage is considered as fraudulent; as in the following cases: Sir J B being executor of the plaintiff, Peyton's mother, and having purchased an estate which belonged to the plaintiff's mother, promised that he would not only settle such estate upon the plaintiff, but also other lands of 300*l.* a year, if a convenient match could be found for the plaintiff. In 1676, Sir J B treated a marriage for him with the niece of the plaintiffs, Sir J R and Denham; and it was agreed between him and Sir J R, that Sir J R should give his niece 2500*l.* portion, to be laid out in lands after his death, and that Sir J B should settle lands of the value of 300*l.* a year, whereof 200*l.* *per annum* should be settled for the jointure, and that he would also settle other lands of 100*l.* *per annum* on himself for life, remainder on plaintiff Peyton and his heirs. Accordingly, by lease and release, Sir J B, in consideration of a bond entered into by Sir J R to pay 2500*l.* after his and his wife's death for the marriage portion, conveyed lands stated in the deed to be 300*l.* a year; and as to 200*l.* a year thereof, the same were limited for the jointure of the wife of plaintiff Peyton, remainder to the heirs male of their two bodies, remainder to Peyton in tail, remainder to him in fee; and as to the residue, to plaintiff Peyton in tail, remainder to him in fee. And Sir J B thereby covenanted, that the jointure lands were 200*l.* a year, and that within two years then next he would settle other lands of 100*l.* a year, and worth 1700*l.*, to be sold, to the use of himself for life, remainder to plaintiff Peyton in fee. After the marriage, Sir J B prevailed on plaintiff Peyton, who was very young, by promises of leaving him a greater estate by his will than he had promised to settle upon him, and by

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other insinuations, to execute a writing, whereby Sir J B was to receive the profits of the whole estate, allowing the plaintiff Peyton only 100*l.* a year, and to assign over to him Sir J R's bond, and also to release and discharge the agreement for 100*l.* *per annum* on him and his heirs after the death of Sir J B. The plaintiff's bill was to be relieved against these agreements, which had been extorted from the plaintiff Peyton, and to have the jointure made good, the lands settled for the jointure not being of the value of 200*l.* a year. After long debate the Lord Keeper decreed, that the defendant Bladwell, notwithstanding the agreement with plaintiff Peyton, should account for all the profits of the estate which Sir J B had been in possession of under that agreement, over and above the 120*l.* *per annum*, and the Master was to see what was the value of the jointure lands at the time of the settlement; and the defendant was decreed to make good so much as the jointure lands fell short of 200*l.* *per annum* at the time of the settlement made. And Sir J B having devised some lands to the plaintiff Peyton, the defendant was decreed to make up those lands, and to settle them according to the marriage agreement. And although it was strongly insisted by the defendant's counsel, that the agreement being to settle 100*l.* *per annum* on plaintiff Peyton and his heirs, he had power to release and discharge that agreement; and there was no benefit thereby intended to the wife or issue of that marriage; and in case the settlement had been made, it had been in plaintiff Peyton's power to have sold or given away those lands, (the settlement being to be made to him and to his heirs after the death of Sir J B,) and therefore he might well release the agreement as to the 100*l.* *per annum*, and no one could be said to be injured by it, any more than if he had devised away or sold those lands; yet the court declared its detestation of such underhand agreements, and that it was a deceit and fraud as to Sir J R, who was drawn in to give a great portion with his niece, in expectation of a settlement adequate to it, which by this means is to be frustrated; for though plaintiff Peyton could have disposed of the lands, which were to have been settled on him and his heirs, yet that is frequently done in many settlements, the father by that means being left at liberty to provide for his younger children, and to reward them most who behave themselves best: and still there is a benefit intended to the issue of the marriage, and it is part of the consideration for which the portion was given; and therefore they declared this underhand agreement and release to be fraudulent, and set the same aside, and decreed the agreement to be performed, as to the 100*l.* *per annum*.

Peyton v. Bladwell, 1 Vern. 240.

Upon a treaty for a marriage between C R and the plaintiff, the plaintiff's father would not consent to the match, by reason that C R was indebted in the sum of 200*l.* to one B, for which he and his mother stood bound in a bond. To remove this obstruction, H R (younger brother to C R) and the mother gave a new bond to B for the payment of this debt; and thereupon the bond in which C R was bound was given up to be cancelled. But C R gave his brother H R a counter-bond to indemnify him against the debt, and paid the interest of the 200*l.* to B during his life. It was in proof, that the plaintiff, the widow of C R, was privy to all this matter, and that she, being in love with C R, contrived this way to satisfy her father, that the marriage might take effect; but now being sued by H R on the counter-bond, as administratrix to her husband, she brought her bill to be relieved. Lord Chancellor said, This is a plain fraud, and by this contrivance the father of the plaintiff was drawn in to give the greater portion; and he absolutely

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refused to marry his daughter till C R was made a clear man, and, particularly, discharged of this very debt; and though H R had no obligation upon him to become bound for his elder brother's debt, yet it was all one to the plaintiff's father which way that debt became discharged; but that was to be first done, let it be one way or other. And his lordship declared, that in case C R himself had been the plaintiff, he should have been relieved; but the case was stronger, because if this bond should be suffered to lie on C R's estate, it might swallow the assets, and defraud his creditors; as it also injured the plaintiff in the right she had by the custom of London to the personal estate of her husband; and therefore he decreed the bond to be delivered up.

Redman v. Redman, 1 Vern. 348.

Upon a treaty of marriage between one G and the sister of W P, the woman not having so great a fortune as the man insisted upon, she prevailed with her brother W P to let her have 160*l.* to make up her portion, and gave him a bond for the repayment of it, upon which the marriage was had. The husband, who knew nothing of the bond, died without issue, and his wife survived him, and afterwards died, having made her will, and the plaintiff executor. W P, the brother, dies, and makes the defendant his executor, who put the bond in suit against the plaintiff as executor of the widow, to recover the 160*l.*, and thereupon he brings his bill to be relieved. For the defendant it was insisted, that although this might be a fraud, as against the husband or any issue of his who were to have the benefit of the marriage agreement, yet the husband being dead, and there being no issue, the bond was good against the woman herself, and, by consequence, against her executor, there being no creditors in the case, nor any deficiency of assets pretended. Lord Chancellor,—You admit the husband might have been relieved on a bill brought by him and his wife; that which was once a fraud will be always so; and the accident of the woman's surviving the husband will not better the case. Decreed the bond to be delivered up, and a perpetual injunction against it.

Gale v. Lindo, 1 Vern. 475.

Lamlee the mother having a jointure in part, and 10*l.* *per annum* devised to her by her husband, and charged upon the other part of the premises in question, on the marriage of Lamlee the son, joined in the settlement, and accepted 15*l.* *per annum* in lieu thereof. The day before the settlement, she had taken a security from her son for 10*l.* *per annum* out of the leasehold estate, which was not comprised in the marriage settlement, and the son covenanted to pay it. The son died; the plaintiff, his widow, took out administration to him. The defendant brought an action of covenant against her for the non-payment of the 10*l.* *per annum*. The bill was to be relieved against this action on the ground of fraud; and the court, upon the authority of the above cases, decreed a perpetual injunction.

Lamlee v. Hamman, 2 Vern. 499.]

An uncle gives his niece by will 1200*l.*; the niece marries, but, antecedent to the marriage, the father takes a bond from the then intended husband to pay him 200*l.* in case the daughter should happen to die without issue male, living her husband: the daughter did die without issue male, living her husband; whereupon the father sued the husband at law upon this bond; and the husband brought his bill in equity to be relieved against the bond, and had a decree accordingly; for it appearing that no money was

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paid, nor any consideration given for entering into it, the court took it to be in nature of a marriage-broccage bond, and therefore ordered it to be delivered up.

Pr. Ch. 267; 2 Eq. Ca. Abr. tit. *Bonds, &c.* D. pl. 1, S. C.; 2 Vern. 588, S. C.

[A made an absolute conveyance of lands to B and his heirs, in consideration of 1500*l.*, which sum was at that time the full value. On the next day B executed a defeasance; declaring, that if A or his heirs should, within sixteen years, pay to B the 1500*l.*, the conveyance should be void. B entered and enjoyed the lands, and about three years afterwards, upon his marriage, settled them as an absolute estate on his wife and her issue. To this settlement A was privy, but took no notice of the defeasance, or ever attempted to refute the general opinion that B was the sole and absolute owner of the estate. Upon B's death, A set up the defeasance, and filed a bill to redeem, to which the son and heir of B pleaded the purchase deeds and his father's marriage-settlement. It was in proof, that A made the conveyance to enable B to obtain a marriage and a considerable fortune, though not with the particular lady whom he married. A perpetual injunction was decreed against A, to stop all proceedings under the defeasance.

Webber v. Farmer, 2 Br. P. C. 88. Mr. Viner says, that the decree was affirmed in the House of Lords by eight lords against seven; Cowper and Harcourt against the decree, and Parker for it: that in a manuscript report of it, said to be Lord Harcourt's, there is added a note, that the wife's father had notice of the defeasance before the settlement made; a circumstance which is taken notice of in the argument for the appellant in 2 Br. P. C. 90; Vin. Abr. tit. *Fraud*, H. pl. 3.

On a treaty of marriage between Lord Arbuthnot, then a minor, and the daughter of Morrison, it was agreed, that Morrison should pay 50,000 marks as a portion for his daughter, and a settlement was agreed to be made by Lord Arbuthnot and his friends in consideration of that fortune. The night before the execution of the articles, Morrison prevailed on Lord Arbuthnot privately to sign a writing, purporting that the real agreement was for 40,000 marks only, and that Morrison had agreed to the contract for 50,000, upon the express granting of this private obligation, by which Lord Arbuthnot bound himself to release Morrison from 10,000 marks, part of the 50,000. When Lord Arbuthnot came of age, he brought his action to have this obligation reduced, on two grounds,—1. That it was granted by him, whilst a minor, without the consent of his guardians. 2. That it was *contra fidem tabularum nuptialium*, to elicit such a writing clandestinely, contrary to a solemn contract entered into in the presence of his friends. The Lords of Session sustained the reason of reduction, and held the obligation null. Against their decree, Morrison appealed to the House of Lords, where it was affirmed with 80*l.* costs.

Morrison v. Arbuthnot, H. L. 1728; 1 Br. Ch. Rep. 548, note; [and see Palmer v. Neave, 11 Ves. 165.]

{ A father, on the marriage of his son, settled a jointure on the wife, and took a bond from the son of the same date to indemnify him from the jointure. On a bill by the executors of the son against the executors of the father, the bond was declared void, as a fraud upon the marriage contract, consisting in affecting to put the son in one situation by the settlement, and putting him in another and a worse situation by the private agreement.

11 Ves. J. 165, Palmer v. Neave. }

A treaty was entered into between the plaintiff and his son of the one

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part, and R G and her uncle of the other part, for the marriage of the plaintiff's son and R G. The uncle was treated with *in loco parentis*; the intended wife's whole dependence was upon him; she continued to live with him till the time of his death, and she took an ample provision under his will. Upon this treaty an annuity bond was entered into by the plaintiff, by which he stipulated to pay 150*l.* *per annum* to the husband, and to the wife, if she survived him. The wife survived the husband. The plaintiff filed his bill to reduce the payment to 100*l.* *per annum*, upon an agreement said to be entered into between the plaintiff, and the husband and wife, but to which the uncle was not privy; whereby, though the bond was to import payment for 150*l.*, yet, for reasons given on the transaction, the actual agreement was declared to be for 100*l.* only. The master of the Rolls dismissed the bill, considering the private agreement as a fraud upon a material party.

Pitcairne v. Ogbourne, 2 Ves. 375.

Where a bond was entered into by the plaintiff to the defendant before the plaintiff's treaty of marriage, but the defendant, by the plaintiff's desire, upon the occasion of such treaty, misrepresented to the wife's father the amount of the plaintiff's debts, and particularly concealed from him the bond in question; Lord Thurlow relieved by injunction against the bond, although it did not appear that there was any actual stipulation on the part of the wife's father in respect of the amount of the plaintiff's debts.

Neville v. Wilkinson, 1 Br. Ch. Rep. 543.

A bill was brought to be relieved against a bond drawn in common form, for payment of money; but proved to be made on an agreement that the plaintiff should either marry her servant, or should by way of forfeiture pay him the sum of money mentioned in the condition of the bond. The court decreed the bond to be delivered up to be cancelled, it being contrary to the nature and design of marriage, which ought to proceed from a free choice, and not from any compulsion.

Kay v. Bradshaw, 2 Vern. 102.

Joseph Montefiori, a Jew, being engaged in a marriage treaty, his brother Moses, to assist him in his designs, and represent him as a man of fortune, gave him a note for a large sum of money, as the balance of accounts between him and his brother Joseph; which balance he (Moses) acknowledged to have in his hands; though, in truth, no such balance, or any thing like it, existed. After the marriage had, Moses reclaimed this note, as being given on no consideration; and the matter was referred to arbitration. The arbitrators awarded the note to be delivered up, which Joseph refused to do; upon which the court was moved for an attachment against him for non-performance of this award; and, on his part, a cross motion was made, to set aside the award, on a suggestion, that the arbitrators were mistaken in point of law. Lord Mansfield:—The law is, that where, upon proposals of marriage, third persons represent any thing material in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing in the manner in which they represent it. *It shall be*, as represented to be. And the husband alone is entitled to relief, as well as when the fortune, &c., so misrepresented have been specifically settled on the wife: for no man shall set up his own iniquity as a defence, any more than as a cause of action. The arbitrators therefore being clearly mistaken in point of law, the award must be set aside. The rule for the

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attachment was discharged, and the rule for setting aside the award made absolute.(a)

Montefiori v. Montefiori, 1 Bl. Rep. 363; 1 Br. Ch. Rep. 548, S. C., cited by Lord Thurlow; [Jackson v. Duchaire, 3 Term Rep. 551; *Ex parte* Gardener, 11 Ves. 40.] {6 Ves. J. 182, 183; 9 Ves. J. 13, *Ainslie v. Medlicott*; 11 Ves. J. 40, *Ex parte* Gardner.} [(a) A representation under mistake, if made *bond fide*, will not however bind the party making it to make it good. *Merewether v. Shaw*, 2 Cox, 124.]

A mother, who was guardian to her daughter, took a bond from the husband to give her a release of all accounts of the mesne profits of the estate within two years after the marriage. The court held such bond to be of the same nature with a marriage-brokerage bond, and decreed it to be delivered up: for if a bond to *give* money if such a marriage could be obtained, was ill; by the same reason, a bond to *forgive* a sum of money must be ill also.

Duke Hamilton v. Lord Mohun, 1 Abr. Eq. Ca. 90; 1 P. Wms. 118, S. C., mentions it as a release to be given within two years after the marriage, in pursuance of a covenant in the marriage-articles, which were made on great deliberation; and that Cowper, C., relieved against the covenant, saying, That to tolerate such an agreement would be paving a way to guardians to sell infants under their wardship. 1 Salk. 158, S. C.

The defendant, who was a tailor by trade, and entitled to a small real estate of about 14*l.* per annum, in 1730 made his addresses to the plaintiff, who was then about the age of twenty-six years, and was the daughter of a man esteemed in the neighbourhood as a man of substance, and who could give her about 500*l.* for her fortune: the courtship had been carried on some time, before it came to her father's knowledge, who, as soon as he was acquainted with it, declared a great dislike of the match, and forbade the plaintiff giving the defendant any encouragement; notwithstanding which, the courtship was carried on in a clandestine manner till January, 1732, when the defendant met the plaintiff at a market-town in the neighbourhood, and there, at an alehouse, the following bonds were executed, nobody being present except the witnesses, who were two strangers, and were called in for that purpose, *videlicet*, A bond from the plaintiff in the penalty of 600*l.*, with condition, that, "if she did, on or before the expiration of thirteen months after the decease of her father, according to the usage and ceremony of the church of England, espouse and marry the defendant, if the defendant would thereunto assent, and the laws of the realm permit the same, or if it should happen the plaintiff should not, nor would not marry and take to husband the defendant as aforesaid, but should marry with some other person, then the plaintiff should and would well and truly pay, or cause to be paid, unto the defendant the sum of 500*l.* of lawful British money, at or immediately after failure of such marriage; but if it should happen that the plaintiff should die before the time limited and appointed for the said marriage, then the plaintiff should leave and give the defendant 10*l.* as a token of her love, to buy him a suit of mourning with; then the obligation to be void, else, &c."—A bond from the defendant in the like penalty, with condition, that "if he did, on or before the expiration of thirteen months after the decease of the plaintiff's father, according to the usage and ceremony of the church of England, espouse and marry the plaintiff, if the plaintiff should thereunto assent, and the laws of the realm permit; or if it should happen the defendant should not, nor would not marry and take to wife the plaintiff as aforesaid, but should happen to marry with some other woman, then the defendant did thereby covenant and agree to forfeit, surrender, and yield up unto the plaintiff for her own use, all his estate real and personal in M and S, or elsewhere by sea or

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land ; but if it should happen the defendant should die *fore* the time limited and appointed for the said marriage, then the plaintiff was to have to her own use one half of all the defendant's estate, both real and personal, that he should be possessed of at the time of his decease ; then the obligation to be void, else, &c."—An endorsement on the back of defendant's bond : "Memorandum, That before the sealing of this bond, R. Shepley doth promise, covenant, and agree, that he will settle and assure the within-named H. Woodhouse a yearly dower, according to what portion she shall have, and make her a good assurance, as the law directeth, either of lands, money, or living, that shall please her ; if this said H. Woodhouse shall have a child or children, then she shall have one half of his estate, and the child or children the other half that he shall die possessed of, or that by any means belong to him, or his inheritance, that may either fall to him by sea or land ; and if this said H. Woodhouse shall marry this R. Shepley, and have no children by him, then she shall pay to Sarah Shepley 20*l.* of lawful money as a legacy, and then all his lands, livings, goods, chattels, money, and any thing that shall ever belong to him, or that ever did in his lifetime, that has not been received, she shall have and peaceably enjoy, and take for her own use, and at her own disposing, both in her life and at her death, unto which I have put my hand. R. S." Upon the examination of the witnesses to the bonds, it appeared they differed in their accounts of the execution : one saying, the bonds were read over before execution ; the other, that they were not : one that they were exchanged ; the other that they both remained in the custody of the defendant ; and in fact, at the time the answer was put in, they were both in the hands of the defendant. After this transaction, the execution of these bonds remained unknown, and the intercourse was continued till May, 1736, when the plaintiff's father died, who by his will left her a fortune of about 340*l.* The thirteen months expired, and then the plaintiff filed the original bill to be relieved against her bond, and dying soon after, the cause was revived by her administrator. The cross bill was brought by the defendant to have satisfaction of this bond out of the assets of H. Woodhouse, alleging he was always ready and willing to have married her, but was prevented from having any access to her by her brothers. Lord Hardwicke refused to decree satisfaction of this bond on the cross bill, but directed it to be delivered up to be cancelled on the original bill ; grounding his decree upon public and general considerations, the encouragement which transactions of this kind, if allowed, would give to disobedience, and the *fraud* upon parents.

Woodhouse v. Shepley, 2 Atk. 535.

{So where a bond was given by an apprentice of the age of 22, to a female servant of his master of the same age, to marry her, or pay her a sum of money within one year after his master's death, upon which a judgment had been obtained at law, an injunction was granted until the hearing, upon principles of public policy, as the engagement was founded on expectations of benefit under the will of the master (though not a relation) from whom it was kept secret, and was a fraud upon him : and because there was no mutual obligation, the woman not being bound to marry him.

10 Ves. J. 429, Cock v. Richards.}

But where a father treated for the marriage of his son ; and in the settlement on the son, there was a power reserved to the father to jointure whom he should marry, in 200*l.* *per annum*, paying 1000*l.* to the son ; and the

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father afterwards treating about marrying a second wife, the son agreed with the second wife's relations to release the 1000*l.*, and actually did release it; but took a bond from the father, without the privity of the second wife's relations, for the payment of this 1000*l.*; equity refused to set this bond aside, because it would be injurious to the first marriage, which, being prior in time, was to be preferred.

Roberts v. Roberts, 3 P. Wms. 66.]

(F) Marriage how long to continue: And herein of the several Kinds of Divorces; and herein,

1. Of Elopement.

MARRIAGE, for the reasons already given, being to continue during life, a wife can in no (a) case whatsoever leave her husband; for in doing it she breaks the most solemn vow, which is made in the presence of God and in the face of the church, that she will cleave to him during life; and therefore, if a woman runs away from her husband, without any (b) provocation, he shall not answer for any (c) contract she makes, nor be obliged to answer for her necessities.

(a) That wife may have alimony, without any separation, Moor, 874. (b) For if a husband turn away his wife, or by ill usage oblige her to go away, he gives her credit wherever she goes, and must pay for necessities for her. Salk. 118, pl. 10; 6 Mod. 171; 2 Ld. Raym. 1006. [But in this case if the wife, whilst she is living apart from her husband, committ adultery, it hath been holden, that the husband is not bound to receive her again, and consequently, not liable for necessities provided for her subsequent to the time of her being guilty of adultery. Govier v. Hancock, 6 Term Rep. 603.] [And see Ham v. Toovey, 1 Selw. N. P. 278; Morton v. Fazan, 1 Bos. & Pul. 226.] (c) That a court of equity will not assist a wife, who elopes, with alimony. 2 See 3 Pick. 289; 11 Johns. 281; 12 Johns. 293; Bull. N. P. 135; 1 Str. 647, 706.]

Also, if a woman elope from her husband, she loses her dower; but it seems, that elopement was no bar of dower at the common law, though a divorce were sued and obtained for the adultery; but now by the statute of W. 2, c. 34, it is expressly provided, that in such case the wife shall lose her dower; the words of which are, *si uxor sponte reliquerit virum suum, et abierit, et moretur cum adultero suo, amittat in perpetuum actionem petendi dorem suam, quæ ei competere posset de tenementis viri sui si super hoc convincatur, nisi vir suus sponte et absque coactione ecclesiæ eam reconciliet et secum cohabitare permittat, in quo casu restituatur ei actio*; and though she does not go away *sponte*, but is taken against her will, yet if after she consents, and remains with the adulterer, she shall lose her dower; for the remaining with him without reconciliation is the bar of dower, not the manner of the going away; and this was the old way of preventing the crime; for they thought it unfit that a wife, who did not share in the labours of the husband, should have any family provision.

2 Inst. 435; Co. Lit. 32, 40; F. N. B. 150; Roll. Abr. 680; [6 Term Rep. 604.]

In Dyer there is a precedent of such elopement pleaded, and issue taken upon the reconciliation of the husband; but it is there held, that the defendant cannot give in evidence any other elopements than that which is pleaded; for there may be divers elopements, and divers reconciliations, and defendant, at his peril, ought to take issue on one only; that is, as I understand the book, upon the last; for if there be divers reconciliations, yet, if she afterwards elope, the showing that she was once reconciled after elopement will not take away what is set up in bar of dower.

Dyer, 107.

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If a woman be ravished, and remain with the ravisher against her will, she shall not lose her dower; but, if after such ravishment she consent to remain with him, she shall lose it, though the book thinks the contrary; and in the case cited there, she answered only to the elopement, and not to the remaining with the adulterer: but if she voluntarily go away from her husband, though she remain all her lifetime with the adulterer against her will; or if she remain not with him, but he turn her away, yet shall she lose her dower: but if she be reconciled, as the statute ordains, then she shall be endowed, though the husband hath aliened the land in the mean time.

Perk. 354; Brook, 12; Roll. Abr. 680; 2 Inst. 436; Co. Lit. 32 b.

If she elope, and live in adultery in any other the manors or lands of her husband, some (a) books say she shall not lose her dower; either because it cannot be intended a running away from her husband, when she remains in any of his manors or lands; or, because he is to take care that no such live there: but my Lord (b) Coke holds the contrary, and says, though she cohabits with her husband in the same house, yet without his reconciliation *sponte*, she shall lose her dower; *a fortiori* in the other case; for the adultery, and the remaining with the adulterer, are the causes of her being barred of dower; and so, though she do cohabit, and be reconciled to her husband, yet if it be by church censures, she shall lose her dower; though (c) Rolle says, if she elope, and after live with her husband for some years till his death, by his consent, without compulsion of the church, she shall not be barred of her dower, though it be not averred, that she was reconciled to her husband; which seems reasonable enough, the permission to cohabit with him being an argument and proof of the husband's reconciliation.

(a) Perk. 35; F. N. B. 150; Roll. Abr. 680. (b) Inst. 436. (c) Roll. Abr. 680.

If a man grants his wife, with her goods, to another, and she lives with the grantee all the lifetime of the husband, yet she shall lose her dower, by reason of her living with him in adultery; and in that case, where such a grant was pleaded, it was held, 1st, that the grant was void. 2d, That it did not amount to a license, or, if it did, that it was void. 3d, That after the elopement, there shall be no averment admitted *quod non fuit adulterium*; though the grantee and the woman married after the husband's death; and though, in that case, they brought sentence of purgation of the adultery, from the spiritual court, yet it was not allowed against such presumption.

2 Inst. 435; Roll. Abr. 680; Dyer, 106 b, *in margine*.

If the husband's relations keep him from his wife, so that she does not know what is become of him, and give out that he is dead, and thereupon procure her to release all marriages and interests which she can have in him as her husband, and also persuade her to marry again, which she does, with one who has notice that her first husband is alive, but she herself has no notice of it; though she live in adultery with this man, and though her husband be not out of the realm, nor beyond the seas, so that she ought to have taken notice of his being alive; (d) yet, because *non reliquit virum sponte*, as the statute says, but by persuasion of his friends, not knowing herself but that he was dead, this is no such elopement as will bar her of her dower.

Roll. Abr. 680, Green v. Harvey. ¶ (d) Before the wife can marry a second time, her husband must have been continually absent from her for the space of seven years then last past, and shall not have been known to be living by her during that time. See 9 G. 4, c. 31, s. 22.¶

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2. Of the Offence of taking away a Wife, and of Criminal Conversation.

At common law, the husband may have an action of trespass, *de uxore abductâ cum bonis viri*: also, this offence is prohibited by the statute of Westm. 2, c. 13, and a further punishment inflicted than was at the common law; and by Westm. 2, c. 34, it is punishable at the suit of the king, by the words following, *de mulieribus abductis cum bonis virorum suorum habeat rex sectam de bonis sic asportatis*.

2 Inst. 180, 181, 434; Dyer, 256 b

If the wife be *infra annos nobiles*, viz., under the age of twelve years at the time of taking away, some have holden, that the husband shall not have a writ *de uxore abductâ cum bonis viri*; but my Lord Coke holds the contrary, and that she is *uxor* until disagreement.

47 E. 3, Action sur le Statut. 37; 2 Inst. 435, *cont.*

If the wife be taken away, and after be divorced, or if she die, yet the husband shall have his action *de uxore abductâ cum bonis viri*; for in this action he shall not recover his wife, but damages; and he cannot have an action for taking her away as his servant, because the law gives him an action in another form.

2 Inst. 434.

Also, it is held, that though the words of the writ be *rapuit*, &c., yet here it is taken for a violent taking away, and not when carnal knowledge is had; so as this action may be brought against women as well as men.

2 Inst. 435; Cro. Ja. 538, 539, that it may be *cepit et abduxit* as well as *rapuit*.

In an action of trespass *de uxore abductâ cum bonis viri sui*, the jury found for the plaintiff, *quoad* taking some goods, but as to all the rest, for the defendant. It was alleged, 1st, That this action concludes *contra formam statuti*, and so the plaintiff makes his case upon the statute, and has failed in proof; for the verdict is for the defendant, as to the taking away the wife, which is the only matter provided against by any statute. *Sed non allocatur*; for *per cur.*, if a man brings an action at common law, and concludes *contra formam statuti* generally, it shall not hurt; but if he recites a statute in particular, and lays the fact to be *contra formam stat. predict.*, there he must make his case within the statute, else he has failed of his case; and it has been adjudged, that an indictment of barrety concluded *contra formam stat.* is good, though there be no statute that is express against it. 2d, That it does not lay *per quod consortium amisit*. 3d, That the word *ravish* in English implies a carnal knowledge only, (though in latitude it signifies also a forcible taking away;) and so the matter amounts to a felony of the plaintiff's own showing, for which he can have no action of trespass; but to these the court paid no regard, because they were made immaterial by the verdict.

Mich. 17 Car. 2, at Oxford, in B. R., Walker v. Rich, Ent. 1654, in English.

Also, the husband alone may bring an action for the battery, carrying away and detaining of his wife, *per quod solamen et consortium* of his said wife *amisit*; because the action is founded upon the special damage done to himself, and will be no bar to another action brought by baron and feme, or by the feme, after the death of the baron, for the same battery.

Cro. Car. 89, 90, adjudged and affirmed in Cam. Scacc; Cro. Ja. 538, S. P. adjudged; 2 Roll. Abr. 556; Jon. 440; Lit. Rep. 339; 2 Roll. Rep. 51, S. P. adjudged.

In trespass and false imprisonment by baron and feme, *per quod negotia domestica* of the husband *ramanserunt infecta ad grave damnum ipsorum*;

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it was objected, that this being laid as a special damage to the husband, the action ought to have been brought by him alone; but adjudged for the plaintiffs after verdict, being only matter in aggravation of damages.

Salk. 119, pl. 12; 6 Mod. 127; 2 Ld. Raym. 1031, *Russel v. Corne*; [Todd v. Redford, 11 Mod. 264.]

In trespass by baron and feme, for beating the feme, they may declare, that it was *ad damnum ipsorum*, notwithstanding a *feme covert* can have no damages, for this action will survive.

Sid. 387; Palm. 393; 3 Mod. 120; 2 Ld. Raym. 1032.

And as the husband may bring an action for the battery, carrying away, and detaining of his wife; so, also, may he have an action against a person for having criminal conversation with her, although the wife consent to the adulterer; for this is a matter in which she cannot assent, by reason of the injury to the husband, and his interest in her.

7 Mod. 79. [Force and violence being in law supposed to accompany this atrocious injury to the husband, the courts, it should seem, proceeded upon this principle, when they formerly held, that the husband's consent, as being to the commission of an unlawful action, was not available as a justification; and that the defendant could not plead in bar, that the fact was by the plaintiff's license; though it might be given in evidence in mitigation of damages. 12 Mod. 232. But it seems now thought that the husband's privity will defeat the action, though it doth not appear to be any where said that it is pleadable. Bull. N. P. 27; 4 Term Rep. 651.] [So, if the wife be suffered to live as a prostitute with the privity of the husband, and the defendant has thereby been drawn in to commit the act of which the husband complains, the action cannot be maintained. Per Lord Mansfield, C. J., in *Smith v. Allison*, Bull. N. P. 27; *Hodges v. Windham*, Peake, N. P. C. 39. But infidelity in the husband goes only in mitigation of damages, and not as furnishing an answer to the action: so ruled by Lord Alvanley in *Bromley v. Wallace*, 4 Esp. N. P. C. 237.]

[In this action, it is necessary to bring proof of the actual solemnization of the marriage; cohabitation and reputation are not sufficient, nor is any collateral proof whatever. But a copy of the register (a) is sufficient evidence of the fact of marriage; and the identity of the parties married may be proved by other means, and other persons, besides the minister, clerk, and subscribing witnesses.

Morris v. Miller, 4 Burr. 3057; 1 Bl. Rep. 632. (a) *Birt v. Barlow*, Dougl. 171. But among some dissenters marriages are not registered, in which case other proof must necessarily be admitted. Ibid. The fact of a marriage may be established by the sentence of a foreign court, having competent jurisdiction, in a suit properly instituted there, 1 Ves. 159. [As to proof of Jewish marriage, see *Horn v. Noel*, 1 Camp. 61; *Ganer v. Lady Lanesbro'*, Peake, Ca. 17; *Lindo v. Belisario*, 1 Hagg. C. R. 216; of Quakers' marriages, *ibid.* Append. p. 9; of Scotch marriages, 2 Hagg. C. R. 54; of Sicilian marriages, *ibid.* 263; and see head *Foreign Marriages*.]

In an action for criminal conversation, the marriage was proved by a person who was present when it was solemnized in the Fleet, in the year 1737, and the plaintiff's counsel offered to give in evidence the Fleet register, as a confirmation of the testimony. De Grey, C. J., rejected the evidence, for that the whole of the transaction was illegal, and the register made by a person under no tie, and therefore not entitled to credit.

Howard v. Burtenwood, C. B; *Sittings at Westminster*. Tr. 1776; *Espin*. N. P. 343. [In *Doe dem. Passingham v. Lloyd*, Salop Sum. Ass. 1794, *Heath*, J., admitted these books in evidence; but *Le Blanc*, J., in the subsequent case of *Cook v. Lloyd*, Salop Sum. Ass. 1803, *Peake's Evid.* Append. 36, rejected them. See further on the subject, *Lloyd v. Passingham*, 16 Ves. 59; *Coop. C. C.* 155.]

It has been doubted whether the ceremony must not be performed according to the rites of the church; but as this is an action against a wrong-doer,

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and not a claim of right, it seems sufficient, if the plaintiff is of any religious sect, to prove the marriage according to the religious form of that sect.

Woolston v. Scott, *per* Dennison, J., at Thetford, 1753, where plaintiff was an Anabaptist, and recovered 500*l.*, Bull. N. P. 28.

The confession of the wife will be no evidence against the defendant; but a discourse between her and the defendant may be proved. So letters written to her by the defendant may be read as evidence against him, but her letters to him will be no evidence for him. (a)

Baker v. Morley, Guildhall, 1739, Bull. N. P. 28. ¶(a) But where the letters had been written before the time when the criminal facts were proved to have been committed, Lord Kenyon admitted them, the object being to show that the defendant had been solicited by the wife. *Elsam v. Faucett*, 2 Esp. 562. The wife's letters to the husband are, generally, not evidence for him, unless in case of absence before her misconduct, to show her feelings towards him. *Trelawney v. Colman*, 1 Barn. & A. 90.¶

In actions of assault, the time of limitation is *four* years; but the criminal conversation, and not the assault, being the gist of this action, not guilty within *six* years is the proper plea to it under the statute of limitations. And upon the same principle, the defendant is entitled to his costs, though the damages should be under forty shillings. (b)

Cooke v. Sayer, Bull. N. P. 28; 2 Burr. 753. ¶The action for adultery is now considered the subject of an action of trespass. See *Woodward v. Walton*, 2 Bos. & Pul. N. R. 476, recognised in *Ditcham v. Bond*, 2 Maul. & S. 436; and *semble* that the plea of the statute of limitations is "not guilty within four years." See *Blanshard on the Statutes of Limitations*, p. 96, *et seq.* (b) *Batchelor v. Bigg*, 3 Wils. 319; 2 Bl. Rep. 855.]

Also, the husband may not only bring an action at law for the criminal conversation, in which he shall be repaired in damages, but may also proceed in the ecclesiastical court for the adultery and solicitation of chastity: and the proceedings in the one court shall be no bar to the other.

2 Salk. 553. ¶ In the United States, actions for criminal conversation with the wife are of frequent occurrence; and, in most of the states, criminal proceedings by indictment will be supported against the guilty party.¶

But where there was an indictment for assaulting, beating, wounding, and endeavouring to ravish the wife of B, upon which the party was convicted; and afterwards the husband brought an action of trespass for the same cause; and the party being also libelled against in the spiritual court for the same fact, viz., for soliciting her chastity, moved for a prohibition to the proceedings in the spiritual court; though it was urged for the jurisdiction of the spiritual court, that they may punish for the solicitation and incontinence, and that this suit was *pro salute animæ*, the others for fine and damages; yet, a prohibition was granted; for it being an attempt and solicitation to incontinence, coupled with force and violence, it does, by reason of the force, which is temporal, become a temporal crime *in toto*; as if one says, *thou art a whore and a thief*, or *thou keepest a bawdy-house*, which are temporal matters, the party shall not proceed in the spiritual court; whereas if it were only, *thou art a whore*, a libel lies in the spiritual court: so, if it be said of a woman, that she is a bawd only, and not that she keeps a bawdy-house. But *per* Holt, C. J.: If one commit adultery, and the husband bring assault and battery, this shall not hinder the spiritual court; for it is a criminal proceeding there, and no indictment lies at common law for adultery.

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3. Of the several Kinds of Divorces.

Divorces are either such as (a) dissolve a *vinculo matrimonii*, and set the parties entirely at liberty, so that they may marry whom they please afterwards; or such as separate a *mensa et thoro*, from bed and board only; in which last the marriage continues in force, so that if either of them marry any other, such marriage is void.

Co. Lit. 233 a; Cro. Car. 462. β The following is extracted from Bouv. L. D., *Divorce*.—In the United States divorces a *vinculo* are granted by the state legislatures for such causes as may be sufficient to induce the members to vote in favour of granting them; and they are granted by the courts to which such jurisdiction is given for certain causes particularly provided for by law. The courts in nearly all the states have power to decree divorces a *vinculo* for, first, causes which existed and which were a bar to a lawful marriage, as, precontract, or the existence of a marriage between one of the contracting parties and another person, at the time the marriage sought to be dissolved took place; consanguinity, or that degree of relationship forbidden by law; affinity in some states, as Vermont, Rev. Stat. tit. 16, c. 63, s. 1; impotence, idiocy, lunacy, or other mental imbecility, which renders the party subject to it incapable of making a contract; when the contract was entered into in consequence of fraud. Secondly, the marriage may be dissolved by divorce for causes which have arisen since the formation of the contract. The principal of which are adultery, cruelty, wilful and malicious desertion for a period of time specified in the acts of the several states; to these are added in some states, conviction of felony or other infamous crime, Ark. Rev. Stat. c. 50, s. 1, p. 333; being a fugitive from justice, when charged with an infamous crime. Laws of Lo. Act of April 2, 1832. In Tennessee the husband may obtain a divorce when the wife was pregnant at the time of marriage with a child of colour; and also when the wife refuses for two years to follow her husband, who has gone, *bona fide*, to Tennessee to reside. Act of 1819, c. 20, and Act of 1835, c. 26; Carr. Nich. & Comp. 256, 257. In Kentucky and Maine, where one of the parties has formed a connection with certain religionists, whose opinions and practices are inconsistent with the marriage duties. And, in some states, as Rhode Island and Vermont, for neglect and refusal on the part of the husband (he being of sufficient ability) to provide necessaries for the subsistence of his wife. In others habitual drunkenness is a sufficient cause. In some of the states divorces a *mensa et thoro* are granted for cruelty, desertion, and suchlike causes, while in others the divorce is a *vinculo*. When the divorce is prayed for on the ground of adultery, in some and perhaps in most of the states, it is a good defence, 1st, that the other party has been guilty of the same offence; 2, that the husband has prostituted his wife, or connived at her amours; 3, that the offended party has been reconciled to the other by either express or implied condonation; 4, that there was no intention to commit adultery, as when the party supposing his or her first husband or wife dead, married again; 5, that the wife was forced or ravished. The effects of a divorce a *vinculo*, on the property of the wife, are various in the several states. When the divorce is for the adultery or other criminal acts of the husband, in general the wife's lands are restored to her; when it is caused by the adultery or other criminal act of the wife, the husband has in general some qualified right of curtesy to her lands; when the divorce is caused by some pre-existing cause, as consanguinity, affinity or impotence, in some states, as Maine and Rhode Island, the lands of the wife are restored to her. 1 Hill. Ab. 51, 52. See 2 Ashm. 455. When a divorce a *vinculo* takes place, it is, in general, a bar to dower; but in Connecticut, Illinois, New York, and, it seems, in Michigan, dower is not barred by a divorce for the fault of the husband. In Kentucky, when a divorce takes place for the fault of the husband, the wife is entitled as if he were dead. 1 Hill. Ab. 61, 62. γ (a) Where such sentence of divorce is given in the spiritual court, the issue shall be perpetually bound, so long as that stands in force: and shall not at common law be admitted to make any proof to the contrary. 7 Co. 43, Ken's case; Jenk. 289; Cro. Ja. 186. β By a divorce a *mensa* the marriage is so far dissolved that the wife may maintain her rights by action upon causes which have arisen since the divorce, and is liable to the same extent to be sued alone. Dean v. Richmond, 5 Pick. 461. γ

A divorce by reason of (b) precontract (c) dissolves a *vinculo matrimonii*; for the party being under a prior engagement the second marriage is null

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and void, and, consequently, the issue of such second marriage are bastards.

47 E. 3, 78; 18 H. 6, 34; Roll. Abr. 360. (b) *Per* 32 H. 8, c. 38, no divorce could be for any precontract after marriage solemnized in the face of the church and consummated with bodily knowledge, or fruit of children; but *quoad* this matter, this was repealed *per* 2 & 3 E. 6, c. 23, and the whole act *per* 1 & 2 Ph. & M. c. 8, § 20, and the 32 H. 8, c. 38, *quoad* so much only as was not repealed by 2 & 3 E. 6, c. 23, was revived *per* 1 Eliz. c. 1, § 11, so that *quoad* this matter, the 32 H. 8, c. 38, stands repealed.—(c) *Qu.* If since 26 Geo. 2, c. 33, and 4 Geo. 4, c. 76, any such divorce can now be had, as no suit or contract of marriage, to compel the same, can be supported in the ecclesiastical courts? || 1 Blackst. Com. 435.]]

So, a divorce by reason of consanguinity and affinity dissolves a *vinculo matrimonii*, such marriage being against the divine positive law, and therefore void.

Co. Lit. 235. Vide *supra*, letter (A).

So, a divorce by reason of frigidity, or impotence, dissolves the marriage absolutely, (a) because the end of the contract cannot be answered.

Co. Lit. 235; 5 Co. 98. But for this kind of divorce, vide 5 Co. 9; Moor, 225; 2 Leon. 169; And. 185; Dyer, 178, pl. 40. (a) But if a man be divorced from a woman *propter perpetuam generandi impotentiam*, and then marry another, and have issue by the second marriage, which continues without divorce, the issue are lawful; for a man may be *habilis et inhabilis diversis temporibus*; and the second marriage is not avoided by any divorce, and therefore stands good in law. 5 Co. 9; Bury's case, Noy, 72; Moor, pl. 366, S. C. by the name of *Morris v. Webber*.

A divorce *causâ professionis* is reckoned by some amongst the causes that dissolve the *vinculum matrimonii*, the monks and nuns, by their being professed, having vowed perpetual chastity; but others hold, that in some cases it does not, and that in such the wife shall be endowed; but it is said, this divorce is now taken away by 32 H. 8, c. 38, and other acts, made on purpose to take away that and other scrupulous divorces.

Roll. Abr. 681; 2 Leon. 169; Moor, 226; Cro. Car. 462; 2 Inst. 684, 687.

And though these kinds of divorces dissolve a *vinculo matrimonii*, yet the issue between the parties are not bastards, till there be a divorce actually had; for though such marriages be unlawful, yet they remain good till sentence of divorce be pronounced; and, consequently, the issue must be esteemed legitimate till such a dissolution.

Roll. Abr. 357.

Also, though a divorce *causâ præcontractus*, *causâ consanguinitatis*, *causâ affinitatis*, or *causâ frigiditatis*, dissolve the *vinculum matrimonii*, and leave the parties at liberty to marry again; yet, if either of the parties die before such sentence of divorce be actually pronounced, it cannot be pronounced (b) after; and therefore if the husband die before such divorce, the issue are legitimate, and his wife *de facto* shall have dower; for it was *legitimum matrimonium quoad dotem*, and the bishop ought to certify, that they were *legitimo matrimonio copulati*.

Roll. Abr. 681; Co. Lit. 32 a, 33 b; 7 Co. 70; 5 Co. 98; 2 Leon. 169; || Elliott v. Gurr, 2 Phil. Rep. 20. || (b) But though in case of incest a divorce cannot be had after the death of one of the parties, so as to bastardize the issue, yet the spiritual court may proceed to punish the survivor for the incest. Carth. 271; 4 Mod. 182; Salk. 121.

¹ A divorce *propter adulterium* does not dissolve the marriage, but only makes a separation *a mensâ et thoro*; (c) lest married persons should commit the crime in order to dissolve the marriage; and though such a divorce does not bastardize the issue, yet the children born in such a state of separation are *primâ facie* not presumed to be the husband's unless it can be proved

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that they cohabited afterwards; but such divorce does not bar the wife of dower.(d)

Co. Lit. 32 a; 33 b, 235; Cro. Car. 462; 7 Co. 42; Noy, 108. ¶(c) The committee of a lunatic may sue for a divorce on behalf of the lunatic. *Parnell v. Parnell*, 2 Hagg. C. R. 169. § Where the husband was resident in India apart from the wife, living in England, the court allowed the father of the husband to be appointed curator *ad litem*, in a suit for divorce by reason of adultery. *Morgan v. Morgan*, 2 Curt. 679. § A woman divorced *a mensâ et thoro*, and living separate, cannot be sued as a *feme sole*. *Lewis v. Lee*, 3 Barn. & C. 291.¶ [(d) So laid down as to the point of dower, Tr. 10 E. 3, pl. 24; 1 Ro. Rep. 426, *arguend.*; and *Powell v. Weeks*, Noy, 108; Godb. 145, S. C. by the name of *Lady Stowell's case*; 1 Roll. Abr. tit. *Baron and Feme*, A. pl. 21, S. C. by the name of *Stowell v. Wikes*; and Cro. Car. 463, S. C. cited. But Mr. Hargrave, in note 9, on Co. Lit. 32 a, saith, that according to Rolle's report of this last case, 1 Roll. Abr. 681, it was adjudged, that the divorce for adultery was a bar of dower. And Lord Thurlow, in the debate in the House of Lords upon Shadwell's Divorce Bill, is reported to have said, that in a divorce *a mensâ et thoro* for adultery, a woman forfeits her dower. Woodf. Parl. Rep. vol. 11, p. 339.—The reason why a divorce *propter adulterium* does not dissolve the marriage is, that the ecclesiastical court cannot divorce *a vinculo matrimonii* for any cause arising *subsequent* to the marriage: for if there has been a marriage *de jure*, it is not competent to that court to rescind it. In fact, the sentence of the spiritual court in a divorce *a vinculo matrimonii* is not so properly a dissolution of the contract, as a declaration of its absolute nullity *ab initio*. But the legislature, uncircumscribed in its powers, has frequently for adultery wholly dissolved the conjugal union. It has gone so far, too, in some cases, as to bastardize children born after a certain time prior to the passing of the act. See Wakeman's and Briscoe's Divorce Bills, in 1796; and though it has in general made some provision for the unhappy woman whose criminal conduct has occasioned its interference, yet, where the case has been of a very atrocious nature, it has left her wholly at the mercy of her injured husband. See Shadwell's Divorce Bills, in 1796, and Woodf. Parl. Rep. *ubi supra*.—In the debate which took place upon Mr. Shadwell's Bill, the Lords Thurlow, Loughborough and Grenville expressed a wish, that the subject of divorce for adultery, were submitted by an enactment of the legislature to some regular judicial court, where the crime and the provocation to the crime would be carefully balanced, where facts and circumstances could be investigated with the temper, the deliberation, the caution, that ought to accompany such an investigation. ¶The first bill of this description appears to have been passed in the reign of Edward VI., from which period to the Revolution, few, if any, are to be found. Since the 12th Will. & M. there have been above 150, and 64 since the commencement of the present century. The commissioners appointed by Hen. VIII. and Edward VI., for reforming the ecclesiastical law, in their elaborate report, recommend divorces *a mensâ et thoro* to be abolished, and complete divorces to be allowed for adultery, desertion, bad treatment, &c., the innocent party to be allowed to marry again, the offending party to be punished by banishment or imprisonment. When this reformation failed, the practice of divorce bills originated. See *Reformatio Legum Ecclesiasticarum*, 1640; Gibson's Cod. J. E. p. 536; Burnet, Hist. Ref. 11, p. 315.¶

§ Where the parties were white persons, and the complainant was charged by the oath of the defendant as the putative father of her bastard child, and the complainant thereupon believing the child to be his, married her, to obtain his discharge from the proceedings against him under the bastardy act, and he subsequently ascertained that the child was a mulatto, and that the defendant knew that fact at the time she swore it to be his, she then having been delivered and seen the child; held, that the complainant was entitled to a decree declaring the contract void, on the ground that his consent was obtained by fraud.

Scott v. Shufeldt, 5 Paige, 43.

A marriage with a lunatic is absolutely void, yet, as well for the sake of the good order of society, as for the quiet and relief of the party, its nullity should be declared by the decision of a court of competent jurisdiction.

Wrightman v. Wrightman 4 Johns. Ch. 343. See 12 Mass. 363.

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A divorce will not be granted for the adultery of the wife, committed through the husband's procurement,(a) nor where the libellee was insane,(b) nor where the parties resided in another state, at the time of the commission of the offence,(c) nor unless a legal marriage be proved.(d)

(a) *Pierce v. Pierce*, 3 Pick. 299. (b) *Broadstreet v. Broadstreet*, 7 Mass. 474. (c) *Hopkins v. Hopkins*, 3 Mass. 158; *Carter v. Carter*, 6 Mass. 263. (d) *Mangue v. Mangue*, 1 Mass. 240.g

¶The law of Scotland as to divorces for adultery, differs from the English law. In that country the courts grant a divorce *a vinculo matrimonii*, on the ground of adultery. A question of the highest importance has hence arisen; viz., whether the Scotch courts have authority to dissolve by such divorce a marriage solemnized in England, or whether they ought to look to the law of the country where the marriage was made, and to hold it indissoluble in Scotland because it is so in England. The Scotch Consistory Courts, in various cases, have conceived themselves bound by this latter rule, and have offered to the English parties to grant a divorce *a mens et thoro*, but refused more. However, these decisions, when brought before the Court of Session, on appeal, have been uniformly reversed, and divorces *a vinculo* have been granted. The judges of England, on the other hand, have determined that such sentences of divorce are invalid. And where a man married in England, and then obtained a divorce *a vinculo* for adultery in Scotland, and then re-married in England, they held him guilty of bigamy; and that the exception in favour of parties divorced, in the statute 2 Jac. 1, c. 11, § 3, only applied to divorces by ecclesiastical courts, within the limits to which the act extends.

See the cases fully reported, *Fergusson's Reports of Decisions in Actions of Divorce*; *Rex v. Lolly*, Russ. & Ry. 237; 1 Russ. on Cri. 190; and see *Tovey v. Lindsay*, 1 Dow. R. 117. ¶Vide *anté*, vol. 2, p. 110, tit. *Bigamy*; Story, Conf. of Laws, § 203; *McCarthy v. De Caix*, 3 Hagg. Ecc. R. 642, note; *Hopkins v. Hopkins*, 3 Mass. 158; *Carter v. Carter*, 6 Mass. 268; *Inhabitants of Hanover v. Turner*, 14 Mass. 227; *Barber v. Root*, 10 Mass. 265; 1 Johns. 431; *Pawling v. Bird's Executors*, 13 Johns. 192.g

¶If a citizen of Massachusetts removes into another state for the purpose of obtaining a divorce *a vinculo* from his wife, on a ground which would not in that state support a decree, and then returns to Massachusetts, the decree by him so obtained is of no effect there.

Inhabitants of Hanover v. Turner, 14 Mass. 229.

The effects of a divorce made in a foreign state, which is recognised in Massachusetts as valid, are the same as if the decree had been made in that state. But the decrees of divorce of a foreign tribunal, when the parties are not domiciled nor resident, for offences not committed there, nor against their policy, nor in violation of any contract there subsisting, are not valid in the state where the parties are domiciled.

Barber v. Root, 10 Mass. 260.g

A divorce *propter sævitiam* or *metum* is of the same nature, and does not dissolve the bond of matrimony; but is only a provision for the woman's safety, that she may avoid her husband's cruelty and ill-usage.

Cro. Car. 462. ¶What cruelty is held a sufficient ground, see *Harris v. Harris*, 2 Hagg. C. R. 148; *Evans v. Evans*, 1 Hagg. C. R. 36; *Holden v. Holden*, 1 Hagg. C. R. 453; *Kirkman v. Kirkman*, Ibid. 409. ¶2 Hagg. Suppl. 1; S. C. 4 Eccles. R. 238; 2 J. J. Marsh. 324; 1 Mc Cord, Ch. R. 205; 2 Chit. Pr. 461; *Poynt. on Mar. and Div.* ch. 15, p. 208; *Shelf. on Mar. and Div.* 425; 1 Hagg. Cons. R. 37; 2 Hagg.

Master and Servant, [and Apprentice.]

Cons. R. 154; 1 Phillim. 111, 112; 8 N. H. Rep. 307; 1 Briand, Méd. Lég. prem. partie, c. 2, art. 3; Bouv. L. D. *Cruelty.g*

¶The wife will not be entitled to this divorce if her own conduct has been provoking, and contrary to the duty of a wife.

Waring v. Waring, 2 Hagg. C. R. 153.¶

§ Legal *sevitia*, to be the ground of separation, must be of violence, dangerous to life, limb, or health, or a reasonable apprehension of it; but when some of the articles are established by sufficient evidence, although there is a failure as to others, it is sufficient.

Lockwood v. Lockwood, 2 Curt. 281.

The interest of a father in the legitimacy or illegitimacy of the issue of his daughter, held to be a sufficient interest to entitle him to support a civil suit to annul her marriage with the husband of a deceased sister.

Ray v. Sherwood, 1 Curt. 193.g

{As to the validity and effect of articles for voluntary separation, see 1 Burr. 542, Rex v. Mead; 1 Str. 478, Lister's case; 3 Bro. C. C. 614, Guth v. Guth; Ibid. 619, n., Fletcher v. Fletcher; 3 Ves. J. 352, Legard v. Johnson; 10 Ves. J. 191, Cooke v. Wiggins; 11 Ves. J. 526, Lord St. John v. Lady St. John; 2 Dick. 791, Wilkes v. Wilkes; 2 East, 283, Lord Rodney v. Chambers, and the cases referred to *ante*, vol. ii, p. 48.}

MASTER AND SERVANT, [AND APPRENTICE.]

THE relationship between a master and a servant, from the superiority and power which it creates on the one hand, and duty, subjection, and, as it were, (a) allegiance, on the other, is in many instances applicable to other relationships, which are both in a superior and a subordinate degree; such as lord and bailiff, principal and attorney, (b) owners and masters of ships, merchants and factors, and all others having authority to enforce obedience to their orders from those whose duty it is to obey them, and whose acts, being conformable to their duty and office, are esteemed the acts of their principals. But these being treated of under their proper heads, we shall here consider this relationship, as it more particularly affects masters and those who are more properly called servants and apprentices.

(a) Hence by the statute 25 E. 3, statute 5, c. 2, it is petit treason for a servant to kill his master; in the construction whereof it hath been held to extend to a mistress, or master's wife. ¶But the stat. 25 E. 3, st. 5, c. 2, is now repealed by 9 Geo. 4, c. 31, § 1. By the second section of which act, it is enacted, that petit treason shall be treated in all respects as murder.¶ Plow. 86; 3 Inst. 20; 4 Co. 46. (b) Where a master of a ship is expressly said to be a servant to the owners, and the owners shall answer for him as such. 3 Mod. 323; 2 Vern. 643.

(A) Of the Manner of Hiring and Binding a Person Servant or Apprentice, §and for what Services.g

§1. *Manner of Binding and by whom it is to be made.*

2. *For what Services.g*

(A) Of the Manner of Hiring and Binding, &c.

(B) Who may serve, or are capable of binding themselves Servants or Apprentices, and of the Power of the Master over the Apprentice.*g*

§ 1. *Who may serve and bind themselves.*

2. *Power of Master over the Apprentice.*g**

(C) Of the Jurisdiction of Justices of the Peace in binding out Apprentices, in obliging Masters to provide for them, in compelling them to refund the Money had with them, and in discharging Apprentices from their Masters, [and also in settling Disputes between Masters and Servants.]

(D) Of the Necessity of serving an Apprenticeship, as a Qualification to follow a Trade within the 5 Eliz. c. 4: And herein,

1. *What shall be said a Trade, which a Person is prohibited to follow, within the Statute.*

2. *What Manner of following or exercising a Trade shall be said within the Statute.*

3. *What Kind of Service will be a sufficient Qualification within the Statute.*

4. *By whom the Offence of following a Trade without a Qualification is cognisable.*

5. *Of the Form of the Proceedings in order to a Conviction, for following a Trade without being qualified.*

(E) Of assigning and turning over Apprentices to other Masters.

(F) Of making Apprentices free.

(G) How Apprentices are to be taken Care of when their Masters happen to die.

§ (G 2) Of the Dissolution of the Relation between Master and Apprentice.*g*

(H) Of Servants' Wages, how recoverable.

(I) What Acts of the Servant are deemed the Master's: of which the Master may take Advantage.

(K) What Acts of the Servant shall be deemed the Master's, for which the Master shall answer and be bound.

(L) For what Acts of his shall the Servant himself answer to others.

(M) For what Acts of his shall the Servant answer, and be responsible to his Master: And herein,

1. *Where by an implied Trust or Confidence a Servant shall answer in a Civil Action.*

2. *Where Servants and Apprentices shall be punished criminally, for Acts done in relation to their Masters.*

(N) Of the Master's authority over his servant, and how far he may correct and punish him.

(O) Of the Master's Remedies against others for enticing away, and other Injuries done, in relation to his Servant.

(P) What a Master or Servant may justify doing in each other's Defence.



(A) Of the Manner of Hiring and Binding a Person Servant or Apprentice, and for what Service.*g*

§ 1. *Manner of Binding, and by whom it is to be made.*g**

THE retaining a menial servant and taking an apprentice differ greatly as to the manner; for as to the first it may be by parol (a) contract, or agreement only, and therefore such a one may be discharged by parol, and without writing; but an apprentice must be by deed, (b) and cannot be discharged without deed, and must be retained by the name of an apprentice {1} expressly, otherwise he is no apprentice, though bound.

21 H. 6, 23; 3 Keb. 304; 6 Mod. 182; Ld. Raym. 1117; Salk. 68, pl. 7. (a) That by the contract he is considered as servant, though he has not yet actually done any

(A) Of the Manner of Hiring and Binding, &c.

service for his master. Dalt. Just. c. 58. And on such contract the master may have an action against him, if he either refuses to serve at all, or departs before the time is expired for which he agreed to serve. Dalt. Just. c. 58. And where the master has his remedy against another detaining him, vide *infra*, letter (D). (b) β A written agreement, not sealed, signed by the minor, his mother and step-father, and also by the master, stipulating that the minor shall go on a whaling voyage, and do duty on board the ship, and that the master shall furnish an outfit, &c., does not constitute the contract of apprenticeship. Nickerson v. Easton, 12 Pick. 110. An agreement without a seal is not an indenture within the meaning of the act of Pennsylvania of 1770. *Ex parte Ruggles*, 10 S. & R. 416. See Dowd v. Davis, 4 Dev. 61; Hall v. Gardner, 1 Mass. 172; Squire v. Whipple, 1 Verm. 69. γ *Contra*, 8 Term, 379, The King v. Inh. of Laindon; 1 East, 531, The King v. Inh. of Rainham; 2 East, 298, The King v. Inh. of Eccleston. And see 8 East, 25, The King v. Inh. of Cromford.}

{An indenture binding an adult as an apprentice, which is not executed by her, but only by her father-in-law and the master, though with her consent, does not make her an apprentice.

9 East, 295, The King v. Inh. of Ripon.}

A servant may hire himself for what time he pleases; but it is said, that if a man retain a servant generally, without expressing any time, the law will construe it to be for one year, because that retainer is according to law.

Co. Lit. 42 b, F. N. B. 168; H. 1 Bl. Com. 425. $\parallel$ But see Cutter v. Powell, 6 T. R. 320, and Selw. N. P. 1090, 6th ed., where it is said, if a servant be hired in the general way, he is considered to be hired with reference to the general understanding upon the subject, viz. that he shall be entitled to his wages for the time he shall serve, though he do not continue in the service during the whole year. $\parallel$

Also, it hath been adjudged, that if a person retain a servant for a year, *et sic de anno in annum quamdiu ambabus partibus placuerit*, that after the second year begun, the retainer holds good for another year; and that it shall not be a retainer for a year certain, and afterwards at will.

2 Keb. 16, Cotes v. Sadler.

And as an apprentice can only be bound by deed, so it is necessary, according to the custom of (a) some places, that such deed or indenture be enrolled; as, in London, if the indentures be not enrolled before the chamberlain within a year, upon a petition to the mayor and aldermen, &c., a *scire fac.* shall issue to the master, to show cause why not enrolled; and if it was through the master's default, the apprentice (b) may sue out his indentures, and be discharged; otherwise, if through the fault of the apprentice; as, if he would not come to present himself before the chamberlain, &c., for they cannot be enrolled, unless the apprentice be in court and acknowledge them.

2 Roll. Rep. 305; Palm, 361; Mod. Rep. 271, pl. 22. (a) Where persons binding themselves apprentices to mariners, their indentures are to be enrolled in the next corporate towns. 3 Lev. 389. β See Nickerson v. Easton, 12 Pick. 110. γ (b) Where it is necessary in order to prove him an apprentice. Skin. 579, pl. 2. And see a certificate relating to the enrolment of apprentices in vol. 3 of Lord Bacon's Works, 4to, 353. [By 5 G. 3, c. 46, § 18, the chamberlain, or other proper officer of every city, &c., where any apprentice obtains his freedom by servitude, shall enrol the name of every apprentice, who shall be placed out within such city, the name of the master and mistress, the apprentice fee, the trade, and the dates of the indenture, on pain of twenty pounds. And by § 41, all printed indentures shall have the notice or memorandum described in the act, printed under the same.]

But it hath been held, that this custom does not extend to one bound apprentice to a waterman, under twenty-one years of age; for the company of watermen are but a voluntary society, and being free of that does not make one free of London.

6 Mod. 69; Salk. 68, pl. 8.

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[By 5 Eliz. c. 4, § 25, an apprenticeship can only be created by *INDENTURE* (a): therefore, where the writing by which one person agreed to serve another for seven years began, "THIS INDENTURE witnesseth," but was in fact a *deed poll*, and not an indenture, it was holden, that the master could not maintain any action upon it against a person for enticing away and detaining *his* APPRENTICE.

[(a) But this section relates only to apprentices taken by husbandmen.] Smith v. Birch, 1 Sess. Ca. 222. [By stat. 54 G. 3, c. 96, § 2, (an ill-worded section), § 25, of stat. 5 Eliz. c. 4, *appears* to be wholly repealed. It contains, however, a proviso (§ 4) that the act shall not tend to defeat, alter, or prejudice the custom, &c., of the city of London, concerning apprentices; or the ancient custom, &c., of any city, town, corporation, or company, lawfully constituted, or any by-law, or regulation of any corporation or company.]

§ A legal apprenticeship can be created only by deed.

Squire v. Whipple, 1 Verm. R. 69.

So, an *agreement* to execute indentures of apprenticeship will not constitute a sufficient binding under 5 Eliz. c. 4, although a service of seven years is performed under it; for there must be an *indenture* duly executed: and of course, where there is neither indenture nor agreement, but only a binding by parol, there can be no apprenticeship. (b)

Rex v. Stratton, Burr. Set. Ca. 272: Rex v. Whitchurch Canoncorum, 1 Const's Bott's P. L. 464, pl. 650, S. P.; Rex v. Mannam, Burr. Set. Ca. 290. [(b) These cases were decided before the passing of the 54 G. 2, c. 96, § v.]

An indenture, however, though lost, shall be sufficient, on proof being made, that it was duly executed: (c) but a declaration of the mother, that she heard the apprentice's father say he was bound by indenture, is not sufficient evidence of the fact.

Case of St. Saviour's, Southwark, 1 Const's Bott's P. L. 463, pl. 648. [(c) In the case of parish apprentices, it is provided by § 1 of 42 G. 3, c. 46, that the overseers of the poor shall keep a book for entering the name of every apprentice bound out by them, and each entry shall be signed by two justices; and by § 3, it is enacted, that the books may be inspected, and shall be deemed evidence.]

It is provided by 31 G. 2, c. 11, that although the instrument by which the contract is formed should not be indented, the apprentice shall nevertheless gain a settlement under it.

[(The duties imposed by 8 Ann. c. 9, on indentures of apprenticeship, having by § 33 of that statute been placed under the management of the commissioners of the stamp-office, were repealed by 44 Geo. 3, c. 98, and new stamp duties were imposed by that act: these were again repealed by 48 Geo. 3, c. 149, and the new duties granted by that act were again repealed by stat. 55 Geo. 3, c. 184, by the schedule of which act, part 1, the following stamp duties are payable upon indentures of apprenticeship:—

If the sum of money, or the value of any other matter or thing which shall be paid, given, assigned, or conveyed, or be secured to be paid, given, assigned, or conveyed to or for the use or benefit of the master or mistress, with or in respect of such apprentice, clerk, or servant, or both the money and value of such other matter or thing shall not amount to 30*l*. £1 0 0

If the same shall amount to -	$\left\{ \begin{array}{l} £ 30 \\ 50 \\ 100 \\ 200 \\ 300 \\ 400 \end{array} \right\}$	and not amount to	$\left\{ \begin{array}{l} £ 50 \\ 100 \\ 200 \\ 300 \\ 400 \\ 500 \end{array} \right\}$	-	2	0	0
				-	3	0	0
				-	6	0	0
				-	12	0	0
				-	20	0	0
				-	25	0	0

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If the same shall amount to -	{ £500 600 800 1000 or upwards	and not amount to	{	£600	-	30	0	0
				800	-	40	0	0
				1000	-	50	0	0
				-	-	60	0	0

And where there shall be no such consideration as aforesaid moving to the master or mistress; if the indenture or other instrument shall not contain more than 1080 words, - - - - - £1 0 0

And if the same shall contain more than that quantity - - - 1 15 0

The *exemptions* are "of indentures or other instruments placing out *poor* children apprentices, by or at the sole charge of any parish or township, or by or at the sole charge of any public *charity*, or pursuant to the 32 G. 3, c. 57, for the further regulation of parish apprentices.

"And all assignments of such poor apprentices; provided there shall be no such valuable consideration as aforesaid given to the new master or mistress, other than what may have been or shall be given by any parish or township, or by any public charity."||

By 8 Ann. c. 9, § 35, the moneys paid or agreed to be paid with every clerk, apprentice, and servant, shall be truly inserted and written in words at length in the indenture or other writing which contains the covenants, &c. for such service; and such indenture or writing shall bear date upon the day of signing, sealing, or otherwise executing the same, upon pain to every master or mistress of double the sum given, one moiety to the king, and the other to the informer; with full costs to be recovered by action, &c. within one year after the term appointed for the service is expired.

By § 36, all indentures, &c. executed in the bills of mortality, shall be stamped at the head stamp-office, and the duties paid to the receiver-general within one month from the date of the indenture.

By § 37, all such indentures, &c. executed in any other part of Great Britain shall, at the option of the party, be sent either to the head stamp-office within the bills of mortality, or to some of the collectors residing without the bills of mortality, within two months after the date of such indentures, and the duties paid thereon: and in case the said payment shall be made immediately to the receiver-general, the indenture shall be forthwith stamped; but, if made to the collector, he shall endorse on such indenture a receipt for the moneys so paid in words at length, bearing date the day on which such payment shall be made, and subscribe his name thereto, and then deliver back the indenture to the bringer thereof.

By § 38, the indenture, &c. so endorsed, if made within fifty miles from the bills of mortality, shall, within three months after the date thereof, be brought or sent to the stamp-office in London, and immediately stamped, as the case shall require.

By § 39, all indentures, &c. wherein shall not be truly inserted the full sum (a) received with such apprentice, &c., or which shall not be stamped according to the tenor of this act, within the time limited, shall be void, and not available in any court; and the apprentice be incapable of being free of any city, &c., or of following the intended trade.

||(a) By full sum here is meant the insertion of a sum not less than that upon which duty is really payable. *Rex v. Keynsham*, 5 East, 309.||

But by § 40, this act shall not extend to apprentices put out at the common public charge of any parish.(b)

||Vide 55 G. 4, c. 184, § 10. (b) And, therefore, in *parish* indentures the sum to be paid need not be inserted. *Rex v. Oadly*, 1 Barn. & A. 477.||

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By § 43, no indenture required by this act to be stamped shall be given in evidence in any suit brought by the parties, unless the party producing it do first make an oath, that the sums inserted were all that were paid on behalf of the apprentice.

And by § 45, where any thing, not being money, shall be given, &c. to any master or mistress with any apprentice for whom a duty is chargeable by this act, the duty shall be paid to the full value of the thing given.

By 9 Ann. c. 21, § 66, if any master or mistress shall neglect to pay the rates or duties, they shall forfeit fifty pounds, one moiety to the king, the other to him who shall sue for the same, &c.

If a person agrees to go apprentice to another, and enters upon the service accordingly, and after a trial of three months is bound apprentice by indenture, but the indentures are dated at the time he entered on the service, and not at the time of the execution, the indentures are absolutely void to all intents and purposes, by 8 Ann. c. 9, § 35.

Cuerden v. Leland, 1 Bott's P. L. 545.

So also, where a mother bound her son apprentice, and paid twenty shillings to the master, which sum was recited in the indenture pursuant to 8 Ann. c. 9, § 45, but the sixpence duty was never paid, nor the indentures stamped with the additional stamp, they were held void.

Cuerden v. Leland, 1 Bott's P. L. 545.

So also, if on production of the indentures they are not stamped, though the duty paid.

Rex v. Lanvari Dyffryn Clwyd, Burr. Set. Ca. 236; *Rex v. Ditchingham*, 4 Term Rep. 769; [and see *Rex v. Chipping Norton*, 5 Barn. & A. 412.]

So, an agreement of apprenticeship, entered into with a view to save the expenses of indentures, and to avoid the payment of the duties imposed by the above statute of 8 Anne, is void and of no effect.

Rex v. Highnam, 1 Const's Bott's P. L. 495, pl. 689.

But, in cases where the indenture is not produced, and evidence is given that indentures actually existed, and were duly executed, the court will presume that they were regularly stamped, and the duty paid.

Rex v. East Knoyle, Burr. Set. Ca. 151; {7 East 45, *The King v. Inh. of Long Buckly*.}

But, before parol evidence is given of the contents of indentures, proof must be made of their being lost; and it seems, that some evidence ought to be given, not only that they were duly executed, but that the duty was paid.

Rex v. Badly, 1 Const's Bott's P. L. 490, pl. 687.

The additional stamp is only required, where the money or other thing is given, paid, contracted, or agreed for, with, or in relation to, the apprentice; and therefore, when the mother of a lad proposed to put him out an apprentice, but the intended master refused to take him, because he wanted clothes, and the grandfather agreed to give the master thirty shillings, which the master was to, and did, lay out for the boy in clothes, the court held, that there was not any stamp necessary on this account; for the statute means money given for the benefit of the master; and in this case he laid out the money merely as an agent to the boy's friends.

Rex v. Northrowam, 2 Stra. 1132; *Rex v. St. Peter's, Chester*, 1 Const's Bott's P. L. 486, pl. 682, S. P.; *Rex v. St. Petrox*, in Dartmouth, 4 Term Rep. 196, S. P.

So, where in an indenture sixpence was the sum mentioned to have been given to the master as a fee with the apprentice; the court resolved, that

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the statute intended, that when more than fifty pounds was paid, a twentieth part thereof should be paid for duty, and a fortieth part when the sum was under fifty pounds; but that in the present case, there would not, under this mode of calculation, be any coin small enough to pay the duty in; and *de minimis non curat lex*.

Baxter v. Faulam, 1 Wils. 129; *Rex v. Yarmouth*, Burr. Set. Ca. 379, S. P.

So also, where in indentures of apprenticeship there was a covenant that the father would provide the apprentice meat, drink, washing, lodging, and clothes, and that the master should pay the apprentice five pounds a year in consideration of his faithful services and of the due performance of the covenants; the court seemed to think that the indentures did not require a stamp under the statute of 8 Anne.

Pennington v. Socal, 1 Const's Bott's P. L. 88, pl. 686.

But this point was afterwards more solemnly decided. Thus, where it was agreed in the indentures, that "sufficient meat, drink, apparel of all kinds, physic, surgery, and lodging, and all other necessities during the term, should be found and provided for the apprentice by the father, for which purpose the master was to allow him four shillings a week during the term;" the court held the indentures good, although they were not stamped, and no duty paid.

Rex v. Portsea, Burr. Set. Ca. 834.

So also, where in an indenture the apprentice covenanted, that "he would at his own expense provide for himself meat, drink, washing, lodging, apparel, and physic, at all times during the term; and the master covenanted to pay him five shillings a week for the first three years, and seven shillings a week for the remainder of the term;" it was ruled, that the indenture did not require the additional stamps imposed by 8 Anne.

Rex v. Walton Dale, 3 Term Rep. 515. ¶And a master stipulating for fourpence out of every shilling of the earnings of his apprentice, is no benefit to him within the statute of Anne, for which an additional duty is to be paid, he being by law entitled to the whole. *Rex v. Wantage*, 1 East, 601.¶

And where an indenture was, that the father of the apprentice would, at his own charge, find and provide for his own son, good, competent, and sufficient meat, drink, and lodging, every Sunday in the year during the term; and would provide him with clothes and apparel of all sorts, (except working aprons and shoes;) and the master covenanted to provide him with meat, drink, and lodging, except on Sundays, during the term; the court thought the point so clearly settled, that they would not suffer it to be argued.

Rex v. Leighton, 4 Term Rep. 732. {Vide 1 East 601, *The King v. Inh. of Wantage*.}

So also, money given by parish officers, (in the case of a voluntary binding,) as the consideration of the pauper's being taken apprentice, is not liable to the duty imposed by the 8 Anne; (a) for it comes within the exception of § 40, as being at the public charge of the parish.

Rex v. St. Petrox, in Dartmouth, 4 Term Rep. 196. ¶(a)And is exempted from duty in the stamp act, 55 G. 3, c. 184.¶

By 18 G. 2, c. 22, § 24, if any master or mistress neglect to pay the rates and duties within the respective times limited by 8 Ann. c. 9, and 9 Ann. c. 21, they shall further forfeit for every neglect double the rates and duties charged.

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By 18 G. 2, c. 22, § 25, if any apprentice, &c., on the neglect of his master or mistress to pay the rates and duties, shall, on notice to his master or mistress, pay the said rates and duties, and also the penalties and forfeitures of this act, within one year after the same became incurred, such apprentice may, within three months afterwards, demand back the apprentice-fee; and if the same be not paid within three months after such demand, he may recover the same by action, and shall be discharged from his apprenticeship.

And by § 26, such apprentice shall have the same benefit of the time he shall have served, as he could have had in case of any assignment or turning over to any new master or mistress.

By 20 G. 2, c. 45, § 5, if any master or mistress, who shall become liable to the double duties, shall pay them to the persons who ought to receive them; and also tender the indentures to be stamped at any time within two years after the end of the apprenticeship, and before any suit for them is commenced, the indentures shall be good and available in law and equity, and the apprentice as capable of following his trade as if the single duties had been regularly paid.

By § 6, if any apprentice shall, after such double duties incurred, make request in writing before one witness, to his master or mistress to pay them, and shall, on the neglect of his master or mistress to pay the said double duties within three months after such request, pay the same at any time within two years after the determination of his apprenticeship, he may, within three months after such payment, demand of his master or mistress double the apprentice-fee; and if the same be not paid within three months after such demand, he may recover the same by action, and shall, immediately after such payment, and upon signifying by writing under his hand that he desires to be discharged from his apprenticeship, be discharged from the same.

And by § 7, he shall have the same benefit of the time served, as if he had been assigned or turned over.

But by § 8, if where any prosecution shall be commenced against any master or mistress for penalties, the apprentice shall pay such double duties within two years after his apprenticeship expires, the indenture shall be good, &c.]

|| By 1 & 2 G. 4, c. 32, all indentures for binding parish apprentices, and all certificates of the settlement of poor persons, which previous to the act have been executed by one churchwarden or chapelwarden for any parish, &c., for which two church or chapelwardens had formerly been appointed, shall be as good and effectual as if executed by one or more church or chapelwardens, legally appointed, provided that nothing in the act shall affect any judgment of any court before the passing of the act.||

¶ When children have no parents, and become a charge to the public, the overseers of the poor, or other similar officers, may bind them, under the provisions of the several local laws of the different states, but they must have, in general, gained a settlement in the place where they are bound.

Ramsay v. Ellsworth, 4 N. H. Rep. 139; Curry v. Jenkins, Hardin, 493; Franklin v. South Brunswick, 1 Pen. 445; Commonwealth v. Jennings, 1 Browne, 197; Powers v. Ware, 2 Pick. 451; Welborn v. Little, 1 N. & M. 263; Commonwealth v. Jones, 3 S. & R. 158; Cooper v. Saunders, 1 H. & M. 413.

When overseers make an indenture which they are not authorized to do, they are not liable on the covenants, the whole being void.

Butler v. Hubbard, 5 Pick. 250.

(B) Who may serve, or are capable of binding themselves, &c.

A minor may be bound apprentice, with the consent of his next friend when he has no parent, and it is not requisite that the next friend should have received an appointment as such from legal authority.(a) The sister of the minor may act as such,(b) but the master cannot act as next friend, so as to give validity to an indenture executed by him, as such.(c)

(a) Roach's case, 1 Ashm. 27. (b) Ibid. (c) Commonwealth v. Kenday, 1 S. & R. 366.

2. *For what services.*

A father may bind his son to serve three years as a sweep;(d) and the overseers may bind out a poor child to do any lawful work the master may see fit to employ him in.(e)

(d) Commonwealth v. Moore, 1 Browne, 275. See United States v. Bainbridge, 1 Mason, 78. (e) Bowes v. Tibbets, 7 Greenl. 475.

An indenture, by the managers of the almshouse, binding a girl to learn the art, trade, and mystery of a housewife, is valid.

Commonwealth v. Jennings, 1 Browne, 197.g

(B) Who may serve, or are capable of binding themselves Servants or Apprentices.

β 1. *Who may serve and bind themselves.g*

It is said, that if a married man and his wife bind themselves to serve, they shall be compelled thereto, according to their covenant or agreement; and that if a woman who is a servant shall marry, yet she must serve out her time; and her husband cannot take her out of her master's service.

Dalt. c. 58. β One of full age may bind himself an apprentice. Commonwealth v. St. Germans, 1 Browne, 24; but he is not subject to the summary remedy given by the act of assembly of Pennsylvania for breach of the contract. Commonwealth v. Sturgeon, 2 Browne, 205.g

It seems clearly agreed, that by the (g) common law, infants, or persons under the age of twenty-one years, cannot bind themselves apprentices, in such a manner as to entitle their masters to an action of covenant, or other action, for departing their service, or other breaches of their indentures; which makes it necessary, according to the usual practice, to get some of their friends to be bound for the faithful discharge of their offices, according to the terms agreed on.

11 Co. 89 b; 2 Inst. 379, 380; 3 Leon. 63; 7 Mod. 15; [8 Mod. 190; Dougl. 518.] {See 2 Mass. T. Rep. 228, Blunt v. Melcher.} || And see Winston v. Linn, 1 Barn. & C. 469, 470; Cumming v. Hill, 3 Barn. & A. 59. *Qu.* Whether by custom of London an apprentice can be compelled to serve after twenty-one? *Ex parte Eden*, 2 Maul. & S. 226. || (g) Nor in equity. ABR. EQ. 6. But if an infant of five years of age, or other person who is not *potens in corpore*, be retained, and serve in the best manner he can, his master must pay him his wages. Bro. tit. *Labour*, 46; Dalt. Just. c. 58.

But by the 5 Eliz. c. 4, § 43, it is enacted in the words following: "And because there hath been and is some question and scruple moved, whether any person being within the age of twenty-one years, and bounden to serve as an apprentice, in any other place than in the said city of London, shall be bounden, accepted, and taken as an apprentice; for the resolution of the said scruple and doubt, be it enacted by the authority of this present parliament, That all and every such person or persons, that at any time or times from henceforth shall be bounden by indenture to serve as an apprentice in any art, science, occupation, or labour, according to the tenor of this statute, and in manner and form aforesaid, albeit the same apprentice, or any of them, shall be within the age of twenty-one years, at the time of making their seve-

(B) Who may serve, or are capable of binding themselves, &c.

ral indentures, shall be bounden to serve for the years in their several indentures contained, as amply and largely, to every intent, as if the same apprentices were of full age at the time of making such indentures; any law, &c."

But notwithstanding this statute, it hath been held, in an action of covenant against an apprentice, for departing from his master's service without license, within the time of his apprenticeship; where the defendant pleaded that at the time of making the indenture he was within age; and on demurrer to this plea it was argued, that this indenture should bind the infant, because it was for his advantage to be bound apprentice, to be instructed in a trade; and it was also urged, that he was compellable by the 5 Eliz. c. 4, *suprà*, to be bound out an apprentice; that although an infant may voluntarily bind himself an apprentice, and if he continue an apprentice for seven years he may have the benefit to use his trade; yet neither at the common law, nor by any words of the above-mentioned statute, a covenant or obligation of an infant for his apprenticeship shall bind him; but if he misbehave himself, the master may correct him in his service, or complain to a justice of peace, to have him punished according to the statute; but no remedy lieth against an infant upon such covenant.

Cro. Car. 179, *Gybert v. Fletcher*; Cro. Ja. 494, S. P.; [*Whitby v. Loftus*, 8 Mod. 459, S. P.; *Brand v. Ewington*, Dougl. 518, S. P.;] {2 Mass. T. Rep. 232, *Blunt v. Melcher*.}

By the custom of London, an infant unmarried, and above the age of fourteen, may bind himself apprentice to a freeman of London, by indenture with proper covenants; which covenants, by the custom of London, shall be as (a) binding as if he was of full age.

Moor, 134; 2 Bulst. 192; 2 Roll. Rep. 305; Palm. 361; Mod. 271; 2 Keb. 687. (a) And for a breach an action may be brought in any other court, as well as in the courts of the city. Moor, 136.

[Although an infant cannot bind himself apprentice so as to entitle his master to an action of covenant for breach of any of the clauses in the indenture, yet it should seem (but the point has never been directly determined), that if in fact he does bind himself, he is not afterwards at liberty to avoid a contract so notoriously for his benefit.

St. Nicholas and St. Peter, in Ipswich, 2 Stra. 1066; Burr. Set. Ca. 91, S. C.; Ca. temp. Hardw. 323, S. C.; *Rex v. Evered*, Cald. 26; *Rex v. Hindringham*, 6 Term Rep. 557; *Ashcroft v. Bertles*, Ibid. 652; [and see *Newbury v. St. Mary's Reading*, 2 Bott, 363; *Rex v. Saltern*, 1 Bott, 613; *Rex v. Inh. of Chillesford*, 4 Barn. & C. 94.] β An indenture of apprenticeship executed without his guardian's consent is void. *Guthrie v. Murphey*, 4 Watts, 80.

It has been determined, that an indenture of apprenticeship to an infant is not void, but only voidable.

Rex v. Petrox, in *Dartmouth*, 4 Term Rep. 196.] || See also *Rex v. Chillesford*, 4 Barn. & C. 94.]

|| A father has no authority at common law to bind his infant son apprentice without his assent, and the infant can only bind himself by deed; therefore, where an indenture of apprenticeship was executed by the master and the father of the apprentice, but not also by the apprentice himself, it was held invalid, and that no settlement could be gained under it.

Rex v. Arnesby, 3 Barn. & A. 584; and see *Rex v. Cromford*, 8 East, 25; *Rex v. Ripon*, 9 East, 295. β *Commonwealth v. Moore*, 1 Ashm. 123; *Matter of M'Dowles*, 8 Johns. 328; *Irvin v. Norcross*, 2 Pen. 977; *Springfield v. Heiskell*, 2 Yorg. 546; *Day v. Everett*, 7 Mass. 147; *Commonwealth v. Baird*, 1 Ashm. 267; *Respublica v. Keppele*, 2 Dall. 199; *U. S. v. Bainbridge*, 1 Mason, 78.

(C) Of the Jurisdiction of Justices of Peace, &c.

But a parish apprentice's indenture is not void for want of signing by the apprentice.

Rex v. St. Nicholas, 2 Term Rep.; Rex v. Woolstanton, 1 Nolan, P. L. 500. ¶ In Pennsylvania, it is not requisite that the minor should join in the indenture, when he is bound by the overseers of the poor. Commonwealth v. Jones, 3 S. & R. 158.g

§ 2. *Power of the Master over the Apprentice.*

A master may correct his apprentice for disobedient and improper conduct.

Commonwealth v. Baird, 1 Ashm. 267. See *anté*, ASSAULT AND BATTERY, (C.)

An apprentice bound in one state cannot in general be removed out of it, unless such removal is provided for in the indenture, or, as in the case of sea-faring business, it arises from the nature of the contract.

Coffin v. Bassett, 2 Pick. 357; Commonwealth v. Deacon, 6 S. & R. 526; Commonwealth v. Edwards, 6 Binn. 202; Burden v. Skinner, 3 Day, 126; Vickarce v. Pierce, 3 Fairf. 315; Lewis v. Wildman, 1 Day, 153.

When, after an apprentice has enlisted, the master consents to the enlistment, the apprentice will not be discharged.

State v. Brearly, 2 South. 555.

A cooper, to whom a boy had been bound to learn his trade, has no right to send the apprentice on a whaling voyage, and receive his earnings.

Randall v. Rotch, 12 Pick. 107.g

(C) Of the Jurisdiction of Justices of Peace in binding out Apprentices, in obliging Masters to provide for them, in compelling them to refund the money had with them, and in discharging Apprentices from their Masters, ¶ and also in settling disputes between Masters and Servants.¶

THE jurisdiction of justices of the peace herein depends on divers acts of parliament, particularly on the 5 Eliz. c. 4, the most material clause of which, as to this purpose, is § 35, which is as followeth: "That if any person shall be required by any householder, having and using half a plough-land, at the least, in tillage, to be an apprentice, and to serve in husbandry, or in any other kind of art, mystery, or science, before expressed, and shall refuse so to do; that then, upon complaint of such housekeeper, made to one justice of the peace of the county where the said refusal is or shall be made, or of such householder inhabiting in any city, town corporate, or market-town, to the mayor, bailiffs, or head officer of the said city, town corporate, or market-town, if any such refusal shall be there, they shall have full power and authority by virtue hereof to send for the same person so refusing; and if the justice, or the said mayor or head officer, shall think the said person meet and convenient to serve as an apprentice in that art, labour, science, or mystery, wherein he shall be so then required to serve, that then the said justice, or the said mayor or head officer, shall have power and authority by virtue hereof, if the said person refuse to be bound as an apprentice, to commit him unto ward, there to remain until he be contented, and will be bounden to serve as an apprentice should serve according to the true intent and meaning of this present act; and if any such master shall misuse or evil entreat his apprentice, or the said apprentice shall have any just cause to complain, or the apprentice do not his duty to his master; then the said master or apprentice, being grieved, and having cause to complain, shall repair unto one justice of peace within the said county, or to the mayor, or other head officer of the said city, town corporate, market-town, or other place, where the said master dwelleth, who shall, by his wisdom and discre-

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tion, take such order and direction between the said master and his apprentice as the equity of the cause shall require; and if for want of good conformity in the master, the said justice of peace, or the said mayor or head officer, cannot compound and agree the matter between him and his apprentice, then the said justice, or the said mayor or other head officer, shall take bond of the said master to appear at the next sessions then to be holden in the said county, or within the said city, town corporate, or market-town, if the said master dwell within any such; and upon his appearance, and hearing of the matter before the said justices, or the said mayor or other head officer, if it be thought meet unto them to discharge the said apprentice of his apprenticeship, that then the said justices, or four of them at the least, whereof one of them to be of the *quorum*, or the said mayor or other head officer, with the consent of three other of his brethren, or men of best reputation within the said city, town corporate, or market-town, shall have power by authority hereof, in writing under their hands and seals, to pronounce and declare that they have discharged the said apprentice of his apprenticeship, and the cause thereof; and the said writing, so being made and enrolled by the clerk of the peace or town-clerk, amongst the records that he keepeth, shall be a sufficient discharge for the said apprentice against his master, his executors and administrators; the indenture of the said apprenticeship, or any law or custom to the contrary notwithstanding; and if the default shall be found to be in the apprentice, then the said justices, or the said mayor, or other head officer, with the assistance aforesaid, shall cause such due correction and punishment to be ministered unto him as by their wisdom and discretion shall be thought meet.

“*Provided*, that no person shall by force or colour of this statute be bounden to enter into any apprenticeship, other than such as be under the age of twenty-one years.”

[By § 47, justices are authorized to grant warrant to apprehend apprentices or servants, who shall abscond from service; and to imprison them, until they demean themselves properly.

An apprentice apprehended under this act cannot object, in his defence, that he had been bound contrary to the directions of the act, and had therefore run away to avoid the indentures. *Rex v. Evered*, Cald. 26.

||By 20 G. 2, c. 19, § 2, one or more justices may on application or complaint made upon oath by a master or employer, (a) against any such servant, &c., touching any misdemeanor or ill behaviour in his service, hear and examine the same, and punish the offender by commitment to the house of correction, there to remain and be corrected and held to hard labour, (b) not exceeding one month, or otherwise by abating his wages, or by discharging him from his service. And in like manner it shall be lawful for such justice, on complaint on oath by any such servant, artificer, &c., against such master or employer, touching any misusage, refusal of necessary provision, cruelty, or other ill treatment towards such servant, artificer, &c., to summon such master or employer to appear before such justice at a reasonable time prefixed in such summons, and such justice shall examine the matter, whether such master or employer appear or not, proof being made of the summons, and upon proof thereof, on oath, to his satisfaction, to discharge such servant, artificer, &c., from his said service, which discharge shall be given under the hand and seal of the justice *gratis*.

(a) The employer is the person on whose behalf the employment is, and not the bailiff making the hiring. *Rex v. Hoseason*, 14 East, 605. (b) See 24 East, 605.]

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By § 3. "Any two justices where the master dwells, may, upon complaint of any parish apprentice, or of any other apprentice upon whose binding no larger a sum than five pounds was paid, touching any misusage, refusal of necessary provision, cruelty or other ill treatment, summon such master and examine the case, and upon proof on oath of the fact alleged, may, whether the master be present or not, if the service of the summons be proved, discharge such apprentice by a certificate under their hands and seals, for which no fee shall be paid. And by § 4, the two justices, upon complaint by the master on oath,^(a) may examine the same, and commit the apprentice to the house of correction to hard labour for any time not exceeding a calendar month,^(b) or may discharge such apprentice as aforesaid." By § 5, "Persons grieved may appeal to the next general quarter sessions, where the matter shall be finally determined, and such costs paid to the appellant or respondent as the sessions shall think reasonable, not exceeding forty shillings."^(c)

¶^(a) This extends to a complaint in writing preferred by the master, and verified by the oath of another person. *Finley v. Jowle*, 12 East, 248. ¶^(b) Enlarged to *three months* by 32 Geo. 3, c. 57, § 13. ¶^(c) This statute is not repealed by 6 G. 3, c. 25, § 1, empowering the justices to oblige an apprentice, absenting himself from his master's service, to serve out after the expiration of the apprenticeship such time of absence, or to make satisfaction for it, and in default of such satisfaction to commit the apprentice; for the remedy given to the master by the latter statute is cumulative to the punishment inflicted by the former statute for his offence. *Gray v. Cookson*, 16 East, 13.¶

By 6 G. 3, c. 25. "If any apprentice, except such with whom the sum of ten pounds was paid, shall absent himself during the term, he shall serve for so long a time as he shall absent himself over and beyond the term of his apprenticeship, unless he shall make satisfaction to his master for the loss he shall have sustained by his absence; and if he refuse so to do, one justice, on complaint of the master, may apprehend such apprentice, and, on hearing the complaint, determine the satisfaction that shall be made; and if the apprentice do not conform to such determination, the justice may commit him to the house of correction for any time not exceeding three months." By § 3, "The application of the master to compel satisfaction for absence as aforesaid, must be made within seven years next after the expiration of the term of apprenticeship." And by § 5, "The party grieved may appeal to the next general quarter sessions, on giving six days' notice of his intention to bring such appeal, and of the cause and motive thereof, to such justice, and entering into a recognisance within three days after such notice, to try such appeal; and the sessions shall finally determine the same, and award costs." But by § 6, "Neither the stannaries, nor the jurisdiction of the chamberlain, nor any other court within the city, shall be affected by this act."¶

¶By stat. 4 G. 4, c. 34, intituled "An act to enlarge the powers of justices in determining complaints between masters and servants, and between masters, apprentices, artificers, and others," after reciting the titles of statutes 20 G. 2, c. 19; 6 G. 3, c. 25; 4 G. 4, c. 29, and that it is expedient to extend the powers of the said acts, it is enacted, that it shall be lawful not only for any master or mistress, but also for his or her steward, manager, or agent, to make complaint upon oath, against any apprentice within the meaning of the said acts, to any justice of peace of the county or place where such apprentice shall be employed, of or for any misdemeanor, misconduct, or ill behaviour of any such apprentice; and that the justice,

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in case the apprentice shall abscond, may on complaint thereof upon oath issue his warrant for the apprehension of such apprentice, and, upon hearing the complaint, may punish the offender by abating his wages, or committing him to the house of correction.

And by § 3, if any such servant, artificer, calico-printer, &c., shall contract to serve any person, (by written contract *signed*), and shall not enter on his service, or, having entered on it, shall absent himself before the term of his contract (whether written or not) shall be completed, or be guilty of any other misconduct in the execution thereof, a justice is empowered, on complaint on oath by the person with whom such servant, &c. contracted, or his steward, &c., to issue a warrant to apprehend such servant, &c., and to examine into the same; and if it shall appear such servant has not fulfilled his contract, or been guilty of any other misconduct therein, such justice may commit such servant, &c. to the house of correction, there to remain at hard labour not exceeding three months, and to abate his wages in part; or, in lieu thereof, to punish the offender by abating the whole or part of his wages, or to discharge him from his contract or employment.||

The justices of peace may discharge an apprentice not (a) only on the default of the master, but also on his own (b) default; but it hath been holden, that their jurisdiction herein extends only to such apprentices as were bound to trades within the statute of 5 Eliz., (c) and were compelled by them to serve; for that in such case it is but reasonable that the contracts, which were made by their authority, should be dissolved by the same power, but that they cannot discharge any voluntary agreements made between the parties.

Skin. 108, pl. 7; 5 Mod. 139; 2 Salk. 471, pl. 4. (a) The order of discharge need not be mutual; therefore if they order that the servant shall be discharged from his master, they need not discharge the master from his covenants; for when the servant is discharged, the other is no longer master. 5 Mod. 139; 2 Salk. 471, pl. 4. β An apprentice will be discharged when the acts of the master are injurious to his morals, for example, when he is compelled to work on Sundays. *Commonwealth v. St. Germans*, 1 Browne, 74; *Berry v. Wallace*, Wright, 657; *Warner v. Smith*, 8 Conn. 14. γ (b) A person, after three years' service, plainly appearing to be a natural idiot, discharged, and order affirmed. Skin. 114.—That by the custom of London, a freeman may turn away his apprentice for gaming. 2 Vern. 291. β See *Powers v. Ware*, 2 Pick. 451. γ—But if an apprentice marries without the privity of his master, yet that will not justify his turning him away, but he must take his remedy on his covenant. 2 Vern. 492. [Nor can he send him away on account of his being sick, or so lame as to be unable to work, or having the king's evil to such a degree as to be deemed incurable. *Rex v. Hales-Owen*, 1 Stra. 99. β See *Dunbar v. Williams*, 10 Johns. 249; *Percival v. Nevill*, 1 N. & M. 452. γ Neither can the sessions discharge an apprentice on general allegations of unkind usage by the master, and the declaration of the master that he will not take his apprentice again; for by 5 Eliz. c. 4, § 35, the particular cause of the discharge must be stated in the order. *Rex v. Davis*, 2 Stra. 704; *Rex v. Heaseman*, Ca. temp. Hardw. 101; 2 Stra. 1014, S. C. β An apprentice may leave his master's service after cruel and inhuman treatment. *McGrath v. Herndon*, 2 Monr. 82; *Same v. same*, 4 Monr. 481; *Coffin v. Bassett*, 2 Pick. 360. γ But a neglect on the part of the master to instruct his apprentice in the mysteries of that trade he was bound to learn, is a sufficient cause of discharge. *Rex v. Amies*, 1 Const's Bott's P. L. 515, pl. 731. (c) But the contrary is now settled. *Rex v. Amies*, *ubi supra*; *Rex v. Collingburne*, 1 Stra. 663.] [In *Rex v. Sutton*, 5 Term Rep. 659, Lord Kenyon, C. J., appeared to be of opinion that insanity was not a legal cause for discharging a servant; but in *Rex v. Hulcoff*, 6 Term Rep. 587, this opinion being cited and relied upon, his lordship expressed himself unwilling to go that length.||

Therefore, where an order of sessions was made to discharge a surgeon's apprentice from his master, for not instructing him in the art of surgery; but the master being a *mountebank* kept the apprentice for a tumbler on the

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stage; the order was quashed for want of jurisdiction in the justices, because a surgeon is not one of the trades mentioned in the 5 Eliz. c. 4; and there it was held, that the justices have power only over such apprentices who are bound to the trades therein named, and not over apprentices to other trades.

Carth. 366; 5 Mod. 138; 2 Salk. 471, pl. 4; Case of Set. & Rem. 20, pl. 29, The King v. Gately.

And yet it hath been resolved, that the justices may not only discharge a merchant's apprentice, (which has been agreed not to be a trade within the statute 5 Eliz. c. 4,) but also oblige the master to refund part of the money which he had with him. And this doctrine of refunding seems to be now established, as founded on (a) great reason, though not expressly mentioned in the act; for the justices being authorized to discharge according to their discretions, when the end of the apprenticeship cannot be attained with one person, it is but justice the master should return part of the money he has received with his apprentice, to place him out with a new master.

Saund. 314; Hawkeeworth and Hillarys, Salk. 67, pl. 3; Skin. 108, pl. 7. (a) Where a court of equity will oblige a master to refund, Finch's Rep. 396; Vern. 46, pl. 2; Vern. 64, pl. 57, 492; Atk. Rep. 149, pl. 89.

It hath been held, that an order on the master to return money is good, though it is not averred that he had any with the apprentice, for the order being to return money, is as necessary a proof of the receipt of it as if it had been expressly alleged. And in this case the court seemed to be of opinion, that though the justices had jurisdiction as to discharging and obliging the master to refund, as well in other trades as those mentioned in the statute; that they are not obliged in their orders to set forth all the steps they take in their proceedings, there being nothing in the act which makes it necessary, and that there was a known and established distinction between orders and convictions.

The King v. Amies, 2 Barnard. K. B. 244, 296, S. C.; Ses. Cas. 190, pl. 170, S. C.; 1 Const's Bott's P. L. 515, pl. 731, S. C.; 2 Kel. 128, pl. 104, S. C. [But in Rex v. Vandeleer, 1 Stra. 69, justices cannot order moneys to be returned on discharge of an apprentice.]

It hath formerly been held, that the sessions cannot make an original order of discharge; but that, according to the statute, the parties ought first to apply themselves to a justice of peace; and if he cannot compound the matter, then he is to bind the master to appear at the next sessions. But it hath been ruled of (b) late, and seems now established, that an order on an original application is good, and that the previous application to one justice is only discretionary.

Sand. 316; Carth. 198; Salk. 68, pl. 6; 5 Mod. 138. (b) So ruled in the case of The King v. Amies, Trin. 7 G. 2, 2 Barnard. K. B. 244, 279; 2 Kel. 128, pl. 104, 296; Rex v. Gill, 1 Stra. 143; Rex v. Davies, Ibid. 704.

If the master, being bound to answer at the sessions, does not appear, it is a forfeiture of his recognisance; but yet at the same time the (c) justices may proceed to make an order against him.

Salk. 67, pl. 3. (c) For though the statute says the discharge must be made on the appearance of the master, yet it must have a reasonable construction, so as not to permit the master to take advantage of his own obstinacy. 2 Salk. 490, pl. 53. [But the master must be summoned. Watkins v. Edwards, 1 Mod. 286. And it must appear on the face of the order, that the master either appeared, or was summoned. Reg. v. Rutter, 1 Const's Bott's P. L. 513, pl. 723; Rex v. Gill, 1 Stra. 143. But it is said, that although there must be a summons, it need not be set forth in the order; nor need the order state, that the master was heard; for that summons and default is equal

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to appearance. *Rex v. Amies*, 1 Const's Bott's P. L. 315, pl. 731. But *qu.* of this opinion, for the statute expressly requires appearance, and Lord Hardwicke quashed an order, because it did not appear on the face of it that the master had appeared or made default. *Rex v. Heaseman*, Ca. temp. Hardw. 101.]

The order of discharge must be under the hands and seals of the four justices, according to the express appointment of the statute; but it is (a) said, that in a *certiorari* to remove the order, it is sufficient in the return to take notice of the order so made, for it is not necessary to certify the discharge itself.

Sand. 316; Carth. 199; Comb. 344. (a) 2 Salk. 470, pl. 2.

[The order must state the reason of the judgment, for the statute requires the sessions to express the cause of the discharge.

Rex v. Heaseman, Ca. temp. Hardw. 101.

It must also be enrolled among the records of the sessions.

Rex v. Hales-Owen, 1 Stra. 99.

The sessions of the place where the parties *live* have jurisdiction on this subject; and therefore, where A was bound and enrolled apprentice to a freeman in London, but lived with his master in the county of Middlesex, it was holden, that the sessions of the county have a concurrent jurisdiction with the sessions of the city, and may discharge the apprentice in Middlesex for causes arising in London.

Rex v. Collingburne, 1 Stra. 663.

By the 43 Eliz. c. 2, § 5, it is enacted, "That it shall be lawful for the churchwardens and overseers of the poor, or the greater part of them, by the assent of any two justices of the peace, (b) to bind poor children apprentices, where they shall see convenient, till such man-child shall come to the age of twenty-four years, (c) and such woman-child to the age of twenty-one years, or the time of her marriage; the same to be as effectual to all purposes, as if such child were of full age, and by indenture of covenant bound him or herself."

¶ By 56 G. 3, c. 139, § 11, reciting that the provisions of the 43 Eliz. had been frequently evaded, it is enacted, "That no indenture of apprenticeship by reason whereof any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual unless approved of by two justices of the peace under their hands and seals, according to the provisions of the 43 Eliz. and of the said 56 G. 3, c. 139." [(c) But by 18 Geo. 3, c. 4, "the apprenticeship of a *male* child put out pursuant to the 43 Eliz. shall be for no longer term than till such child shall come to the age of *twenty-one* years."]

¶ Upon this section of 43 Eliz. c. 2, it has been decided that the justices must by their signing testify their assent, that no other mode of allowance is good, and that being a judicial act they must when they do it meet and confer together. (d) But one may sign alone, and afterwards be present at the signing by the other. (e)

(d) *Rex v. Hamstall Ridware*, 3 T. R. 380; 4 Burn's Just. 469. (e) *Rex v. Winwick*, 8 T. R. 455.]

By the 1 Jac. c. 25, § 23; 21 Jac. c. 28; 3 Car. c. 4, § 22, this last-mentioned act is continued, with this further addition, "that all persons, to whom the overseers of the poor shall, according to this act, bind any children apprentices, may take and receive and keep them as apprentices; any former statute to the contrary notwithstanding."

By the 8 & 9 W. 3, c. 30, reciting, that whereas by an act made in the 43 Eliz. c. 2, § 5, it is, among other things, enacted, that it shall be lawful

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for the churchwardens and overseers of the poor of any parish, or the greater part of them, by the assent of two justices of the peace, whereof one to be of the *quorum*, to bind poor children apprentices where they shall see convenient; but there being doubts whether the persons, to whom such children are to be bound, are compellable to receive such children as apprentices, that law hath failed of its due execution; therefore it is enacted and declared, "That where any poor children shall be appointed to be bound apprentices pursuant to the said act, the person or persons, to whom they are so appointed to be bound, shall receive and provide for them, according to the indenture signed and confirmed by the two justices of the peace, and also execute the other part of the said indentures; and if he or she shall refuse so to do, oath being thereof made by one of the churchwardens or overseers of the poor, before any two of the justices of the peace for that county, liberty, or riding, he or she shall for every such offence forfeit the sum of 10*l.* to be levied by distress; the same to be applied to the use of the poor of that parish or place where such offence was committed; saving always to the person to whom any poor child shall be appointed to be bound an apprentice as aforesaid, if he or she shall think themselves aggrieved thereby, his or her appeal to the next general or quarter sessions of the peace for that county or riding, whose order shall therein be final, and conclude all parties."

[By 20 G. 3, c. 36, the same provisions are enacted with respect to poor persons put out apprentices in any particular district of England by virtue of any private act of parliament for the regulating and ordering of the poor.]

||By the 56 Geo. 3, c. 139, s. 1, it is enacted, "That from and after the 1st day of October, 1816, before any child shall be bound apprentice by the overseers of the poor of any parish, township, or place, such child shall be carried before two justices of the peace of the county, riding, division, or place wherein such parish, township, or place shall be situate, who shall inquire into the propriety of binding such child apprentice to the person or persons to whom it shall be proposed by such overseers to bind such child; and such justices shall particularly inquire and consider whether such person or persons reside, or have his, her, or their place or places of business within a reasonable distance from the place to which such child shall belong, having regard to the means of communication between such places; or whether any circumstances shall make it fit, in the judgment of such justices, that such child should be placed apprentice at a greater distance; and if the father or mother of such child shall be living, and shall reside in or near the place to which such child shall belong, such justices shall (if they see fit) examine such father or mother, or either of them; and shall particularly inquire as to the distance of the residence or place of business of the person or persons to whom it shall be proposed to place such child, and the means of communication therewith; and such justices shall also inquire into the circumstances and character of such person and persons; and if such justices shall, upon such examination and inquiry, think it proper that such child should be bound apprentice to such person or persons, such justices shall make an order declaring that such person or persons is or are fit person or persons to whom such child may be properly bound as apprentice; and shall thereupon order that the overseer or overseers of the place to which such child shall belong shall be at liberty to bind such child apprentice accordingly; which order shall be delivered to such overseer or overseers as the warrant for binding such child apprentice as aforesaid; and such order

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shall be referred to by the date thereof, and the names of the said justices in the indenture of apprenticeship of such child; (a) and after such order shall have been made, such justices shall sign their allowance of such indenture of apprenticeship before the same shall be executed by any of the other parties thereto: Provided always, that no such child shall be bound apprentice to any person or persons residing or having any establishment in trade, at which it is intended that such child shall be employed out of the same county at a greater distance than forty miles from the parish or place to which such child shall belong, unless such child shall belong to some parish or place which shall be more than forty miles from the city of London, in which case it shall be lawful for the justices who shall authorize the apprenticing of such child to make a special order for that purpose, in which order such justices shall distinctly specify the grounds on which they shall think fit to allow of the apprenticing of such child to a person or persons residing or having an establishment in trade at a greater distance than forty miles from the parish or place to which such child shall belong."

Previous to this act to remedy the inconveniences arising from the 43 Eliz. c. 2, which requires that there shall be two overseers distinct from the churchwardens, it had been enacted by 51 G. 3, c. 80, that indentures which had theretofore been signed by two persons only, acting as churchwardens and overseers, should be valid; and by 54 G. 3, c. 107, that indentures signed by persons as churchwardens of separate townships, the same persons not being sworn in as churchwardens of those townships, though churchwardens of the parishes in which those townships are situate, shall be as valid as if they had been actually churchwardens of such townships. And see 1 & 2 G. 4, c. 32, *ante*, p. 507. (a) This part of the section requiring that the order of justices for the binding out of parish apprentices shall be referred to in the indenture by the date thereof, is compulsory, and therefore an indenture in which the date of the order is omitted is void, and no settlement is gained by serving under it. *Rex v. Bawberg*, 2 Barn. & C. 222.

By § 2 of the same statute it is provided, that the indenture shall be allowed by two justices of the county or jurisdiction into which the apprentice is to be bound, as well as by two justices of the county or jurisdiction from which he is bound. By § 3, that the allowance by justices of the peace of the county shall be valid in towns and places having exclusive jurisdiction. By § 4, the distance to which apprentices may be bound is expressed not to be limited to cities which are counties of themselves. By § 5, it is declared that no settlement shall be gained, unless the directions of the act are complied with. By § 6, overseers binding apprentices contrary to the act shall each respectively forfeit 10*l.* for each apprentice so bound. By § 7, children shall not be bound out until nine years old. By § 8, provision is made for the disposal of those apprentices whose masters shall remove their residence out of the county, or forty miles from the parish or place wherein the same was when the apprentice was bound. By § 12, 13, 14, 15, & 16, it is declared how the penalties imposed for offences against the act are to be recovered and disposed of. By § 17, a power of appeal is given from the justices to the general or quarter sessions of the county. And by § 18 it is enacted, that the provisions and penalties therein contained respecting overseers of the poor shall be deemed to extend to all churchwardens having the power and authority of overseers of the poor.||

In the construction of the statutes above stated, pp. 515 and 516, the following opinions have been holden:—

That by the 5 Eliz. c. 4, the justices of peace may bind a poor person to husbandry against the consent of his master; but that neither by that statute, nor the statute of 43 Eliz. c. 2, which empowers the churchwardens,

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&c. to raise a stock of money, by way of assessment on the parish, for that purpose, they could impose an apprentice on a tradesman against his consent, but must assess and raise money to bind him out.

T. Raym. 65, 177; Sid. 99; Lev. 84; Vent. 325, S. P. cont.; Rex v. Fairfax, Carth. 94; Comb. 165, S. C.; 3 Mod. 269, S. C.; Show. 76, S. C., resolved by three judges against Holt. [Although the several reporters, who have given us the history of the case of The King v. Fairfax, assign different reasons for the judgment of the court in that particular case, yet they all agree, that the three judges, *contra* Holt, C. J., were of opinion, that the stat. 43 Eliz. having empowered the churchwardens and overseers, with the assent of two justices, to bind parish apprentices where they should see convenient, the order for that purpose was compulsory on the master.]

||That an indenture binding a poor apprentice, which was executed by *one* churchwarden (where by custom there was but *one*) and one overseer, was valid.

Rex v. Earl Shilton, 1 Barn. & A. 275.||

That though by the statute 8 & 9 W. 3, c. 30, the master is bound under the penalty of 10*l.* to keep an apprentice bound to him pursuant to the statute 43 Eliz. c. 2, yet, if two justices bind a poor girl to a merchant, and he appeals to the sessions, where the order is reversed, it being thought unfit to compel a merchant to take an apprentice, the Court of King's Bench, on removing the order before them, may confirm the order of sessions (as they did in this case;) for the statute having given an appeal to the sessions, they are made thereby proper judges, whether the person be a proper person to impose an apprentice on or not.

2 Salk. 491, pl. 57, Minchamp's case; [Rex v. Saltern, East. 24 G. 3, 1 Bott, P. L. 555, pl. 791, S. P.]

||By stat. 5 G. 4, c. 13, (The Mutiny Act,) s. 113, it is enacted that no officer of his majesty's forces residing in barracks or elsewhere under military law, shall be deemed liable to have any parish poor child bound apprentice to him; but that every such officer shall be wholly exempt from taking or receiving, or from having bound to him, any such child as an apprentice, any law, statute, or usage to the contrary notwithstanding.||

The churchwardens and overseers need not aver, that the parents were not able to maintain the child, for they have a discretionary power, by the statute, of determining that.

Rex v. Crosse, Comb. 289, *per* Holt, C. J.

And as the justices of peace have a power of imposing an apprentice on a master, in consequence thereof an indictment lies for disobedience to their orders, either in not receiving, or receiving and after turning off, or not providing for such apprentice; for though an act of Parliament prescribes an easier way of proceeding by complaint, yet that does not exclude the remedy by indictment.

6 Mod. 163; Salk. 381, The Queen v. Gold. [But the indictment must state, that the binding or appointment was a binding or appointment within the 43 Eliz. c. 2. Rex v. Trevilian, 2 Stra. 1268.]

[It is said to have been the opinion of all the judges, that a parish apprentice may be put to a clergyman.

Const's Bott's P. L. 540, pl. 771.

So, a female parish apprentice bound to a day-labourer to learn the art and mystery of a housewife, has been holden good.

Rex v. St. Margaret's, Lincoln, 1 Const's Bott's P. L. 549, pl. 787.

A person occupying land in a parish, (a) but living out of it, is compella-

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ble to receive a parish apprentice. And a custom to bind only to occupiers of a particular description is not good.

Rex v. Clapp, 3 Term Rep. 107; Rex v. St. Nicholas, in Nottingham, 2 Term Rep. 796; Rex v. Saltern, 1 Const's Bott's P. L. 555, pl. 791. (a) It is said *generally*, that the binding of parish apprentices may be to a person residing in another parish. Rex v. St. Margaret's, Lincoln, 1 Const's Bott's P. L. 549; [Rex v. Barwick, 7 Term Rep. 33.]

In binding apprentices under 20 G. 3, c. 36, it is not necessary that the master should actually reside within the parish: if he be an occupier there, it is sufficient; for *inhabitant* and *occupier* are for this purpose synonymous.

Rex v. Tunstead, 3 Term Rep. 523.

It is said, that an order of apprenticeship need not state the trade to which the pauper is intended to be bound.

Rex v. Gillifler, Sir T. Raym. 63.

But the justices cannot order, nor can the indentures covenant that the master, at the end of the term, shall give his apprentice two suits of clothes, one for holidays, and the other for working days; for this sounds like *wages*, and they can only order *maintenance*; and not even that after the term is ended.

Rex v. Wagstaffe, Foley, 225.

A parish apprentice may be bound for a shorter, but not for a longer time than the statutes require; and if the indenture (a) be not for any certain time, it is not therefore bad; for with respect to the time the statute is only directory.

Rex v. Chalbury, 1 Const's Botts P. L. 543, pl. 779. (a) Rex v. Woolstanton, Ibid. pl. 780.

So, an indenture binding a poor girl an apprentice is not void for want of the alternative, "or till married."

Rex v. St. Petrox, Burr. Set. Ca. 249.

And neither a parish indenture, nor a common indenture, though voidable, can be avoided but by the parties to it.

Rex v. St. Petrox, Burr. Set. Ca. 249.

Parish indentures must be assented to by two justices in the presence of each other; for if it be done by them separately, the indenture is void.

Rex v. Hamstall Redware, 3 Term Rep. 380; [Rex v. Winwick, 8 Term Rep. 454.]

It is not necessary to the validity of the indentures of a parish apprentice, that the master should sign the counterpart. But after the master has signed the counterpart, he cannot appeal to the sessions. (b)

Rex v. Fleet, Cald. 31; 2 Const's Bott's P. L. 547, pl. 482. (b) Rex v. Saltern, 1 Const's Bott's P. L. 555, pl. 791.

Nor is it necessary to their validity, that the apprentice should sign the deed.

Rex v. St. Nicholas, in Nottingham, 2 Term Rep. 796.

An infant parish apprentice and his master cannot by themselves, without the assent of the parish officers, vacate the indentures. *Secus*, after the apprentice has attained twenty-one years of age. (c)

Rex v. Langham, Cald. 126. (c) Rex v. Harburton, 1 Const's Bott's P. L. 558, pl. 792.

By 32 G. 3, c. 57, § 11, "In every case where a parish apprentice shall be discharged under the 20 G. 2, c. 19, the two justices shall order the master or mistress to deliver up the apprentice's clothes, and to pay a sum not exceeding ten pounds to the parish officers, for the purpose of placing such apprentice out again. And the two justices may compel the parish officers to enter into a recognisance to prosecute the master or mistress of any such parish apprentice for ill-treatment of the apprentice."

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By § 12, "The justices may order any master convicted under 20 G. 2, c. 19, when liable to take a parish apprentice, to pay to the parish officers a sum not exceeding ten pounds, nor less than five pounds, for the binding out such poor child. But such master may appeal to the quarter sessions, on giving notice," &c.

By § 8, "If any master or mistress become insolvent, two justices, where such master or mistress live, may, on the application of such master or mistress, discharge any such apprentice from the indentures, if upon inquiry they find the allegation of insolvency to be true." But by § 9, "This shall not extend to any indenture under the 43 Eliz. c. 2, where a larger sum than five pounds shall have been given."]

||By the 33 G. 3, c. 55, Two justices at any special or petty sessions, upon complaint upon oath, by or on the behalf of any parish apprentice, or other apprentice, upon whose binding out not more than 10*l.* was paid, (extended to 25*l.*, by 4 G. 4, c. 29, § 1,) of any ill usage by his or her master or mistress, (such master or mistress having been duly summoned to appear and answer such complaint,) may impose, upon conviction, any reasonable fine not exceeding 40*s.* upon such master or mistress as a punishment for such ill usage; and if not paid may, by their warrant, levy the same by distress and sale of the goods of such offender, rendering to him the overplus, (if any,) after deducting such fine, and the charges of such distress and sale, to be applied at the discretion of such justices, either to the use of the poor, or paid and applied to and for the use and benefit of such apprentice, for or towards recompense or compensation for the injury he may have sustained by reason of such ill usage.

And by 4 G. 4, c. 29, power is given to two justices to take into consideration the circumstances under which such apprentice or apprentices shall be discharged, and to make an order upon the master or mistress of such apprentice or apprentices to refund all or any part of the premium or premiums, which may have been or shall be paid upon the binding or placing out of such apprentice or apprentices, as such justices in their discretion shall see fit; and in case of their order not being complied with, to levy the same by distress under their warrant.||

(D) Of the Necessity of serving an Apprenticeship, as a Qualification to follow a Trade within the 5 Eliz. c. 4.

At common law, every person might follow what lawful trade he pleased; which being inconvenient in many instances, and a detriment to the public, in permitting persons to exercise trades in which they had little or no skill or experience; to prevent this mischief, and the better to train up and inure persons to labour and industry from their youth, and thereby make them more skilful and expert:

11 Co. 53; 2 Buls. 191; Skin. 133; Sand. 312.

It is enacted by the (a) 5 Eliz. c. 4, § 31, "That it shall not be lawful to any person or persons, other than such as now do lawfully use or exercise any art, mystery, or manual occupation, to set up, occupy, use, or exercise any craft, mystery, or occupation, now used or occupied within the realm of England or Wales, except he shall have been brought up therein seven years, at the least, as an apprentice, in manner and form above said; nor to set any person on work in such mystery, art, or occupation, being not a workman at this day, except he shall have been apprentice, as is aforesaid; or else having served as an apprentice, as is aforesaid, shall or will become

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a journeyman, or hired by the year; upon pain, that every person willingly offending, or doing the contrary, shall forfeit and lose for every default forty shillings for every month."

(a) It is said that no encouragement was ever given to prosecutions upon this statute, and that it would be for the common good if it was repealed; for no greater punishment can be to the seller than to expose goods to sale ill wrought; for by such means he will never sell more; *per* Dolben, Justice. 3 Mod. 317. See stat. 8 Ann. 9, § 39. ¶ Since the above note was written, this section of the statute 5 Eliz. c. 4, has been repealed by 54 G. 3, c. 96, § 1.]

[But by the 15 Car. 2, c. 15, hemp-workers of all kinds, net-makers, and makers of tapestry hangings, may set up without having served seven years.

By 24 G. 3, sess. 2, c. 6, § 1, 4, all officers, mariners, and soldiers, who have been in the land or sea service, or in the marines, or in the militia, or any corps of fencibles, since the second year of his majesty's reign, and have not deserted their wives and children, may exercise such trades as they are apt for, in any town or place.

By 26 G. 3, c. 107, § 131, every person having served in the militia, when drawn out into actual service, being a married man, may exercise any trade in any town or place.

By 6 & 7 W. 3, c. 17, an apprentice discovering two offenders guilty of coining, so as they be convicted, shall be deemed a freeman, and may exercise his trade, as if he had served out his time.

And by the 17 G. 3, c. 33, it shall be lawful for any person carrying on or using the trade of a dyer within the counties of Middlesex, Essex, Surrey, and Kent, to employ journeymen who have not served an apprenticeship to the trade, without incurring any penalty.

The like liberty is given to hatters generally by the 17 G. 3, c. 55, § 5, and to woolcombers by 35 G. 3, c. 124.]

¶ By the 54 G. 3, c. 96, § 1, the thirty-first section of the stat. 5 Eliz. c. 4, is declared to be repealed. But by § 4, of the same statute, it is declared, that the customs of London, or of any other city, town, corporation, or company lawfully constituted, concerning apprentices shall not be affected.

And by stat. 56 G. 3, c. 67, passed for the purpose of enabling soldiers, mariners, &c., to exercise trades, it shall be lawful for officers, mariners, soldiers, and marines, who have been employed in his majesty's service since June 22, 1802, and have not since deserted, and also the wives and children of such officers, &c., to set up and exercise trades in any city, town, or place within this kingdom, (excepting the two universities of Cambridge and Oxford;) nor shall they be liable to be removed from the place in which they may set up trade to their last legal settlement, until they have become actually chargeable to the parish.

By § 3, this act is extended to militia-men and fencibles who have served five years, and been honourably discharged.¶

In the construction of the statute of the 5 Eliz. c. 4 it will be necessary to consider,

1. *What shall be said such a Trade as a Person is prohibited to follow.* (a)

¶ (a) In these five divisions, under the head (D), it must be borne in mind that the 31st section of the stat. 5 Eliz. c. 4, is repealed, except so far as the customs of London and other towns are concerned.¶

Herein we must observe, that it hath been ruled, that there are many trades within the general words and equity of the act, besides those which are particularly enumerated therein; yet it seems agreed, and hath frequently

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been (a) adjudged, that in every indictment, &c., it must be alleged, that it was a trade at the time of making the statute ; for the words thereof are, any craft, mystery, or occupation now used, &c. ; from whence it seems to follow, that a new manufacture, which to all other purposes may be called a trade, is yet not a trade within this statute.

2 Salk. 611, pl. 3, 2 Ld. Raym. 1188 ; Ld. Raym. 514 ; 2 Ld. Raym. 1410. (a) Palm. 528 ; Sid. 175, S. P. adjudged ; 2 Salk. 611, pl. 3 ; Ld. Raym. 513 ; 2 Ld. Raym. 1188, 1189. So, for not averring that the trade of a tiler was an art or mystery used in England at the time of making the statute, though the statute expressly mentions it 4 Mod. 145, 146. But Comb. 288, *contrd.*

Also, it seems agreed, that the act only extends to such trades as imply mystery and craft, and require skill and experience ; and that therefore (b) merchants, husbandmen, gardeners, &c., are not within the statute ; and on this foundation it hath been held, that (c) a hemp-dresser is not within the statute, as not requiring much learning or skill, and being what every husbandman uses for his necessary occasions.

8 Co. 130 ; 2 Buls. 191 ; Vent. 326. (b) But they are expressly mentioned in § 27, 29. (c) Cro. Car. 409, pl. 4.

It is said in (d) 2 Buls. to have been adjudged, that an upholsterer is not a trade within the statute, as not requiring (e) skill ; but this hath been contradicted by a later (g) resolution, wherein it is said to have been resolved, that a (h) barber and tailor were trades within the statute.

(d) 2 Buls. 186, but no resolution. 2 Salk. 611, pl. 3, S. C., and denied to be law. (e) But see Roll. Rep. 10. (g) 1 Lev. 243 ; Sid. 367, pl. 4 ; 2 Keb. Rep. 366, pl. 19 ; Vent. 346 ; 2 Salk. 611, pl. 3 ; Ld. Raym. 514. (h) Lev. Rep. 87, 243 ; 2 Lev. Rep. 206 ; Sid. 367, pl. 4 ; Vent. 326 ; Keb. Rep. 411, pl. 115 ; Ibid. 429, pl. 143.

Also, it is said in 2 Buls. that a pippin-monger is not within the statute, because there is no mystery in buying apples, and all his skill is in so laying his apples as to keep them from rotting ; but this likewise hath been doubted in a late (i) case, where it was debated, whether the using of the trade of a costermonger or (k) fruiterer be within the statute ; but there is no resolution.

2 Buls. 189, 190 ; Rol. Rep. 10 ; Ld. Raym. 514 ; 2 Salk. 611, pl. 2. (i) 2 Lev. 206 ; Vent. 326, 346 ; 2 Salk. 611, pl. 2, S. C. cited, and said not to be resolved. (k) 3 Keb. Rep. 816, pl. 38.

It is clearly agreed, that the following the common trade of a brewer, baker, or cook, is within the statute, as unskilfulness herein may be very prejudicial to the lives and health of his majesty's subjects ; but it is at the same time agreed, that the exercising of any of these trades in a man's own house or family, or in a private person's house, is not within the restraint of the statute.

11 Co. 54 a ; Cro. Car. 499 ; Mo. 886 ; Hob. 183, 211 ; 8 Co. 129 ; Palm. 542 ; Lit. Rep. 251 ; Bridgm. 141.

On motion to quash an indictment for using the trade of a fellmonger, it was urged, that this was a business which required no skill, for that it was only to pull the wool from the skin ; but *per* Holt, Chief Justice,—If in the indictment it be averred to be a trade at the time of making the statute, we will not quash it ; for whether it was a trade then or no, or whether any skill be requisite to the exercise of it, is a matter of fact proper for the trial of a jury.

2 Salk. 611.

So, the court refused to quash an indictment for using the trade of a seamstress, not having served as apprentice : because it was set forth in the in-

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dictment to be a trade in England at the time of making the act ; so that if this trade of a seamstress be not within the act, the defendant will have the advantage of it on the trial.

2 Salk. 611, pl. 3; 2 Ld. Raym. 1189.

But it is said, that the court had quashed an indictment for following the trade of a merchant-tailor, because they did not know what was meant by it, and it seemed to them nonsense and unintelligible.

2 Salk. 611, pl. 3; *The King v. Harper*, 2 Ld. Raym. 1189.

A coachmaker is within this statute.

Vent. 346.

[It hath been objected, that the using of a trade in a country village is not within the statute; and in the case of *Rex v. Langley*, H. 6 G. 2, Mr. J. Page said, he had known indictments quashed upon such exception. It is said, however, (a) by a very respectable author, that he doth not apprehend it would be now allowed; for, in such case, at the sittings at Westminster it was mentioned, but Lord Ch. J. Lee made slight of the objection. In a subsequent case, (b) on motion to quash an information against the defendant for exercising the trade of a baker, without having served an apprenticeship, at the parish of S. in Kent, one objection was, that it did not appear on the record that the offence was committed in a city, borough, or market-town; but the court held, that neither the enacting part of the statute, nor the preamble, gave any foundation for this objection, and that the offence was clearly well laid; though they said, if it came out in evidence, that the defendant followed the business only in a small village, it had been the common practice to find for him.

1 Mod. 26; 2 Keb. 583; 1 Vent. 51. (a) Bull. N. P. 192. (b) *Ball v. Cobus*, 1 Burr. 366.]

2. *What Manner of following or exercising a Trade shall be said within the Statute.*

It seems agreed, that the following a trade within this statute, must be such whereby the party gets his livelihood; and that therefore the using of a trade of a brewer, baker, cook, tailor, &c., in one's own house, or in the private family of another, without any reward, is not within the statute. (c)

11 Co. 54; Hob. 183. [(c) *Qu.* Whether embarking capital in a trade, and deriving the profits through a foreman, be within the act? 15 East, 161. Exercising a trade for seven years unmolested was held to exempt from the penalty. Ibid.]

But in an action for using the trade of a clothier, not having been apprenticed to that trade; where by special verdict it was found that A was a Turkey merchant, and exported great quantities of English cloth into the Levant; and for this purpose only he hired several cloth-workers, who had been all apprentices to the same trade, and kept also a master-workman of that trade to inspect their work; and that by these men he made great quantities of English cloth, all which he transported; and that he, the said A, kept a dye-house, and hired men of that trade to dye his own cloths, and no other;—it was resolved to be within the restraint of the statute, though the cloth was made for his (d) own merchandise only, and though made by persons who had been apprentices; for here they are not traders, but hirelings, and he is the tradesman who hath all the profit, as A in this case has.

Carth. 162; 2 Salk. 610, pl. 1; 3 Mod. 313. *Hobs qui tam v. Young*, Show. 241, 266; Comb. 179; Holt, 66, pl. 1; Skin. 428, pl. 5. (d) For the cloth is not confined to the use of his own family, but vended out for the sake of commerce; and whether the utterance be in England or in Turkey is not material. 2 Salk. 610, pl. 1.

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So, if a man keeps journeymen shoemakers to make shoes for exportation, this is an exercising the trade (a) of a shoemaker within this statute.

Carth. 164. [(a) But if it be an exercising of the trade by the master, it cannot be also an exercising of it by the journeyman, so as to expose him to the penalties of the statute. Beach v. Turner, 4 Burr. 2449.]

[But if a person brought up to the trade take a partner, who hath not served an apprenticeship to the trade, such partner, if he share only in the profits or loss of the business, and do not actually exercise the business, is not liable to the penalties of this act.

Raynard v. Chase, 1 Burr. 2; 2 Wils. 40, S. C.]

It hath been also holden, that this statute doth not restrain a man from using several trades, so as he had been an apprentice to all; wherefore it indemnifies all petty chapmen in little (b) towns and villages, because their masters kept the same mixed trades there before.

Carth. 163; 1 Vent. 51; 2 Keb. Rep. 1 Black. Com. 416; Show. Rep. 242. (b) It seems to be the better opinion, that this statute hath not abrogated the particular customs concerning trades in particular towns and villages; and that therefore a widow, by custom, may continue her husband's business; and it seems by some opinions, she may do it without any such custom, for that the wife serves as an apprentice; but for this vide Cro. Car. 347, 516, 517; 2 Buls. 187; 8 Co. 130; Palm. 541; 11 Co. 54; Noy, 5; Hutt. 131; Hob. 211; Sand. 311; Carth. 163.

If a coachmaker keeps servants to make his wheels, and workmen to curry his own leather, this is against the statute; because it is he only who receives all the profits of the several trades, and the wheelwright and the currier are but his servants.

Carth. 163, 164, *per* Holt; Show. Rep. 267; Comb. 179.

So, in a case upon this statute, prosecuted by the Horners' Company against a combmaker in London, for using the trade of a horner, viz. in pressing horn for making combs, which pressing did not belong to their trade; this was adjudged a breach of the statute, for a horner is a particular trade, and a very ancient company in London.

Carth. 162, cited *per* Holt, C. J.; Comb. 180; Show. Rep. 242; 1 Mod. 190

3. *What Kind of Service will be a sufficient Qualification within the Statute.*

As to this it hath been resolved, that there is no occasion for an actual binding, but that the following a trade for seven years is a sufficient qualification within the statute.

Salk. 6, 7, pl. 5; 2 Salk. 613, pl. 7, S. P., being a hard law. Ld. Raym. 738. [See the 54 Geo. 3, c. 96, repealing the 5 Eliz. c. 4, § 31.]

So, where an action was brought on this statute, and, upon not guilty pleaded, it appeared that the defendant's father kept the same trade, and that he the defendant for several years had been employed by his father therein; it was held, that he might lawfully use that trade, for that he had been (c) *quasi* an apprentice to it, which was sufficient to satisfy the statute.

Carth. 163, *per* Cur. Ses. Cas. 290, pl. 227; 1 Bl. Com. 428. (c) And for the like reason it seems, that a wife living with her husband seven years, may, after his death, continue the trade; for the act does not require a man or woman to be an actual apprentice, but the words are *tantum* an apprentice. Vide the authorities, *supra*.

So, if a man lives with another, that uses a trade which the other is not qualified for using, seven years, he may set up the trade as well as if he had lived with one never so well qualified.

Ca. Law and Eq. 71.

(D) Of the Necessity of serving an Apprenticeship, &c.

Also, it hath been held, that the service need not be in any particular country; and therefore an indictment for using the trade of a tailor, not having served an apprenticeship seven years, was quashed, because only said, not having served as an apprentice *infra regnum Angliæ aut Wallium*; for it may be he did so beyond sea; and if it were anywhere it suffices.

Salk. 67, pl. 2, The King v. Fox.

So, it hath been held, that serving five years to a trade out of England, and two in England, is sufficient to satisfy the statute, but that there must be a service of a full time either in England or out of England; and therefore serving five years in a country, where by the law of the country more is not required, will not qualify a man to use the trade in England.

Ca. Law and Eq. 70. See 3 Keb. Rep. 550, pl. 55.

[So, it hath been holden, that if any man as a master has exercised and followed any trade as a master without interruption or impediment for the term of seven years, he is not liable to be prosecuted on this statute. So, if he hath worked at or followed two or more different trades for the term of seven years or more.

French v. Adams, 2 Wils. 168; Wallen v. Holten, 1 Bl. Rep. 233. If he has exercised a trade for seven years without any prosecution with effect.]

4. *By whom the Offence of following a Trade without a Qualification is cognisable.*

This matter depends chiefly on the statute 31 Eliz. c. 5, § 7, whereby it is enacted, "That all suits for using a trade without having been brought up in it shall be sued and prosecuted in the general quarter sessions of the peace, or assizes of the same county where the offence shall be committed, or otherwise inquired of, heard, and determined in the assizes, or general quarter sessions of the peace for the same county where such offence shall be committed, or in the leet within which it shall happen, and not in anywise out of the same county where such offence shall happen or be committed."

In the construction hereof it hath been holden, that it restrains not a suit in the King's Bench or Exchequer, for such offence happening in the same county where these courts are sitting; for the negative words of the statute are not, that such suits shall not be brought in any other court, but, that they shall not be brought in any other county; and the prerogative of these high courts shall not be restrained without express words.

Cro. Ja. 178; Hob. 184; Salk. 373, pl. 14.

But where the offence is in a different county, such suits in these, or any other courts out of the proper county, seem to be within the exress words of the statute.

Hob. 184, 327; Cro. Ja. 85, pl. 9.

Yet it hath been doubted, whether an action of debt, or information in the courts of Westminster Hall, were not to be construed to be out of the meaning of the statute; but it seems to be now settled, in the construction of the statute 21 Jac. 1, c. 4, which provides, that no action of debt, or information, or other suit whatever, can be brought in any court of Westminster Hall on any penal statute made before the said statute of 21 Jac. 1, for any offence therein excepted, for which the offender may be prosecuted in the country; unless such offence shall be committed in the same county in which such court shall sit.

Sid. 303; Keb. 584; 2 Lev. 204; Vent. 8, 364; 2 Lev. 204; Salk. 372, pl. 13; 5 Mod. 425. [See 4 Term Rep. 109.]

(E) Of assigning and turning over Apprentices, &c.

But these statutes hinder not the removal of any indictment into the King's Bench by *certiorari*, after which it may be tried there, or in the county by *nisi prius*.

Jon. 193.

It hath been held that quarter sessions of boroughs may receive indictments on the 5 Eliz. c. 4, as well as those of the county at large, in that there is no danger of oppression, because a *certiorari* lies.

6 Mod. 220; 2 Salk. 370, pl. 2; 2 Ld. Raym. 1038, 1179; Comb. 254, 255; 1 Burr. 251. [So they may proceed by information. Cowp. 369.]

5. *Of the Form of the Proceedings in order to a Conviction, for following a Trade without being qualified.*

The plaintiff, in an action on this statute, 5 Eliz. c. 4, (a) must (b) allege in his declaration, that the defendant did not use the trade at the time of making the statute; for though it cannot be presumed that he did, after such a length of time, yet as the statute makes him liable, and subjects him to a penalty, the prosecutor must show that he has transgressed the law, and that he is entitled to his action.

Sid. 302, pl. 9, Dring v. Respass. [(a) But see *ante*, 54 G. 3, c. 96, § 2, which repeals the penal sections of this statute, i. e. §§ 25, 31.] [(b) Such allegation not necessary. 1 Burr. 367.]

An indictment for following the trade of a *cutler*, not being an apprentice, *contra form*. 5 Eliz. c. 4, was quashed on demurrer; because the trade of a cutler was averred to be a trade then used *infra hoc regnum Angliæ*, whereas this kingdom was not then subsisting.

2 Kel. 212, pl. 165; The King v. Briton, Pasch. 5 Geo. 2, 2 Barnard. K. B. 147, 172, S. C.

It has been held, that an indictment against two or more, for following a joint trade, without having served a seven years' apprenticeship, required by the statute, is naught, in that it would be absurd to charge them jointly, because the offence of each defendant arises from the defect peculiar to himself.

5 Mod. 180; Salk. 382; 2 Roll. Abr. 81 (N), pl. 6; 2 Ses. Cas. 221, pl. 154; 2 Ld. Raym. 1248; Vent. 302; 1 Stra. 623.

[In an indictment on this statute it is not necessary to specify and aver the want of other qualifications allowed by subsequent statutes, for such other qualifications or exceptions ought to be shown by the defendant.

Rex v. Pemberton, 2 Burr. 1035; 1 Bl. Rep. 230, S. C.]

(E) Of assigning and turning over Apprentices to other Masters.

THE placing out an apprentice to a particular person arises from an esteem, and a good opinion of the party to whom he is so committed, that he will not only instruct him in his trade or calling, but will also be careful of his health and safety; and therefore the law has made it such a personal trust or confidence, that the master cannot assign or transfer it over to another. The master must also have the apprentice under his own care and inspection, and cannot send him abroad, though under the pretence of improvement, unless by express agreement, and unless the nature of his business requires it and implies such a power, as that of merchant-adventurer, sailor, &c., are said to do; therefore it hath been adjudged, that a surgeon sending his apprentice a voyage to the East Indies, though in company with other

(E) Of assigning and turning over Apprentices, &c.

surgeons, and the better to instruct him in the art of surgery, was a breach of his covenant, whereby he bound himself to retain, teach, keep, and employ the said apprentice in his own house and service, &c.

Hob. 134, pl. 180. *β* Hall v. Gardner, 1 Mass. 172; Davis v. Coburn, 8 Mass. 299; Shultz v. Travis, Pr. Dec. 164; Pegman v. Ward, Pr. Dec. 361; Stringfield v. Heiskell, 2 Yerg. 546; Hardin, 9, n.; Commonwealth v. Leeds, 1 Ashm. 405; Commonwealth v. Vanlear, 1 S. & R. 248; Commonwealth v. Jones, 3 S. & R. 158; Randall v. Rotch, 12 Pick. 107; Shoppard v. Kelly, 2 Bailey, 93. In Vermont, apprentices bound by the overseers of the poor may be assigned without their consent. Philips v. Culver, 6 Verm. 430; *γ* 1 Mass. T. Rep. 172, Hall v. Gardner.}

But by the custom of London, a freeman of London may turn over his apprentice to another master, being a freeman; and such second master shall have the same benefit of the apprentice's covenants, as shall the apprentice of the covenants on the side of the master, as if he had been originally bound to him.

March, 3; Keb. 250.

But it hath been held, that though justices of peace have a jurisdiction of discharging apprentices, and may bind them to other masters, that they cannot turn them over; (*α*) and therefore an order that an apprentice, whose master was dead, should serve the remainder of his time with his master's widow's second husband, was quashed, because the justices have nothing to do about turning over an apprentice; and that though he applied to them, that could not give them a jurisdiction.

Comb. 324, The King v. Chaplain. [(*α*) They cannot judge of an assignment, for they cannot try the validity of a deed. Rex v. Barnes, 1 Stra. 48.]

[By 32 G. 3, c. 57, § 5, any master or mistress taking a parish apprentice under the 8 & 9 W. 3, c. 30, § 5, may, by endorsement on the indentures, or by other instrument in writing, and with the consent of two justices, testified by such justices under their hands, assign such apprentice for the residue of the term. And by § 7, the person to whom such apprentice is intended to be assigned shall, at the same time, on the counterpart of the indentures, &c., declare his acceptance of such apprentice, and acknowledge himself bound by the covenants in the indenture; and such master or mistress so taking an apprentice by assignment, may, from time to time, assign such apprentice over to any other master or mistress.]

||The 56 G. 3, c. 139, § 9, after enforcing the provisions of the 32 G. 3, c. 57, with respect to assigning or discharging apprentices, enacts, § 10, that "any person or persons who, after the 1st of October, 1816, shall put away or transfer any parish apprentice to another, or who shall in any way discharge or dismiss from his or her service any parish apprentice, without such consent as aforesaid, (*i. e.* such consent as is directed in the 32 G. 3, c. 57,) shall forfeit a sum not exceeding 10*l.* for every apprentice so transferred."||

β No contract entered into between the master and the apprentice, altering the persons to whom the latter was bound, is valid unless ratified by the parent or other person standing *in loco parentis*, in writing.

Commonwealth v. Leeds, 1 Ashm. 405; Commonwealth v. Vanlear, 1 S. & R. 248; Commonwealth v. Jones, 3 S. & R. 158.

When the indenture is to A B, his heirs and assigns, not naming his executors, it cannot be assigned by his executors.

Commonwealth v. King, 4 S. & R. 109.

(G) How Apprentices are to be taken Care of, &c.

A master cannot, in general, assign the services of his apprentice.

Davis v. Coburn, 8 Mass. 299; Hall v. Gardner, 1 Mass. 172; Ayer v. Chase, 19 Pick. 556.

A master cannot transport his apprentice out of the commonwealth.

Comm. v. Hamilton, 6 Mass. 273; Davis v. Coburn, 8 Mass. 299; Coffin v. Bassett, 2 Pick. 357. See Randall v. Rotch, 19 Pick. 107.

An apprentice cannot be assigned and set over to the instruction, provision, and care of any other person, even though it be apparent that the new master could and would instruct him to as great an advantage as the first.

Hadmut v. Bullock, 3 Marsh. 300. See Cochran v. Davies, 5 Lit. 118.

(F) Of making Apprentices free.

WHEREVER, by the custom of any town, borough, &c., the serving an apprenticeship entitles the party to his freedom, the persons refusing to admit him, without sufficient (a) cause, may be compelled thereto by *mandamus*.

Sid. 107, pl. 20; 2 Show. 154, pl. 138. [By the 12 G. 3, c. 21, where any person entitled to his freedom shall apply to the mayor, &c., to be admitted, giving notice and specifying the nature of his claim, and the mayor, &c., shall not admit him within a month afterwards, a *mandamus* shall go, and if he be admitted, the mayor, &c., shall pay costs.] (a) Mr. Common Serjeant said, that if a man trade upon his own account within the seven years of his apprenticeship, the chamberlain of London will not make him free, because he has not fully served an apprenticeship of seven years. 1 Ld. Raym. 383.

Therefore, where to a *mandamus* to the mayor, &c. of Oxford, to admit a person to be free of that city, who had served seven years' apprenticeship; to which it was returned, that he put himself apprentice seven years according to the custom, and that he covenanted to serve seven years, and not to marry within the time, and that within the first two years he married, and so broke his covenant; and that his master accepted of him to serve for the residue of the time, which he did, but not as an apprentice, but rather as a journeyman; though it was urged, that by his breach of covenant he lost his right of freedom, yet the court held the contrary: and that though an action of covenant might lie, yet that it was no loss of his freedom; and therefore awarded a peremptory *mandamus* to admit him.

Lev. 91; Sid. 107; Keb. Rep. 458, pl. 57; Ibid. 470, pl. 79; Ibid. 659, pl. 43; T. Raym. 69, Townsend's case.

So, where a *mandamus* to the mayor, &c. of Lincoln, to admit A to his freedom, he having served an apprenticeship there; and the mayor returned, that A (being a quaker) refused to take the usual oath, according to the custom of the said city, but offered to take the solemn affirmation and declaration; the court held this sufficient to entitle him to his freedom, within the statute 7 & 8 W. 3, c. 34.

Rex v. Mayor of Lincoln, 5 Mod. 402; Carth. 448, S. C.; Ld. Raym. 337, S. C.; [Rex v. Turkey Company, 2 Burr. 1004, S. P.]

Also, it is frequent for masters to bind themselves to make their apprentices free at the end of their time, which they must perform according to their covenants.

6 Mod. 227, 260; [1 Ld. Raym. 382.]

G) How Apprentices are to be taken Care of when their Masters happen to (b) die.

It seems agreed, that if a man be bound to instruct an apprentice in a trade for seven years, and the master die, that the condition is dispensed with, being a thing personal; but if he be bound further, that in the mean

(G) How Apprentices are to be taken Care of, &c.

time he will find him in meat, drink, clothing, and other necessities; here, the death of the master doth not dispense with the condition, but his executors shall be bound to perform it, as far as they have assets. [For there is a great difference between a covenant to *maintain* and a covenant to *instruct*: the first is a lien upon the executor, though not named, in right of the testator's assets being come to his hands; but the other is a *fiduciary* trust annexed to the person of the master.]

Sid 216, pl. 21; Keb. 761, 820; Lev. 177; [1 Const's Bott's P. L. 524, pl. 745; Cro. El. 553;] Burn, 58. β If the apprentice serve the administrator of his deceased master, he cannot recover wages for his services, as, by so doing, he acquired rights, and incurred duties as an apprentice. Phelps v. Culver, 6 Verm. 430. γ (b) There seems to be no sufficient clear provision, what shall be done with an apprentice upon the master's dying, which is a case which must needs often happen. Burn's Observ. 245. β It seems that an executor is not liable to provide meat, drink, clothing, &c. Commonwealth v. King, 4 S. & R. 109. But see Cochran v. Davis, 5 Lit. 118, where it was held that the obligation to teach the trade, being personal, could not be enforced, but that the executors of the master were bound to perform every other covenant of the indenture. See Eastman v. Chapman, 1 Day, 30. The representatives of a master, where the indentures did not extend to executors nor administrators, are not entitled to receive the wages earned by the apprentice after his master's death, and before the expiration of the apprenticeship. Kennedy v. Savage, 2 Browne, 178. γ

But if a person is bound apprentice by justices of peace, and the master happens to die before the term expired, the justices have no power to oblige the executor, by their order, to receive such apprentice and maintain him; for by this method the executor is deprived of the liberty of pleading *plene administravit*, which he may do, in case covenant be brought against him, and must maintain the apprentice, whether he hath assets or not.

Carth. 231; Salk. 66, pl. 1; Show. 405, The King v. Peck. β In Vermont, the indentures of an apprentice bound by the guardians of the poor become voidable on the death of the master. Phelps v. Culver, 6 Verm. 430. γ

But it is said, that in the case of the master's dying, by the custom of London, the executor must put the apprentice to another master of the same trade.

Salk. 66, pl. 1, 204, pl. 2; Per Holt, C. J., March, 3, pl. 6; Keb. Rep. 250, pl. 15; Boh. Priv. Lond. 339, 340.

[By 32 G. 3, c. 57, § 1, if the master or mistress of any parish apprentice die during the term of such apprenticeship, upon whose binding no larger sum than five pounds shall have been paid, the covenant in the indenture for the maintenance of such apprentice shall not continue in force longer than three calendar months after the death of such master or mistress; during which three months the apprentice shall continue to live with and serve the executors or administrators, or with such person as they shall appoint. And in all such parish indentures of apprenticeship there shall be annexed to the covenant for maintenance a proviso, that such covenant shall not continue longer than three calendar months after the death of such master or mistress; but if such proviso be omitted, the covenant on the part of the master or mistress to maintain the apprentice shall continue only for three calendar months after his or her death: within which three calendar months, by § 2, two justices of the peace where the master or mistress died, shall, on the application of the widow of such master, or the husband of such mistress, or of any son, daughter, brother, or sister, or of any executor or executrix, administrator or administratrix, of the deceased, by endorsement on the indenture, direct the apprentice to serve another master for the remainder of his term. And by § 3, the same regulations, which are above directed to

§(G 2) Of the Dissolution of the Relation between Master and Servant.

take place on the death of any original master or mistress, shall also take place on the death of any subsequent master or mistress. By § 4, if no application be made to two justices within the three months, or if, on application, the two justices should not think fit to continue such apprenticeship, the indentures shall be void. But by § 5, this act shall not extend to any parish apprentice not living with and serving such original or subsequent master or mistress at the time of his or her death. By § 6, if the original master or mistress, or any subsequent master or mistress, or the personal representative of such master or mistress, having assets, during the three months, shall refuse or neglect to maintain and provide for such apprentice according to the form of such covenant, two justices, on complaint of the apprentice, or the parish officers, may levy sufficient for the purpose by distress and sale of the effects or assets of such master or mistress.]

§(G 2) Of the Dissolution of the Relation between Master and Servant or Apprentice.

THE indenture of apprenticeship may be vacated by consent of all the parties.

Graham v. Graham, 1 S. & R. 330.

And an apprenticeship *de facto* may be ended by an agreement without seal.

Nickerson v. Easton, 12 Pick. 110.

But when an indenture was executed between the master and a board of selectmen, and afterwards the master, with the consent of one of them, cut out his name from the indenture, this was held not to cancel the indenture, nor to discharge the master from the covenants.

Power v. Ware, 2 Pick. 451.

A contract by which a servant binds himself to a master as a footman and groom is not dissolved by a subsequent contract by which he engages to bind himself to serve in a different character at higher wages and in a foreign country, although the servant accompanies the master unto such foreign country; the service performed abroad being the same as that originally contracted for.

Rex v. Buckingham, 3 Nev. & M. 72.

The causing the servant to be sent to prison on a charge, which was afterwards abandoned, held not to amount to a dissolution of the contract, and the party therefore entitled to wages which would have accrued in the interval, until actual dismissal.

Smith v. Kingsford, 3 Scott, 279.

If a master whose apprentice has wrongfully left his service give out that he will not receive him again, others may lawfully employ him, unless they have a counter notice.

Conant v. Raymond, 1 Aik. 243.

A B was duly bound an apprentice to C D, in the city of Baltimore, to learn the trade of a weaver. He after applied, with the consent of C D, to the Court of Oyer and Terminer for Baltimore county, to be released from his indenture, and he was released.

Mass v. Rogers, 6 Har. & J. 492.

Misconduct on the part of the servant, inconsistent with his duties as such, will justify the master in putting an end to the contract at any time.

Singer v. M'Cormick, 4 Watts & S. 265.g

(H) Of Servants' Wages, how recoverable.

It is clearly agreed, that if a person retains a servant, and agrees to pay him so much by the day, month, or year, that the servant may have an action against the master on the contract, or against his executors, and that every such retainer will be presumed to be in consideration of wages, unless the contrary appears.

9 Co. 88 a, b; 2 Roll. Rep. 269. ¶ And see *White v. Cuyler*, 6 Term Rep. 176. If a master turn away a servant without a previous warning, the servant is entitled to a month's wages. *Robinson v. Hindman*, 3 Esp. 235; but it is otherwise if the servant be dismissed for misconduct. *Spain v. Arnott*, 2 Stark. 256.¶

β A clerk hired generally by the year at a certain salary, upon the dissolution of the contract by mutual consent within the year, may recover salary, *pro rata*, without any express agreement to that effect.

Thomas v. Williams, 3 Nev. & M. 515; 1 Ad. & Ell. 685.

Where a yearly servant is dismissed by his master for a sufficient cause, before the expiration of the year, he cannot recover any wages, even *pro rata* for the time which may have elapsed before his dismissal.

Ridgway v. Hungerford Market Company, 4 Nev. & M. 797; 3 Adol. & Ellis, 171; 1 Har. & Wall. 244.

One who engages to serve another as overseer for one year, and leaves his employer during the year, without his consent or any sufficient reason, cannot recover compensation for the services actually rendered.

Pettigrew v. Bishop, 3 Alab. R. 440.γ

So, if a man be retained in London, to serve beyond sea, he may have his action for his wages in England, and lay his action in any country, in like manner as an obligation bearing date at Roan, in France, may be sued in England, alleging the place to be in such a country where he brings his action.

Brownl. 54.

“As to the jurisdiction of justices of peace herein, by the 5 Eliz. c. 4, § 15,(a) for the declaration and limitation what wages servants, labourers, and artificers, either by the year or day, or otherwise, shall have and receive, it is enacted, That the justices of peace of every shire, riding, and liberty, within the limits of their several commissions, or the more part of them, being then residing within the same, and the sheriff of that county, if he conveniently may, and every mayor, bailiff, or other head officer within any city or town corporate, wherein is any justice of peace, within the limits of the said city or town corporate, and of the said corporation, shall yearly at every general sessions first to be holden and kept after Easter, or at some time convenient within six weeks next following every of the said feasts of Easter, assemble themselves together; and they so assembled, calling unto them such discreet and grave persons of the said county, or the said city, or town corporate, as they shall think meet, and conferring together, respecting plenty or scarcity of the time, and other circumstances necessary to be considered, shall have authority by virtue thereof, within the limits and precincts of their several commissions, to limit, rate, and appoint the wages, as well of such and so many of the said artificers, handicraftsmen, husbandmen, or any other labourer, servant, or workman, whose wages in time past hath been by any law or statute rated and appointed, as also the wages of all other labourers, artificers, workmen, or apprentices of husbandry, which have not been rated, as they the same justices, mayor, or other head officers, within their several commissions or liberties, shall think meet by their dis-

(H) Of Servants' Wages, how recoverable.

cretions to be rated, limited, or appointed by the year, week, month, or otherwise, with meat and drink, or without meat and drink; and what wages every workman or labourer shall take by the great for mowing, reaping, or threshing of corn and grain, or for mowing or making of hay, or for ditching, paving, railing, or hedging by the rod, perch, lugg, yard, pole, rope, or foot, and for any other kind of reasonable labour or service," &c.

Bridgm. 119. *¶*(a) This section of the statute of Eliz. is repealed by 53 G. 3, c. 40.

In the construction of this statute, the following opinions have been holden:—

That though the statute only gives the justices power to set the rate for wages, and not to order payment, yet grafting hereupon they may now, from the frequent practice, and the indulgence the law gives to remedies for wages, order payment, as well as assess the rates.

2 Ld. Raym. 820, 821; Fortesc. Rep. 317, 318; 6 Mod. 91, 204; 10 Mod. 68; Ses. Cas. 35, pl. 37. Case of Set. and Rem. 234; 2 Salk. 441, pl. 3, 442, pl. 5, 484, 485; 3 Salk. 262; Stra. 8.

*¶*By 20 Geo. 2, c. 19, § 1, it is enacted, that complaints and differences between masters and servants in husbandry, hired for one year, or longer, or between masters and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers, (a) shall be determined by one or more justices of the county, &c., where such master, &c., shall reside, although no rate or assessment of wages has been made that year by the justices, &c., where such complaints shall be made; which justice or justices are empowered to examine upon oath such servant, artificer, &c., or any other witness touching such complaint, and to make such order for payment of so much to such servant, &c., as shall seem meet, not exceeding 10*l.* as to a servant, and 5*l.* as to an artificer, &c.; and in case of refusal or nonpayment of any sums so ordered, for twenty-one days after such determination, such justice shall issue his warrant to levy the same by distress (b) and sale, rendering the overplus to the owner, after payment of charges of distress and sale.

(a) This provision extends to *all* labourers, not merely those in the occupations mentioned. *Lowther v. Radnor*, 8 East, 113. But a person employed by an attorney to keep possession of goods under a *fi. fa.* is not within the act. *Branwell v. Penneck*, 7 Barn. & C. 536. (b) Replevin cannot be maintained for a distress under this clause. *Wilson v. Weller*, 1 Brod. & B. 57; 3 Moo. 294, S. C.

By 4 G. 4, c. 34, § 2, justices, in case of disputes between masters and their apprentices, may order payment of wages to apprentices, provided the sum in question does not exceed 10*l.*; and by § 4, in the case of absence of masters, power is given to justices, upon the complaint of servants in husbandry, to summon such masters' stewards or agents, and to make an order upon them for the payment of wages, provided the sum does not exceed 10*l.*, and in case of non-compliance therewith to levy the same under their warrant by distress. And by § 5, every justice before whom any complaint shall be made in pursuance of the 20 G. 2, c. 19, or 31 G. 2, c. 11, may order the amount of wages due to any servant in husbandry, artificers, labourers, or other persons named in the acts to be paid within a proper period, and on refusal to be levied by distress and sale.

That though a single justice may compel payment, yet the power of setting wages is only in the sessions; and that a single justice cannot arrest the party refusing to pay in the first instance.

Hil. 8 G. 2, *Shergold and Halloway*, in B. R.; 2 Stra. 1002, S. C.; 2 Ses. Cas. 100, pl. 100, S. C.

(I) What Acts of the Servant are deemed the Master's, &c.

That justices of peace have no jurisdiction to judge of wages, except in case of husbandmen; but yet the court in favour of servants will always, unless the contrary appears upon the face of the order, presume servants to be servants in husbandry, and will admit of no collateral proof to the contrary.

Ca. Law and Eq. 68; 6 Mod. 91.

But an order, that a person shall pay so much to his coachman, was quashed; for here it appears upon the face of the order, that he is not a servant in husbandry.

2 Jon. 47.

And on the authority of this case it hath been held, that the justices cannot make orders for the payment of footmen, bricklayers, carpenters, &c., servants' wages; because their jurisdiction is confined to the wages of such servants whom they may compel to serve according to the statute.

6 Mod. 204, 205.

So, where, upon the face of the order, it appeared to be for the payment of the wages of two persons retained by A, overseer of the works in the gardens of Hampton Court, the order was quashed. But in this case it was held, that had the order been general,—viz., to pay so much to two of his labourers, or two of his servants,—the court would have supposed them servants in husbandry; but that here there was no room for such an intendment, since the contrary appeared.

2 Salk. 442, pl. 5; 6 Mod. 204; Fortesc. Rep. 317; Case of Set. & Rem. 234; 2 Salk. 261, pl. 20.

So, where one Rycraft, a justice of peace in Middlesex, made an order for the payment of a seaman's wages; upon an action brought against him, the plaintiff recovered 30*l.* damages.

5 Mod. 140.

[It hath been holden, that this statute extends to covenant-servants, if in husbandry.

Reg. v. Cecil, 2 Ld. Raym. 1305; 11 Mod. 266, S. C. ¶See the 53 G. 3, c. 40.¶

But if the order bear upon the face of it, that it was made upon the oath of the servant, it will be quashed; for there is no necessity to resort to the oath of the party in this case, since evidence may be given of the service.

Reg. v. Cecil, 2 Ld. Raym. 1305; 11 Mod. 266, S. C. ¶See the 53 G. 3, c. 40.¶

When an apprentice is employed, without the knowledge or consent of his master, the master is entitled to all his earnings, whether the person who employs him did or did not know that he was an apprentice. But in case of a hired servant, the master must have notice of his being the servant of another, to make him answerable.

James v. Le Roy, 6 Johns. 274.*g*

(I) What Acts of the Servant are deemed the Master's, of which the Master may take Advantage.

THERE are several acts which, being done by a servant, will be equally effectual and advantageous as if done by the master himself. Hence it is held, that continual claim made by a servant is good; as, if he enters into a part, and claims, &c., or if the master says that he dares not go to any part of the land, nor approach nearer than D, and commands his servant to go to D, and claim, and the servant does so; this is sufficient, though the servant

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had no fear, for he doth as much as he was commanded to do, and all that his master durst or ought by the law to do.

Lit. § 433; Co. Lit. 257 b.

But if the master be in health, and command his servant to go to the land and claim, &c., in this case, a claim made by the servant, as near as he dares, is void; for he does not do all that he is commanded, nor so much as the master durst have done.

Lit. § 435; Co. Lit. 258 b.

But if the master be sick, or a recluse, (one who, by reason of his order, cannot go out of his house,) and he command his servant to go and claim for him, and the servant go as near as he dares by reason of fear, &c., this is sufficient, though the command were to go to the land; and yet, regularly, when a servant doth less than he is commanded, his act is void; but when a servant exceeds his master's command, it is void only so far as he hath exceeded.

Co. Lit. 258 a.

If a feoffment with livery be made of land, the servant of the owner being in possession, the livery is void, though made with the consent of the servant; for the servant continuing in possession, it must be only for the use and benefit of him that placed him there, and consequently the possession of the servant must be looked upon as the possession of the master; and the servant having no interest, but in right of his master, his consent was void, and he could neither make a surrender, nor a tenancy at will, to the feoffor.

2 Roll. Abr. 5.

The master hath an interest in the labour and acquisitions of his servant, and his acts herein are said to be for the benefit of the master, according to the rule, *Quicquid acquiritur servo acquiritur domino*; but the master of a hired servant cannot maintain trover for any property acquired by the servant; nor can he have any other remedy against a person who employs him but an action on the case, *per quod servitium amisit*.

Co. Lit. 117 a.

But it is otherwise of an apprentice; and therefore where a waterman's widow took an apprentice, who went to sea, and earned two tickets, which came to the defendant's hands; the widow brought trover, and had judgment; for what the apprentice gains, he gains to his master; and whether legally apprentice or not, is no ways material, for it is enough if he be so *de facto*.

Salk. 68, pl. 8; Barber and Dennis, 12 Mod. 415.

{So where an apprentice has, either with or against his master's consent, quitted his service and gone on board a privateer, his master is entitled to his share of prize money on account of prizes captured before his time was out.

1 Ves. 48, Meriton v. Hornsby; Ibid. 83, Hill v. Allen.

The right of the master, however, to the earnings of his apprentice in the way of his business, or of any other business which is substituted for it, is different from a right to his extraordinary earnings which do not interfere with the profits the master may legitimately derive from his service. Therefore the portion of salvage coming to an apprentice has been decreed to be paid to himself, as it comes within the latter description. It is an extra

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benefit, the reception of which does not deduct from the profits the master is entitled to from his service.

2 Cran. 240, 270, *Mason and others v. Ship Blaireau*; 3 Rob. Adm. Rep. (Am. ed.) 239, *The Beaver*; 2 Pet. 282, *Bell et al. v. Sloop Ann.* }

It is said, that the master shall have advantage of his servant's contracts in the same manner as he shall be bound by them, as to those matters which come within his compass as a servant; as where a servant was sent by a master to a debtor, and appointed by him *ad componendum et agreandum* the money due from the debtor; and there being a promise made to the servant, to pay what was due upon the balance and agreement, it was held, that the master might maintain an action in his own name, on the promise to his servant.

Godb. 360, 361, *Seignior and Walmer*.

|| The master of an apprentice, seduced to work for another, may either sue in tort for the seduction, or may bring *assumpsit* for work and labour done by the apprentice for the person who seduced him and employed him.

Lightly v. Clouston, 1 Taunt. 112; *Foster v. Stewart*, 3 Maul. & S. 191. And see *Eades v. Vandeput*, 5 East, 39 a; *Gye v. Felton*, 4 Taunt. 876. ||

If the servant is robbed of the master's goods, the master or servant may have an appeal.

Stamf. 60; Bro. tit. *Appeal*, 92; *Latch*, 127, S. P.; and he that begins first shall recover, and prevent the other of his action. *Per Dodderidge*.

If a servant is cozened of his master's money, the master may have an action on the case against the cozenor.

Roll. Abr. 98; Cro. Ja. 223.

[Where a clerk had embezzled notes and money belonging to his master to a considerable amount, which he had paid away to the defendant, in the insurance of tickets in the lottery, which insurance was contrary to the statute of 12 G. 3, c. 3, § 36; it was holden, that as these notes and money were not paid *bonâ fide*, but for an illegal consideration, and their identity could be traced, the master should recover them. *Clarke v. Shee*, Cowp. 197.] || See also *Solomons v. Bank of England*, 13 East, 135, n. ||

If a servant be robbed of his master's money, though in the absence of his master, the master may maintain an action for it against the hundred.

But for this vide tit. *Hue and Cry*.

(K) What Acts of the Servant shall be deemed the Master's, for which the Master shall answer and be bound.

THE reason why the acts of a servant are, in many instances, esteemed the acts of the master, arises from the relation between a master and servant; for, as in strictness everybody ought to transact his own affairs, and it is by the favour and indulgence of the law that he can delegate the power of acting for him to another, it is highly reasonable that he should answer for such substitute at least *civiliter*; and that his acts, being pursuant to the authority given him, should be deemed acts of the master.

§ Masters are answerable *civiliter* for the misconduct, negligence and defaults of their servants while acting under the authority delegated to them. *Gray v. The Portland Bank*, 3 Mass. 364; *Foster v. Essex Bank*, 17 Mass. 479; *Deerfield v. Delano*, 1 Pick. 465; *Sproal v. Hemmingway*, 14 Pick. 1; *Lowell v. Boston and Lowell Railroad Company*, 23 Pick. 24; *Fiske v. Fearingham Man. Co.* 14 Pick. 491; *Brown v. Purviance*, 1 Har. and Gill, 316. And as he is responsible for the servants when authorized, he is in the same manner entitled to the advantage of his servants' contracts. *Damon v. Osborn*, 1 Pick. 476. §

Therefore, if a servant sells a piece of cloth, and warrants it to be good, an action of deceit lies against the master.

11 East, 4, 6.

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So, if a man brings a horse to a smith to be shod, and the servant pricks it; or if the servant of a surgeon makes the wound worse; in both these cases an action lies against the master.

5 Co. Pilkinton's case; 2 Roll. Abr. 693; Cro. Eliz. 181.

So, if the servant of a traveller sells wine to another which is corrupted, an action on the case lies against the master, though he did not command the servant to sell it to any (a) particular person.

9 H. 6, 53; Roll. Abr. 95. (a) If a servant sells an unsound horse, or other merchandise, in a fair, no action lies against the master, unless he commanded him to sell to a particular person. 9 H. 6, 53; Roll. Abr. 95, S. C.; Fitz. *Action sur la Case*, 5, S. C.; Poph. 143, and 2 Roll. Rep. 6, S. C. cited.—But if by the command and coven of the master he sells to a particular person, an action lies against the master, for it is then his own sale. 9 H. 6, 53; Roll. Abr. 95; Bridgm. 128, S. C. cited. [A servant, however, employed to sell a horse has an implied authority to warrant that it is sound. *Alexander v. Gibson*, 2 Camp. 555; and in the case of a general agent the master will be bound by the warranty, though made contrary to his express directions. *Per Ashhurst, J.*, in *Fenn v. Harrison*, 3 Term Rep. 761.]

So, if a goldsmith makes plate, wherein he mingles dross, so that it is not according to the standard, and by his servant sells it; an action lies against the master, because it fails in the price in silver.

Cro. Ja. 471; 2 Roll. Rep. 28.

But if A, being possessed of certain artificial and counterfeit jewels, of the value of 168*l.*, and, knowing them to be such, delivers them to B his servant, commanding him to transport the said jewels to Barbary, and to sell them to the king of Barbary, or such other person as would buy them; but (b) gives B no charge to conceal their being counterfeit; and thereupon B goes into Barbary, and, knowing those jewels to be counterfeit, shows them to C for good and true jewels, and affirming to C that they were worth 810*l.*, and desires C to sell them to the said king for 810*l.*, which money C pays B, and B thereupon immediately returns to England, and pays the 810*l.* to A, his master; and after the jewels being discovered to be counterfeit, C is imprisoned by the said king till he repays the 810*l.* out of his own effects; of all which matters C gives notice to A, and demands satisfaction, &c.; yet no action lies against A, for jewels are in themselves of an uncertain value, and B was not by A particularly directed to C, and all that was done *quoad* C was the voluntary act of the servant, for which the master is not bound to answer.

2 Roll. Rep. 5, 26, 27; Bridg. 125; Poph. 143; Cro. Ja. 469, *Southern v. Haw.* (b) According to the report of this case in Cro. Ja. it is said, that the court inclined against the plaintiff, principally because A did not order B to conceal their being counterfeit.

King E. 6, sold a quantity of lead to A, and appointed the Lord North, who was then chancellor of his court of augmentations, to take bond for the payment of the money; the Lord North appointed one B, who was his clerk, to take the bond, which was done, who delivered it to the lord; and he delivered it back again to his clerk, in order to send it to the clerk of the court of augmentations: B suppressed this bond: and it was held by all the judges, that the Lord North was chargeable to the king; because the possession of the bond by his servant, and by his order, was his own possession.

Dyer, 161 a, pl. 48; 3 Mod. 333, S. C. cited.

So, where an officer of the customs made a deputy, who concealed the duties, and the master, being ignorant of the concealment, certified the

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customs of that part of the revenue into the Exchequer upon oath; he was adjudged to be answerable for this concealment of his servant.

Dyer, 258 b, pl. 38; 3 Mod. 323, S. C. cited.

So, where the lessor was bound, that the lessee should quietly enjoy; and it was found, that his servant, by his command, and he being present, entered; this was held to be a breach of the condition, for the master was the principal trespasser.

4 Leon. 123, Seaman and Browning; 3 Mod. 323, S. C. cited.

Two are constituted postmasters-general by letters patent, pursuant to the statute 12 Car. 2, c. 35, and in the patent there is a power to make deputies, and appoint servants at their will and pleasure, and to take security of them in the name and use of the king; and that they, the postmasters-general, shall obey such orders as from time to time should come from the king; and as to the revenue, shall obey the orders of the treasury: and it is farther granted to them, that they shall not be chargeable for their officers, but only for their own voluntary faults and misbehaviour; and this granted with a fee of 1500*l. per annum*. And A having exchequer-bills, encloses them in a letter, directed to B at Worcester, and delivers it at the post-office at London, into the hands of J S, who was appointed by the postmaster-general to receive letters, and had a salary; the letter having miscarried, and the exchequer-bills lost, it was held by three judges, (a) against Holt, C. J., that the postmasters-general are not liable; and this, from the multiplicity of servants they are obliged to employ, and against whom it is impossible for them to secure themselves, the inconsiderableness of the *premium*, &c.

Carth. 487; Salk. 17, pl. 8, 143; 5 Mod. 455; Ld. Raym. 646; Comyns, 100, pl. 68; Lane v. Robert Cotton and Sir Thomas Frankland, 12 Mod. 482. [(a) This opinion of the three judges hath since been confirmed by the decision of the Court of K. B. in Whitfield v. Lord Le Despencer, Cowp. 754, in which case it was holden, that the postmaster was liable only for personal neglect or misconduct.] {See 1 Johns. Rep. 396, Franklin v. Low & Swartwout.} ||And see Gidley v. Lord Palmerston, 3 Brod. & Bing. 275.]]

||In the last case, the postmasters-general were held not liable, though they had the appointment of their servants. Where the public officer has not the appointment of his servants, this is an additional ground for exempting him from liability. Thus, the captain of a ship of war was held not answerable for damage done by running down another vessel, the mischief happening during the watch of the lieutenant who was on deck, and who had the management of the navigation of the vessel at the time, and it not being the captain's duty to be there; for here there was no personal order given by the captain, and the lieutenant was not his servant, he having no power of appointing or dismissing him, but both he and the lieutenant being servants of his majesty.

Nicholson v. Mounsey, 15 East, 384; and see Carruthers v. Sydebotham, 4 Maul. & S. 86; *sed vide per* Lawrence, J., 1 Taunt. 569; and Huggett v. Montgomery, 2 New R. 446.]]

It hath been held, that owners of ships were answerable to freighters for the acts of the masters and mariners, in the same manner as other masters are for their servants; and should answer for their embezzlements, secreting of goods, &c. But this proving a great discouragement to trade, by the 7 G. 2, c. 15, it is provided, that for such embezzlements, &c., without the owners' knowledge, the owners shall only forfeit the value of the ship

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or vessel, with all her appurtenances, and the full amount of the freight due, or to grow, for and during the voyage wherein such embezzlement, &c.

Vent. 190, 233; Raym. 220; 2 Keb. 72, 112, 135; Mod. 85; 2 Lev. 69; Morse v. Sluce, 2 Salk. 440, pl. 1; Carth. 58; 3 Lev. 259, Boson v. Sanford.

The acts of a servant are deemed the acts of the master, in dealing and contracting for his master, in those things in which he has a general authority; as, (a) if a servant usually buys for the master on tick, and the servant buys some things without the master's orders, yet, if the master were trusted by the trader, the master is chargeable, though the things never came to the master's (b) use.

Doct. & Stud. Dial. 2, c. 42; 2 Vern. 643; Comb. 450; 1 Ld. Raym. 224; 3 Salk. 234, pl. 4. (a) Show. 95, so ruled upon evidence by Holt, C. J. (b) That coming to the master's use, clearly implies an authority from the master, and shall charge him. Brownl. 64; and see Precious v. Abel, 1 Esp. 350. But it is otherwise if from the nature of the case an authority cannot be implied, see Hiscox v. Greenwood, 4 Esp. 174.]

But if a man sends his servant with ready money to buy meat, or other goods, and the servant buys upon credit, the master is not chargeable.

Show. 95, per Holt C. J.; [Rushby v. Scarlett, 5 Esp. 76; Pearce v. Rogers, 3 Esp. 214; Stubbing v. Haintz, Peake, 47.]

So, if the master had forbidden the tradesman to trust his servant, this shall excuse the master on evidence.

Brownl. 64.

And herein it is said, that a servant, by transacting affairs for his master, does thereby derive a general authority and credit from him; which general authority is not liable to be (c) determined for a time, by any particular orders or instructions, to which none but the master and servant are privy; for that if this should prevail, there would be an end of all dealing but with the master.

Ca. Law and Eq. 110. (c) A case cited between Monk and Clayton, where the act of a servant, though out of place, bound his master, by reason of the former credit given him by his master's service, the other not knowing that he was discharged.

If a master sends his servant to receive money, and the servant instead of money takes a bill, and the master, as soon as told thereof, disagrees, he is not bound by this payment; but acquiescence, or any small matter, will be (d) proof of the master's consent; and that will make the act of the servant the act of the master.

2 Salk. 442, pl. 4; 5 Mod. 398; 6 Mod. 36; Ld. Raym. 928; Com. Rep. 138, pl. 92. Ward and Evans, and vide 10 Mod. 109, 110; 11 Mod. 72; {2 Mass. T. Rep. 106, Cushman v. Loker.} [Mauder v. Conyers, 2 Stark. 281.] (d) If a merchant's apprentice draws a bill in this manner, *I promise to pay such a sum for my master*; to charge the master with this note, it is said, there ought to be either an authority precedent, or a consent subsequent; or that the master had intrusted him with his affairs; otherwise the master shall not be chargeable. Comb. 450; Ld. Raym. 224; 3 Salk. 234, pl. 4. [And where a party has dealt with a tradesman on credit, it is not sufficient to give notice to the tradesman's servant, that he means to pay ready money in future; it must be given to the tradesman himself. Greatland v. Freeman, 3 Esp. 85.]

{So if A authorize B to sign his name to a note for a certain sum payable in six months, and B put A's name to a note for that sum payable in sixty days, A is not responsible. For the power given was special, and ought to have been strictly pursued.

2 Johns. Rep. 48, Batty v. Carswell; 3 Term, 762, Fenn v. Harrison.}

If A brings case against the master of a stage-coach, on the custom of the realm, for a trunk lost by his negligence; and on evidence it appears that the trunk was delivered to the servant who drove the coach, who pro-

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mised to take care of it, and that the trunk was lost out of his possession ; the action does not lie against the master ; for a stage-coachman is not within the custom as a (a) carrier is, unless he take a distinct price for the carriage of goods, as well as persons ; and though money be given to the driver, yet that is a gratuity, and cannot bring the master within the custom ; for no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master ; and then the act of the servant is the act of the master.(b)

Salk. 282, pl. 11, ruled by Holt at *nisi prius*, and the plaintiff nonsuited accordingly. (a) That if a carrier's porter receives goods, the carrier shall be liable ; Comb. 118 ; per Dolben, J. (b) Most, if not all stage-coaches now carry goods for hire, and therefore come within the description of carriers. {See 8 Term, 531, *Ellis v. Turner*.}

§ Where a servant, at the time of being intrusted with the control of his master's carriage, used it for another person and without the master's knowledge, and, during that time, he occasioned an injury, the master was held liable ; *aliter* where the servant without the master's knowledge improperly used them.

Sleath v. Wilson, 9 C. & P. 607.

In an action on the case done to the plaintiff's cabriolet, against which the defendant's cart was driven, the defendant is liable, though it appear that the defendant's servant was not driving at the time of the accident, but had intrusted the reins with a stranger who was riding with him, and who was not in the service of the defendant.

Booth v. Mister, 7 Car. & P. 66.

If a servant driving his master's cart, on his master's business, make a detour from the direct road for a purpose of his own, his master will be answerable in damages for any injury occasioned by his negligent driving, while so out of the road.

Joel v. Morrison, 6 Car. & P. 501.

A steamboat was employed in the business of towing vessels, and had a brig in tow at her stern ; through the negligence of the master and crew of the steamboat, over whom those in charge of the brig had no control, the latter was brought in collision with a schooner lying at anchor. Held, that the master and crew of the steamboat were not the servants of the owners of the brig, and were not employed by them so as to make such owners responsible for their negligence.

Sproul v. Hemmingway, 14 Pick. 1.

A pilot, while he has charge of a vessel, is so far the servant of the owner as to make the latter responsible for injuries done to third persons in the course of his business, by his negligence or default.

Yates v. Brown, 8 Pick. 23.

Two persons owned a line of stage-coaches running from Barre through Holden to Worcester and back ; one of them furnished stage-coaches and horses, and received pay for the transportation of passengers from Holden to Worcester, and the other, from Holden to Barre. They hired a man to drive all the way from Barre to Worcester and back for a certain sum per month, and perquisites. Money was delivered to the driver to carry on this line from Barre to Worcester, and he absconded without delivering it. Held, that the driver was the servant of both owners jointly.

Cobb v. Abbot, 14 Pick. 289.

|| A master is not responsible for goods ordered by his servant, in the

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master's name, but without his authority, unless he has on former occasions paid for goods ordered by him, or there is some other evidence to show that the servant had authority.

Mauder v. Conyers, 2 Stark. Ca. 281; *Todd v. Robinson*, 1 Ry. & Moo. 217; *Gilman v. Robinson*, *Ibid.* 226.¶

The master must answer for torts and injuries done by his servant in execution of his authority; as, where a pawnbroker's servant took a pawn, the pawner came and tendered the money to the servant, who said he had lost the goods; upon which the pawner brought trover against the master, and it was held well.

2 Salk. 441, pl. 2, *per* Holt, C. J., at *nisi prius* at Guildhall. *Ld. Raym.* 738; *Cas. temp. Holt*, 642, pl. 3.

So, where a servant of A with his cart run against another cart, wherein was a pipe of sack, and overturned the cart, and spoiled the sack; it was held, that an action lay against A.

2 Salk. 441, pl. 2, cited *Ld. Raym.* 739.

So, where a carter's servant run his cart over a boy; it was held, the boy should have his action against the master, for the damage he sustained by his negligence.

2 Salk. 441, pl. 2, cited *Ld. Raym.* 739.

So, where the servant of A brought a coach and two ungovernable horses of his master's to Lincoln's Inn Fields, a place much frequented by people, and there drove them to make them tractable, and fit them for a coach; and the horses being unruly, and for want of care, &c., ran upon the plaintiff, and hurt and wounded him; in an action brought both against the master and servant, it was held that it well lay; and that it shall be intended the master sent the servant to train the horses there.

Vent. 295; 2 *Lev.* 172; 3 *Keb.* 650, *Michel and Alestree*. ¶See *Bush v. Steinman*, 1 *Bos. & Pul.* 404; *Matthews v. West London Water-works Company*, 3 *Camp.* 403; *Harris v. Baker*, 4 *Maul. & S.* 27.

{But though a master is answerable for damages occasioned by the negligence or unskilfulness of his servant acting in the execution of his orders, yet he is not answerable in trespass for the wilful act of his servant, done in his absence and without his direction or assent; as by wilfully driving his carriage against another.

1 *East* 106, *M'Manus v. Crickett*.}

¶In the last case in the text, there was no wilful misconduct in the servant; but if a servant in driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce an accident, the master is not liable; and it is a question for the jury, whether the mischief arose from accident, or mere negligence in the servant, or whether it arose from his wilful misconduct.

M'Manus v. Crickett, 1 *East*, R. 106; *Croft v. Allison*, 4 *Barn. & A.* 590.

Where the carriage or horses are jobbed, as it is called, questions have arisen, whether the hirer is answerable, as master, for mischief happening from the negligence of the coachman. Where the party appoints the coachman, and furnishes the horses, and hires the carriage, it has been held that he is well described as the owner and proprietor of the carriage, and there can be no doubt he would be held liable, as master, for the negligence of the coachman in driving it. But where the owner of a carriage hired the horses for the day, to draw it, and the owner of the horses appointed the

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coachman; in an action brought against the owner of the carriage, for damage occasioned by the negligence of the coachman, Abbott, C. J., and Littledale, J., held, that the defendant was not liable, since the coachman was not his servant. Bayley, J., and Holroyd, J., held, however, the contrary.

Croft v. Alison, 4 Barn. & A. 590; Laugher v. Pointer, 5 Barn. & C. 547; and see Dean v. Branthwaite, 5 Esp. Ca. 35; Sammell v. Wright, Ibid. 263; Chilcot v. Bromley, 12 Ves. 114.]

¶ Where the defendants, having a carriage of their own, were in the habit of hiring horses for the drive or day of the same job-mistress, and giving a gratuity to the driver of the latter, for whom they also provided a coat and hat, which were used on each occasion of accompanying them, and an injury happened during his leaving the horses unattended, while he went to deposit the hat; held, that he was not to be deemed the servant of the defendants, so as to render them liable for the injury arising from such negligence.

Quarman v. Burnett, 6 Mees. & W. 499. See Smith v. Lawrence, 2 M. & R. 1.

A agreed to convey land to B, and B agreed to build a house on it, and to pay A for the land. While the agreement was in force, B, in preparing to build the house on his own sole account, by workmen employed by himself alone, undermined the wall of the adjoining house belonging to C, by which it was injured. Held, that A was not answerable for this injury, although the title in the land remained in him when the injury was committed.

Earle v. Hall, 2 Metc. 353.g

[It was lately ruled^l on the authority of the precedent in *Turberville v. Stampe*, 1 Ld. Raym. 264, 3 Ld. Raym. 375, that a declaration charging the *master*, the defendant, with having negligently driven his cart against the plaintiff's horse, was supported by evidence that the *servant* drove the defendant's cart.

Brucker v. Fromont, 6 Term Rep. 659.]

¶ In the civil law the responsibility for injuries done by a servant was confined to cases of menial or domestic servants, to whom the party stood in the relation of *paterfamilias*. Our law does not admit this restriction. A employed B, a surveyor, to repair his house; B contracted with C, a carpenter, to do the work, who contracted with D, a bricklayer, for the bricklayer's work; and D contracted for the lime with E, a limeburner; and E's servant improperly laid the lime in the road, by which the plaintiff's carriage was overturned. A, the owner of the house, was held answerable for the act to the plaintiff. In such cases the intermediate agents are not liable; the action must be brought either against the hand committing the injury, or against the superior for whom the act was done.

Inst. lib. 4, tit. 5, § 1; Dig. lib. 9, tit. 3; Bush v. Steinman, 1 Bos. & Pul. 409; and see Leslie v. Pounds, 4 Taunt. 649; Matthews v. West London Waterworks Company, 3 Camp. 402; Flower v. Adam, 3 Taunt. 314; Stone v. Cartwright, 6 Term Rep. 411.]

¶ If a servant commit an injury to another person while not acting within the scope of his authority, the master will not be held responsible.

Wilson v. Beverly, 2 N. H. Rep. 548.

When a master uses due diligence in the selection of competent and

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trusty servants, and furnishes them with suitable means to perform the services in which he employs them, he is not answerable to one of them, for an injury received by him, in consequence of the carelessness of another, while both are engaged in the same service.

Farwell v. Boston and Worcester Rail-road Corporation, 4 Metc. 49.g

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If a master command his servant to do what is lawful, and he misbehave himself, or do more, the master shall not answer for his servant, but the servant for himself, for that it was his own act; otherwise it would be in the power of every servant to subject his master to what actions or penalties he pleased.

Skin. p. 228, pl. 7. ¶See *McManus v. Crickett*, 1 East, 106; *Bowcher v. Noidstrom*, 1 Taunt. 568; *Nicholson v. Mounsey*, 15 East, 384; *Croft v. Alison*, 4 Barn. & A. 590.¶

And on this foundation it hath been ruled, that if a man command his servant to do a lawful act, as to pull down a little wooden house, (wherein the plaintiff was, and would not come out, and which was carried upon wheels into the land, to trick the defendant out of possession,) and bid him take care that he hurt not the plaintiff; if, in doing this, the servant hurt the plaintiff, in trespass of assault and wounding brought against the master, he may plead not guilty, and give this in evidence; for that he was not guilty of the wounding, and the pulling down the house was a lawful act.

Skin. 228.

But it is laid down as a rule, that in every case where the master has not power to do a thing, whoever does it by his commandment is a trespasser as well as the master.

8 E. 4, 45, *per* Choke.

If a master locks a man into his house, and delivers the key to his servant, if the servant be ignorant that anybody be there, the servant is not chargeable; but if he know that the master had imprisoned one tortiously, and he still kept him in prison, he is liable to an action.

22 E. 4, 45, *per* Jenny.

¶A servant may be charged in trover, although the act of conversion be done by him for the benefit of his master.

Stephens v. Elwall, 4 Maule & S. 259;¶ *Cranch v. White*, 1 Scott, 314; 1 Hodges, 61.g

If the servant of a taverner sells wine that is corrupted,(a) knowing it to be so, no action of deceit lies against the servant, for he did it but as a servant.

Roll. Abr. 95. (a) If the attorney in an action of debt knows of, and was witness to, a release of the debt, made before the action brought for it, yet no action lies against the attorney, ¶by the defendant,¶ for he acted only as a servant, and in the way of his calling. Mod. 209. [*Sed qu.*]

If the servant of A lease lands to another for years, reserving a rent to A, and, to persuade the lessee to accept thereof, he promise that he shall enjoy the land during the term, without encumbrances; if the land be encumbered, &c., the lessee may have an action on the case against the servant, because he made an express (b) warranty.

Roll. Abr. 95; 2 Roll. Rep. 270, *Broking v. Came*. (b) If one command his ser-

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vant to sell an ill horse, and the servant sell him for a good one, whereby the servant is arrested and endamaged, yet the servant shall not have his remedy against his master. Cro. Ja. 471. *Qu. If the servant did not know it was an ill horse!*

If a man draws a bill, to which he puts his seal, in this form: *Memorandum, That I have received of J S, to the use of my master, the sum of 40l., to be paid at Michaelmas following*; the servant is liable hereby, for though in the premises it is said to be to the use of his master, yet the payment being indefinite, must be understood to be by him who sealed the bill: but it is said, that if it had been to be repaid by his master, that (a) the servant had not been liable.

Yelv. 137, Talbot v. Godbolt. (a) Whether he who speaks for or fetches goods for his master, without any particular promise of paying for them, is liable to pay for them; and where, upon the circumstances of such a case, though he may be held liable at law, a court of equity will relieve. Vide Preced. Chan. 46; Abr. Eq. 308.

So, Mr. Mildmay, agent to the York Buildings Company, residing in Scotland, drew a bill of exchange in favour of J S, on their cashier in London; which bill run thus: "To — Bishop, Cashier to the Honourable Governor and Assistants of the York Buildings Company, at their house in Winchester Street. Sir, pray pay to J S, or his order, 200l., and place it to the account of the Company for value received, as per advice, by your humble servant, Charles Mildmay." The letter of advice referred to was directed to the governor and company, informing them of the draught made upon Mr. Bishop, in favour of J S, (but it did not appear that this was the usual method of drawing bills on the company;) Mr. Bishop accepted the bill generally, viz., accepted by J. Bishop; and if this acceptance should charge him in his own right, was the question? It was saved for the judgment of the court, after a verdict at *nisi prius* for the plaintiff; and it was resolved it should.

Mich. 7 G. 2, in B. R. Thomas v. Bishop; 2 Kel. 136, pl. 116, S. C.; 2 Barnard. K. B. 320, S. C.; 2 Stra. 955, S. C. ¶And see Lefevre v. Lloyd, 5 Taunt. 749; Goupy v. Harden, 7 Taunt. 159; Chit. on Bills, 27, (7th edit.)]

{An officer appointed by government, and treating as an agent for the public, is not personally liable upon a contract made in that capacity, unless he has contracted in such a manner as to pledge his personal responsibility.

1 Term 172, Macbeath v. Haldimand; East, 135, Myrtle v. Beaver; Ibid. 579, Rice v. Chuter; 3 Cain, 69, Sheffield v. Watson; 1 Mass. T. Rep. 208, Brown v. Austin.

Nor is the case varied by the circumstance that the contract is made by an instrument under his seal.

1 Term, 674, Unwin v. Wolseley; 1 Cran. 345, Hodgson v. Dexter. Vide 5 East, 148, Appleton v. Binks.

And the law is the same with respect to the agent of a *foreign* government.

3 Dall. 384, Jones v. Le Tombe.

The secretary of an incorporated company, who as such signs a lottery ticket for the company, is not personally responsible to the holder.

2 Bin. 201, Passmore v. Mott.

But where the defendant, as *treasurer of the jockey club*, agreed to rent from the plaintiff a piece of ground for the use of the club, and by an agreement in writing bound himself to pay the rent, he was holden to be individually liable.

1 Wash. 199, M^cWilliams v. Willis.}

(M) For what Acts of his shall the Servant answer, and be responsible to his Master:
And herein,

1. *Where by an implied Trust or Confidence a Servant shall answer in a Civil Action.*

If a man commits money to his servant to carry to such a place, and he is robbed, the servant shall not answer for it; for a servant only undertakes for his diligence and fidelity, and not for the strength and security of his defence, and therefore shall not be obliged to preserve his master's property at all adventures. And herein the law, as now settled, makes a difference between a servant and another independent person; for every other person has naturally no more than the single care of his own affairs, and is not bound in point of duty to defend or intermeddle with the property of another; but where he will officiously create to himself such an undertaking, he is obliged to answer the loss, if any happen; but a servant is, by the duty of his place, under the command of his master, and is bound, in point of necessity, to take care of another's affairs. Now the first contract, whereby he becomes a servant, implies no more than an undertaking for his care and obedience; and whenever he afterwards intermeddles in the affairs of his master, it is but in consequence of that original contract, and therefore cannot be extended any further; and since, when he first contracted, it was no more than an undertaking for his own care and fidelity, whenever he intermeddles with his master's affairs, it is under that general undertaking, and, by consequence, he cannot be charged but for deficiency in point of care, or of faithfulness; and therefore is not answerable for any inevitable accident.

8 Co. 84, and vide tit. *Bailment*.

But if A is employed by B to sail from England to the Indies, and A covenants that he or his servants will not thence import any calicoes, &c., and A retains C as his servant in this voyage, and acquaints him with the covenants, and notwithstanding C falsely and fraudulently brings thence certain calicoes, &c., A shall have an action against C, for though no action lies by a master for the bare breach of his command, yet if a servant does any thing falsely and fraudulently, to the damage of his master, an action will lie.

Sid. 298; Lev. 188; 2 Keb. 88, Hussey and Pacey.

So, if a merchant's servant takes his master's goods that are arrived at a port in England, and, before payment of the customs, lands them, *per quod* the goods are forfeited and seized by the king; the master may have an action of trespass upon the case against his servant.

Roll. Abr. 105; Cro. Ja. 265; Lane, 65, S. C., *Leveson v. Kirk*.

So, if a servant, that drives his master's cart, by his negligence suffers the cattle to perish, an action upon the case lies against him.

7 H. 4, 14, Bro. tit. *Action sur Case*, 34.

If a man deliver a horse to his servant to go to market, or a bag of money to carry to London, which he neglects to do, the master may have an action of account or detinue against him.

21 H. 4, 14, Moor, 248.

A master sends his servant, that used to transact affairs of that nature for him, on Saturday morning with a note drawn upon Sir Stephen Evans, with order to get from Sir Stephen either bank bills or money, and turn them into exchequer notes; but the servant having other business of his master's upon

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his hands, to save himself the time and trouble of going to Sir Stephen, goes to B, and prevails with him to give him a bank bill for Sir Stephen's note, and then in pursuance of his master's orders invested it in exchequer notes, which he brought to his master, not letting him know but that he had gone to Sir Stephen; Sir Stephen Evans failing on the Monday following, it was adjudged, that this loss should fall on the master, and not on B; and the court was of opinion that the master could not recover it of the servant, the loss being occasioned by a mere accident, and not by either folly or negligence.

10 Mod. 109, Nixon v. Brohan.

2. Where Servants or Apprentices shall be punished criminally, for Acts done in relation to their Masters.

At common law, a servant or apprentice, without any regard to age, might be guilty of felony in feloniously taking away the goods of their master, though they were goods under their charge, as a shepherd, butler, &c., and may at this day for any such offence be indicted, as for a felony at common law; but at common law, if a man had delivered goods to his servant to keep or carry for him, and he carried them away *animo furandi*, this was considered only a breach of trust, but not felony.

Hale's Hist. P. C. 505, 666.

|| This, however, was never settled law; it was only doubtful whether a servant could commit larceny of goods delivered to him by the master to keep or carry; the stat. 21 H. 8, c. 7, (post,) recites such doubts whether it were felony or not; but subsequent decisions have long established the contrary doctrine, viz., that where a party has only the bare charge or custody of the goods of another, the legal possession remains in the owner, and the party may be guilty of trespass and larceny in fraudulently converting them to his own use. This rule appears to hold universally in the case of servants, whose possession of their master's goods, by delivery or permission from the master, is now held the possession of the master himself. Thus, where a mercer's book-keeper having received bills from his master to enclose to correspondents, in the usual course of business, and instead of enclosing them he got cash for them, and absconded with it; the judges were of opinion that this was larceny, as the possession still continued in the master. So, where the prosecutors (corn factors) had purchased a cargo of oats in a vessel lying in the Thames, and they sent the prisoner, who was employed in their service as a lighterman, with their barge to the corn-meter for as much of the oats as the barge would carry, and the prisoner received a quantity of oats, and embezzled part; the judges held it larceny, considering it a taking from the actual possession of the owners, as much as if they were in their granary.

Hale's P. C. 505, note; 2 East, P. C. c. 16, § 14, p. 564; Russell on Cri. b. 4, c. 66; Paradice's ca., 2 East P. C. p. 565; and see 1 Leach, 523; Spears' ca., 2 Leach, 825; 2 East, P. C. 568; and see 4 Taunt. 276; and the other cases to the same effect, Russell on Cri. b. 4, c. 16.]

But now by the statute of 21 H. 8, c. 7, (a) it is enacted, "That all and singular servants, to whom any caskets, jewels, money, goods, or chattels, by his or their masters or mistresses shall from henceforth be delivered to keep, that if any such servant or servants withdraw themselves from their masters or mistresses, and go away with the caskets, jewels, money, goods, or chattels, or any part thereof, to the intent to steal the same, and defraud

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his or their masters or mistresses thereof, contrary to the trust and confidence to him or them put by his or their masters or mistresses, or else being in the service of his or their masters or mistresses, without any assent or commandment of his master or mistress, embezzle the same caskets, jewels, money, goods, or chattels, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal it; that if the said casket, jewel, money, goods, or chattels, that any such servant shall go away with, or which he shall embezzle with purpose to steal as aforesaid, be of the value of 40s. or above, that then the same false, fraudulent, or untrue act and demeanour, shall from henceforth be deemed and adjudged felony, &c. Provided it extend not to *apprentices*, nor to any person under the age of *eighteen* years; but every such apprentice, or person within that age, doing that act, shall be and stand in the like case as they were before the making of this act."

[(a) Repealed by 7 & 8 G. 4, c. 27; but see the provisions of 7 & 8 G. 4, c. 29, *post*, 548, 549.]

By the act of 27 H. 8, c. 17, clergy was taken away in this case, if the indictment were laid specially upon the act of 21 H. 8, c. 7, and pursuant to the same, and by the act 28 H. c. 2, this act of 21 H. 8, c. 7, was made perpetual; but by the act of 1 E. 6, c. 12, these acts were both repealed; but again, by the act of 5 Eliz. c. 10, § 3, (a) this act of 21 H. 8, c. 7, was re-enacted and made perpetual; but it did not revive the act of 27 H. 8, c. 17, for taking away clergy. But now by 12 Ann. c. 7, clergy in such case is taken away from facts committed in any house or outhouse, except as to apprentices under the age of *fifteen* years robbing their masters. (b)

Hale's P. C. 666, 667. [(a) This stat. 5 Eliz. c. 10, is repealed by 7 & 8 G. 4, c. 27. (b) Benefit of clergy is abolished by 7 & 8 G. 4, c. 28, § 6.]

In the construction of this statute the following opinions have been holden: (c)

[(c) The statute being repealed, and the doctrine of the common law being both changed and settled since the period, these opinions are not all law at this day, nor are any of them of much importance, but being part of the original text, the Editor has not felt at liberty to expunge them.]

1. That it extends only to such as were servants to the owner of the goods both at the time they were delivered, and also at the time when they were stolen.

Hawk. P. C. c. 33, § 12.

2. That it is strictly confined to such goods as are delivered *to keep*; and therefore that a receiver, who, having received his master's rents, runs away with them, or a servant, who being intrusted to sell goods, or to receive money due on a bond, sells the goods, &c., and departs with the money, is not within the statute; but that a servant who receives his master's goods from another (d) servant, to keep for the master, is as much guilty as if he had received them from the master's own hands; because such a delivery is looked upon as a delivery by the master.

Dyer, 5 pl. 2, 3; 3 Inst. 105; Hawk. P. C. c. 33, § 13. (d) Or the master's wife, she being as well his mistress as if she were sole. Hale's Hist. P. C. 668.

3. That it includes not the wasting or consuming of goods, howsoever wilful it may be; nor the taking away of an obligation, or any other bare *chase in action*.

Hawk. P. C. c. 33, § 14.

4. That it extends not to the taking of such things, whereof the actual

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property is not in the master at the time; and therefore, that if a servant having money or corn, &c., delivered to him, melt down the money of his own head, without the command of his master, into a piece of plate, or turn the corn into malt, and then run away with them, that he is not within the statute; because the property of these things is so far changed, by altering them in such a manner, that they cannot be known again, and the master cannot afterwards take them without being a trespasser. But it is agreed, that if a servant make a suit of clothes of cloth, or a pair of shoes (a) of leather, delivered to him by the master, and then run away with them, that he is not within the statute; because the property is no way altered: and even in the first case, Hawkins seems to be of opinion, that the taking of the plate and malt is within the statute; and that the whole act of the servant, taken together, should be deemed a conversion of the master's goods to his own use, with an intent to steal them, which brings it within the express letter of the statute; on which foundation it hath been resolved, that a servant who changes his master's money from silver to gold, and then runs away with it, is within the statute.

Crompt. 50; Dalt. c. 102; Hawk. P. C. c. 33, § 15. (a) How can a pair of shoes be within the statute, if the leather was not of the value of 40s., which is not very probable?

||It is to be observed, that the cases referred to in page 545, as establishing the doctrine that a conversion by the servant of his master's goods, received from his master to keep, is larceny, are all cases where the possession has been clearly vested in the master, antecedent to the delivery to the servant. Where, however, the goods are delivered to the servant by a third party for the use of the master, a different principle applies. The master, in such cases, is not held to have had such a possession in himself as to make the subsequent conversion of them by the servant larcenous.

Thus a cashier of the Bank of England, who had received from a third party a bond, to be deposited with the bank, and who fraudulently sold the bond, and converted the money, was held not guilty of larceny of the bond.

Waite's ca., 1 Leach, 28; 2 East, P. C. c. 16, § 17; 2 Russell on Cri. 204.

So, a servant attending his master's shop, and receiving money from a customer, which he ought to have put into the till, but which he purloined, was held guilty only of breach of trust, for the master had no possession of the money.

Bull's ca., 2 Leach, 841; 2 Russell on Cri. 205, where see other cases to the same effect.

The distinction thus established, taking these frequent cases of embezzlement by servants out of the law as to larceny, gave rise to the several statutes against embezzlement. ||

[By 15 G. 2, c. 13, § 12, (passed in consequence of Waite's case, *supra*.) "If any officer or servant of the Bank of England, being intrusted with any note, bill, dividend, warrant, bond, deed, or any security or effects of any other person lodged or deposited with the said company, or with him as an officer or servant of the said company, shall secrete, embezzle, or run away with the same, or with any part thereof, he shall suffer death without benefit of clergy." (b)]

||As to embezzlements by bankers, &c., and other agents, of money, securities for money, or chattels intrusted to them for special purposes, see 7 & 8 G. 4, c. 29, § 49, 50. Russell on Cri. b. 4, c. 18, 19, 20, 21, and 22, 2d edit. (b) See further, as to em-

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bezzlements by servants of the Bank of England, 35 Geo. 3, c. 66; 37 Geo. 3, c. 46; 39 Geo. 3, c. 85; and the cases, *Russell on Cri. b. 4, c. 20.*]

By 5 G. 3, c. 35, § 17, and 7 G. 3, c. 50, (a) "If any deputy, clerk, agent, letter-carrier, postboy, or rider, or any other officer or person whatsoever, employed in receiving, stamping, sorting, charging, carrying, conveying, or delivering letters or packets, or in any other business relating to the post-office, shall secrete, embezzle, or destroy any letter, packet, or bag of letters, which he shall be intrusted with, or which shall have come to his possession, containing any bank note, bank post bill, bill of exchange, Exchequer bill, South Sea or East India bond, dividend warrant, navy, or victualling, or transport bill, ordnance debenture, seaman's ticket, state-lottery ticket or certificate, bank receipt for payment on any loan, note of assignment of stock in the funds, letter of attorney for receiving annuity or dividends, or for selling stock in the funds, or belonging to any company, society, or corporation, or of the Bank, South Sea, East India, or any other company, or society, or corporation, American provincial bill of credit, goldsmith's or banker's letter of credit, or note for or relating to the payment of money, or other bond or warrant, draught, bill, or promissory note whatsoever for the payment of money, or shall steal and take any of the same out of any letter or packet that shall come to his possession, he shall suffer death without clergy." (b)

[(a) And see 52 Geo. 3, c. 143, § 2; *Russell on Cri. b. 4, c. 21.* (b) It seems that it is not felony within this statute for a person employed in the post-office to steal out of a letter intrusted to his care a draft on a London banker, purporting to be drawn in London, but actually drawn above ten miles from London, on unstamped paper. *Rex v. Pooley*, 3 Bos. & Pul. 311; *Russ. & Ry. 12*; and *Russell on Cri. b. 4, c. 21*, where see the cases as to embezzlements in the post-office.]

By 7 Jac. 1, c. 7, and 17 G. 3, c. 56, "Persons employed in the hat, woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, silk, or dyeing manufactures, who shall embezzle or clandestinely dye any of the materials with which they are intrusted, and any persons who shall knowingly buy, sell, pawn, or dispose of the same, shall be liable to be punished by fine, whipping, and imprisonment."

[By the 7 & 8 G. 4, c. 29, § 46, for the punishment of depredations committed by clerks and servants in cases not punishable capitally, it is enacted, that if any clerk or servant shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master; every such offender, being convicted thereof, shall be liable at the discretion of the court to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years; or to be imprisoned for any term not exceeding three years, and if a male to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment.

And by § 47, 48, of the same statute, for the punishment of embezzlements committed by clerks and servants, it is enacted, that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall by virtue of such employment receive or take into his possession any chattel, money, or valuable security, for, or in the name, or on the account of his master, and shall fraudulently embezzle the same, or any part thereof; every such offender shall be deemed to have fraudulently stolen the same from his master, although such chattel, money, or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed; and

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every such offender, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.(a)

These provisions are substituted for the repealed statute 39 Geo. 3, c. 85. Some of the decisions on this repealed statute are of importance, and may be seen, Russell on Cri. b, 4, c. 17. (a) In § 46, *supra*.

(N) Of the Master's Authority over his Servant, and how far he may correct and punish him.

It is clearly agreed, that a master may correct and punish his servant in a reasonable manner for abusive language, neglect of duty, &c.; and that, in an action of assault and battery brought against him, he may justify, that he was (b) his servant, gave provoking language, &c., and that therefore *moderate castigavit*; and on issue of (c) *immoderate castigavit*, if it appears in evidence that the punishment was such as is usual from masters to their servants, the master will be acquitted.

38 H. 6, c. 25; Sid. 175. (b) It is said, that the master in his justification must set forth the retainer, the place where, and in what business, being matters issuable. Sid. 177. (c) Where the plaintiff replied *non moderate castigavit*, held well, though not so pertinent an issue as *immoderate castigavit*. Vent. 70; Sid. 444; 2 Keb. 623.

But as such correction must be moderate, it has been held, that the master cannot justify wounding his servant; as in assault, battery, wounding, and imprisonment, &c., defendant justifies, for that he and the plaintiff were servants to the sheriff of Suffolk; and that the plaintiff, when he should have been attending in court, was at a conventicle; and that he, by command of the sheriff, *leviter et molliter manus imposuit* upon the plaintiff, and brought him thence; which is the same trespass, &c. On demurrer to this plea it was held ill; because as to the wounding (d) he says nothing at all, and in that he cannot justify.

2 Mod. 167; 8 Mod. 120, 218, 330; 21 H. 6, 26; 2 Inst. 316. (d) He should have pleaded not guilty to the wounding; and now in such case, by virtue of the stat. 4 Ann. c. 16, § 4, the defendant may plead double, not guilty to the whole, and justify as to a part of the trespass.

Also it hath been held, that though a master may beat his servant, yet he cannot delegate that power to another; for though a lord might beat his villein, either with cause or without, and he could have no remedy, yet if another by his command did it, the villein might have had an action.

2 H. 4, 4; 11 H. 4, 75; 9 Co. 76 a; 2 Mod. 167.

From this authority which a master hath over his servant, it is held in law, that if a master designeth moderate correction to his servant, and accordingly useth it, and the servant, by some misfortune, dieth thereof, this is not murder, but *per infortunium*; because the law alloweth him to use moderate correction, and therefore the deliberate purpose hereof is not *ex malitia præcogitata*.

Hale's Hist. P. C. 454.

But if the master design an immoderate or unreasonable correction, either in respect of the measure, or manner, or instrument thereof, and the servant die thereof; this *per* (e) Hale cannot be excused from murder, if done with deliberation and design; nor from manslaughter, if done hastily, passionately, and without deliberation; and herein, says he, consideration must be had of the manner of the provocation, the danger of the instrument which

(O) Of the Master's Remedies, &c.

the master useth, and the age or condition of the servant that is stricken; and the like of a schoolmaster towards his scholar.

(e) 1 Hale's Hist. P. C. 454.—And *per* Hawkins, where a schoolmaster in correcting his scholar, or a father his son, or a master his servant, or an officer in whipping a criminal condemned to such punishment, happens to occasion his death; if such persons in their correction be so barbarous as to exceed all bounds of moderation, and thereby cause the party's death, they are guilty of manslaughter at the least; and if they make use of an instrument improper for correction, and apparently endangering the party's life, as an iron bar, or sword, &c., or kick him to the ground, and then stamp on his belly and kill him, they are guilty of murder. Hawk. P. C. c. 59, § 5, for which are cited Bracton, lib. 1, c. 4; H. P. C. 31; Crompt. 28; Dalt. c. 96; Keilw. 136; Kelyn. 65; 5 Mod. 287; Fost. Cr. Law, 262.

(O) Of the Master's Remedies against others for enticing away, and other injuries done in relation to his Servant.

It is clearly agreed, that from the interest a master has in the labour and service of his servant, he may maintain an action for enticing (a) or taking him away.

21 H. 6, 31, pl. 18. (a) But it is said, that for taking away a man's servant out of his actual service, trespass will lie; but that for enticing him, only an action on the case. Salk. 380, pl. 17; 2 Ld. Raym. 1116.—[Trespass will lie for enticing him away; and this though he be only a journeyman. Hart v. Albridge, Cowp. 54.]

Also, if without any enticement a servant leave his master, without license or just cause, and J S, knowing him to be his servant, retain him, an action lies.

Noy, 10, 106; Leon. 240; Keilw. 180; 2 Lev. 63; ||Blake v. Lanyon, 6 Term Rep. 221.]

But it hath been held, that an indictment does not lie for enticing away a servant, being a private injury, which may be redressed by civil action.

Salk. 380, pl. 17; 3 Salk. 191, pl. 21; 6 Mod. 99, 182, 289; 2 Ld. Raym. 1116, The Queen v. Daniel.

||A master may, if he chooses, waive his action for the tort, and bring an action of *indebitatus assumpsit*, for work and labour done by his servant or apprentice, against the person who tortiously employed him.

Lightly v. Clouston, 1 Taunt. Rep. 112; Foster v. Stewart, 3 Maul. & S. 191; Eades v. Vandeput, 5 East, 39, n.]

In case the plaintiff declared, that J S, 19 Sep., 16 Car. 2, was retained as an apprentice to serve the plaintiff for nine years, and continued in his service till the 31st of October, 21 Car. 2, when the defendant procured the said J S to leave the plaintiff's service, &c., (b) *per quod* the plaintiff *totum proficuum quod ratione servitii præd. J S per totum residuum termini recipere potuisset totaliter perdidit*, &c., and after (c) a verdict for the plaintiff, and general damages given, though it appeared the term was not expired, it was intended that damages were given for all the term, as well the time to come as past; for the damages must be intended to be taxed according to the declaration; and if it should be intended otherwise, it would be uncertain to what time they were taxed, whether to the exhibition of the bill, or verdict given; and judgment arrested accordingly.

T. Raym. 200; 2 Saund. 169, 170; Lev. 299, Hambleton v. Veera. (b) The plaintiff declared for a battery of his servant, 19 Jan. &c., *per quod* he lost his service for a long time, viz. for the space of six months then next following, &c. After a verdict for the plaintiff, though the original bore *teste* before the end of the six months, yet the plaintiff had his judgment; for the viz. was more than needed, being not of the substance of the action, but for aggravation of damages only. Hob. 284; All. 23, *per Cur.*; but yet vide Cro. Ja. 619; Yelv. 94. (c) Where upon a demurrer it may be helped, for the plaintiff may take damages for the departure only. Mod. 271, pl. 22.

(P) What a Master or Servant may justify doing in each other's Defence.

For the battery of a servant, the master as well as servant may bring an action, and each shall recover damages, for both are injured; the servant in his person, and the master (a) by the loss of his servant's labour; and therefore a recovery in an action brought by one of them, cannot be pleaded in bar to an action brought by the other.

And. 13; 9 Co. 113; 10 Co. 131; Style, 94; 2 Bulst. 198; Sid. 175. (a) And as it is this that entitles the master to his action, he must always declare *per quod servitium amisit*. Cro. Ja. 618; Roll. Rep. 393.—And therefore the defendant may plead not guilty, and give it in evidence, that he did not lose his service. 2 Roll. Abr. 682. [And see Hall v. Hollander, 4 Barn. & C. 660, where the action was held not to be maintainable, the servant, by reason of his tender age, being incapable of performing any service.]

But if a man beats another's servant to that degree that he dies thereof, the master loses his action, and must proceed by indictment; for the private injury to him is drowned in the general injury to the public.

Yelv. 89, 90; Brownl. 205; 2 Roll. Abr. 568; 1 Salk. 11.

If a surgeon, in consideration of a sum of money, undertakes to cure my servant of a hurt, and he applies unwholesome medicines thereto, on purpose to make the wound worse, by which I lose the service of my servant. for a long time, I may have an action on the case against the surgeon.

Roll. Abr. 98; Roll. Rep. 124; 2 Bulst. 332.

[If a daughter, who is under age, and lives with her father, be seduced, the father (b) may maintain an action against the seducer to recover a compensation for the loss of her service; and he may do so, whatever be her age, if she lived with him at the time, and acts of service be proved: and the slightest acts of service will suffice.

3 Burr. 1878; 3 Wils. 18; 2 Term Rep. 166. [(b) And a master, not standing in the relation of a parent, may maintain this action for debauching his servant. Fores v. Wilson, Peake's N. P. C. 55; so in like manner it may be maintained for the seduction of an adopted child. Irwin v. Dearman, 11 East, 23. And it may be maintained for the seduction of a married daughter serving in her father's family, apart from her husband. Harper v. Luffkin, 7 Barn. & C. 387. So by the father of a girl hired by defendant colourably as a servant, but with the design of seducing her; for the relation of master and servant was never in fact contracted between the girl and the defendant. Speight v. Oliveira, 2 Stark. Ca. 493.]

(P) What a Master or Servant may justify doing in each other's Defence.

From the relationship between a master and servant it hath been agreed, that a master killing a person in defence of his servant, or a servant in defence of his master, are not guilty of murder; and that, in those cases, the act of the assistant shall have the same construction as the act of the party assisted should have had if it had been done by himself.

Hale's Hist. P. C. 484.

Also, a servant may justify an assault in defence of his (c) master; and, by some opinions, so may a master in defence of his servant; but others hold that he cannot, because in such case he may have an action *per quod servitium amisit*.

2 Roll. Abr. 546; Owen, 151; Cont. Salk. 407, pl. 2. (c) But he cannot justify in defence of his master's son, because not servant to him. Dalt. c. 72; Crompt. 136. Nor in defence of his master's goods. 2 Lutw. 1481.

A servant shall not avoid a deed made by duress to his master, nor *vice versa*.

Roll. Abr. 687; 2 Brownl. 276.

As to a master's maintaining a servant, or a servant his master, in suits and legal proceedings, it is agreed, that a master may go along with his servant, or with his domestic chaplain, to retain counsel: also, he may pray one to be of counsel for him, and may go with him, and stand with him, and aid him at the trial, but ought not to speak in court in favour of his cause: also, if the servant be arrested, the master may assist him with money to keep him from prison, that he may have the benefit of his service; but the master cannot safely lay out money for the servant in a real action, unless he have some of his wages in his hand; but these, with the servant's consent, he may safely disburse.

Bro. *Maintenance*, 6, 14; 2 Roll. Abr. 116; Moor, 814. [See tit. *Maintenance*.]

As to a servant's maintaining his master, it is agreed, that a person retained generally as a servant, and not for a particular occasion only, may lawfully ride about to speed his master's business; and may go to counsel for him, and show his evidence to the counsel, or to the jury, and stand by him at a trial; but cannot lawfully lay out his own money in the suit.

Hetl. 79; 2 Roll. Abr. 116; Keilw. 50.

MERCHANT AND MERCHANDISE.

[THE protection of trade was very early a favourite object of the laws of this country. In the time of King Athelstan we find a very remarkable law, which says, that any merchant who has made three voyages upon his own account beyond the British Channel, or narrow seas, shall be entitled to the privilege of a thane. *Et si mercator tamen sit, qui per trans altum mare per facultates proprias abeat, illa postea jure thani sit dignus.*]

Wilkins' Angl. Sax. Leg. *Judicia Civitatis Lond.* p. 71. [See the introductory chapter to Chit. on Commercial Law, vol. 1.]

It seems agreed too, from the fundamental principles of our government, that the king cannot regularly prohibit trade, nor lay a penny imposition on it; but that every man may use the sea, and trade with other nations, as freely as he may use the air.

§ By the Constitution of the United States, art. 1, s. 7, n. 3, power is given to Congress "to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

And this freedom of trade is not only allowed by the common law, but hath also been asserted and established by the care and wisdom of princes and parliaments; and to this purpose it is provided by *Magna Charta*, c. 30, That (a) all merchants, (b) if they were not openly prohibited before, shall have their safe and sure conduct to depart, come and carry, buy and sell, without any manner of evil tolts, by the old and rightful customs, &c.

(a) This respects aliens only; which strongly proves that the English had this liberty before; otherwise they would not have extended it to aliens, and left the English without it. 2 Inst. 57. (b) This prohibition must be by act of parliament, because it concerns the whole realm, which is implied in the word *openly*, and relates to aliens only. 2 Inst. 57.

But notwithstanding this freedom of trade, yet it seems agreed, that the king may in time of war, and for the public service and safety, lay an em-

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bargo on ships, and employ the ships of his subjects on the public service; but this, says my Lord Chief Justice Holt, ought to be upon great emergencies, and for the public benefit, and not for the private interest of any person or society: (a) also it seems agreed, that the king may, by his writ of *ne exeat regno*, retain a subject from going out of the realm; (b) and may, by his privy seal, command any of his subjects to return out of a foreign nation, on pain of having their lands seized, &c. It hath likewise been holden, that the king by his prerogative may restrain his subjects from trading with an infidel nation, state, or people, without his license; and on this foundation principally it was held, in the case of Sands and the East India Company, that the king's charter, which gave them an exclusive right to trade to the East Indies, was good. But this doctrine seems now exploded, for nothing can exclude the subject from trade but an act of parliament.

Skin. 335; 3 Lev. 352; 4 Mod. 176, Sands v. Child and Lynch. *β* (a) See United States v. The Brigantine Williams, 2 Hall's Law Journal, 255; 3 Story, Com. 163; 1 Kent, Com. 60, 432. (b) Citizens of the United States have a right to expatriate themselves until restrained by Congress, but it seems that a citizen cannot renounce his allegiance to the United States without permission of the government to be declared by law. Bouv. L. D. *Expatriation*, and the authorities there cited.

And as the freedom of trade and merchandise is supported by the common law, so likewise are there certain customs (c) and privileges annexed thereto by the common law, of which the judges will take notice *ex officio*. But these privileges are not to be extended (d) to every one who buys and sells; nor is he from thence, says Molloy, to be denominated a merchant, which appellation peculiarly belongs to him who traffics in the way of commerce by importation or exportation; or otherwise, in the way of emption, vendition, barter, permutation, or exchange; and who makes it his living to buy and sell, and that by a continued assiduity, or frequent negotiation in the mystery of merchandising; but those who buy goods to reduce them, by their own art or industry, into other forms than formerly they were of, are properly called artificers, not merchants.

2 Roll. Rep. 113; Yelv. 135; 3 Mod. 226, 227; Show. 127; Molloy, 418. [(c) These customs were first established to supply the want of laws, and afterwards admitted as laws.] (d) There are four sorts of merchants, viz. merchants adventurers, merchants dormant, merchants travelling, and merchants residents. 2 Brownl. 99, *per* Coke.—But it is said, that a merchant includes all sorts of traders, as well and as properly as merchant adventurers; and that a merchant tailor is a common term. 2 Salk. 445, *per* Holt; and vide head of *Bankrupts*.

It hath been adjudged, that a gentleman who is abroad on his travels, and draws a bill of exchange, makes himself a merchant within the custom as to this special purpose, to make him responsible to the party upon non-payment; and this the rather from the inconveniences that might ensue, and the suspicion that might increase amongst foreign merchants upon bills of exchange, if persons who took upon themselves to draw such bills should not be liable to the payment thereof.

Carth. 82; 2 Vent. 293; Show. 127; Comb. 45, Sarfield v. Witherly.

But as the laws and customs of merchants are of various kinds, and most of them chiefly known (e) to merchants themselves, we shall here only insert what we find in our law-books relating to the following heads:

(e) The custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice; and if any doubt arise to them about the custom, they may send to the merchants to know their custom, as they may send for the civilians to know their law. Winch. 24.—May direct an issue for trial of a custom among merchants. Hard. 486.*—*The law of merchants cannot be proved by witnesses. for it is the law of the land. Pillan v. Van Mierop, 3 Burr. 1663. {Sed vide 2 Burr.

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1926, 1928, *Edie v. The East India Co.*; 6 East, 202, *Parr v. Anderson*; 1 Cain. 43, *Smith & Stanley v. Wright*; 2 Johns. Rep. 327, *Frith v. Barker*.} If by the law of merchants is meant the custom, the last proposition is not correct, and certainly is not borne out by the case 3 Burr. 1663. Where a new question arises, depending upon the course of mercantile practice, the custom has repeatedly been held receivable in evidence. Thus, where the question arose for the first time, whether the executor or administrator of the payee of a note could endorse it so as to transfer it to his endorsee, *Willes, C. J.*, and the Court of Common Pleas inquired of merchants the practice. *Stone v. Rawlinson, Willes, 559*. So, where the question was, whether a bill drawn by two drawers not partners, payable to their own order, required the endorsement of both, Lord Mansfield and the court held the evidence of usage among merchants properly received. *Carvick v. Vickery, Dougl. 653*. In *Edie v. East India Company*, 2 Burr. 1216; 1 Black. 295, where the evidence was held improper, it was only on the ground that the question had been previously settled by two decisions: and in a very late case, where the question was, whether a bill drawn abroad on a drawee residing at Liverpool, and made payable in London by the drawer, required a protest for non-payment at London or Liverpool, Lord Tenterden, C. J., received the evidence of merchants and notaries as to the practice, *Mitchell v. Baring, London Sitings, October, 1829*; and that such evidence is receivable to explain the terms of a contract for seamen's wages, see *Cutter v. Powell, 6 Term Rep. 320*; *Birch v. Depeyster, 4 Camp. 388*; or of a policy of insurance, 2 Salk. 443; *Noble v. Kennaway, 3 Dougl. 510*; *Vallance v. Dewar, 1 Camp. 503*; *Uhde v. Walters, 3 Camp. 16*; *Robertson v. Money, 1 Ry. & Moo. 75*; *Palmer v. Blackburn, 1 Bing. 61*.—But evidence of usage cannot be received to *contradict* the plain and express words of a contract. *Parkinson v. Collier, 1797*; *Park, Ins. 416*; *Yeates v. Pim, 2 Marsh. R. 141*; *Holt, Ca. 95*, and see Lord Eldon's observations on the exposition of contracts by evidence of usage. 2 Bos. & Pull. 168.} See also *United States v. Arredondo, 6 Pet. 715*; *Willings v. Consequa, 1 Pet. C. C. 225*; *Van Ness v. Pacard, 2 Pet. 148*; *Williams v. Gilman, 3 Greenl. 276*; *Heald v. Cooper, 8 Greenl. 33*; *Barber v. Brace, 3 Conn. 9*; *Gibson v. Culver, 17 Wend. 305*; *Wood v. Hickok, 2 Wend. 501*; *Schooner Reeside, 2 Sumn. 569*; *Gordon v. Little, 8 S. & R. 533*; *Homer v. Dorr, 10 Mass. 26*; *Harris v. Nicholas, 5 Munf. 483*; *Wait v. Fairbanks, Brayt. 7*; *Yeaton v. Bank of Alexandria, 5 Cranch, 492*.

(A) Of Alien Merchants.

(B) Of Principals [and Agents,] and Factors.

(C) Of Partners and Joint-traders.

(D) Of Owners and Masters of Ships.

(E) Of Mariners.

(F) Of Average.

(G) Of Hypothecation.

(H) Of Charter-parties.

(I) Of Policies of Insurance: And herein,

[1. Of Marine Insurances.

2. Of Insurances upon Lives.

3. Of Insurances against Fire.]

(K) Of Bottomry [and Respondentia].

[(L) Of Bills of Lading.

(M) Of Bills of Exchange.]

[(N) Of the Provisions for the Encouragement of Shipping and Navigation.]

(A) Of Alien Merchants.

ALTHOUGH, by the policy of our constitution, aliens lie under several disabilities, and are denied in many instances the benefits of our laws; yet are they (a) here, as in most other countries, allowed to trade and merchandise, which privilege is confirmed to them by (b) *Magna Charta*, and (c) divers other acts of parliament.

Vide tit. *Alien*; [and see 1 Chit. Commercial Law, 131, tit. *Of Aliens*.] (a) The

(A) Of Alien Merchants.

law of England rather contracts than extends the disability of aliens; because the shutting out of aliens tends to the loss of people, which, laboriously employed, are the true riches of any country. Vent. 427, *per* Hale, C. J.—The king pardons his loving and obedient subjects; this extends to aliens, if here at the time, though not made denizens. *Per* Hob. 271. (b) For this vide *supra*, and 2 Inst. 57; Molloy, 417. (c) By the 2 E. 3, c. 9, merchant strangers and others shall go and come with their merchandise.—By 9 E. 3, c. 1, all merchant strangers and others may freely buy and sell their commodities from whencesoever they came, without interruption, notwithstanding charters or usage to the contrary, which charters or usage (if any be) the king, lords, and commons hold to be of no force, as being to the damage of the king and his great men, and to the oppression of the commons, &c.

And as foreigners and aliens are allowed to trade amongst us, so are they allowed to maintain personal actions, (a) because otherwise they would be incapacitated to merchandise: but they cannot maintain any real action, because it is not necessary that they should purchase lands, or settle amongst us.

Co. Lit. 129 b; And. 25; Dyer, 2 b. ||(a) But although a foreigner suing in our courts is entitled to equal justice with a subject, he has no claim to a greater measure of justice. Duckworth v. Tucker, 2 Taunt. 37, n. || See article *Courts of the United States*, where the manner in which an alien may sue and be sued in those courts is pointed out.

An alien merchant may upon a statute extend lands, and upon office the king shall not have them; and upon ouster he shall have an assize; for the main end and design of both the statute staple and merchant was to promote and encourage trade, by providing a sure and speedy remedy for merchant strangers, as well as natives, to recover their debts at the day assigned for payment.

11 E. 3; Rot. 87; Dyer, 2 b, *in margine*.

So an alien (b) merchant may take a lease of a (c) house for his habitation for years only, and this also is for the encouragement of commerce: for if an alien trade, he must have an abode amongst us: but if he (d) depart the kingdom, or die, it goes to the king, not to his executors or administrators, because it was only a personal privilege annexed to the alien as a merchant, for the encouragement of merchandise, and consequently must expire with him, without going to his executors or administrators.

Co. Lit. 2 b. (b) That he must be a merchant. Poph. 36; Roll. Abr. 194.—For leases of any dwelling-house or shop, made to alien artificer or handicraftman, are void by 32 H. 8, c. 16, § 13; and the person taking such lease forfeits 100*l.*, and the person letting 100*l.*, for which vide Sid. 308, 309, 357; 2 Keb. 102, 116, 118; Sand. 6, 8; 2 Keb. 315; 3 Mod. 94. (c) But he cannot take a lease for years of land, meadow, &c., not being necessary for his trade or traffic. Co. Lit. 2 b; 7 Co. 17; Dyer, 2 b, *cont.*; And. 25; Bendl. 36. By 27 E. 3, c. 2, it is enacted, that all merchant strangers, and not enemies, may safely dwell in the realm, &c.; upon which statute, at a reading in Lincoln's Inn, 35 Eliz., it was agreed a merchant alien might take a lease of a house with gardens at will, but not for years: *per* Dyer, 2 b, *in margin*. (d) Not if he goes beyond sea, and leaves servants in his house during his absence. Dyer, 2 b.

A merchant stranger shall have an action for saying he is a bankrupt, for by law he may have personal actions; and these words tend to impair his credit in his trade.

Yelv. 198; Bulst. 134, S. C.

Also, by the 21 Jac. 1, c. 19, (e) it is provided, that that act, and all other acts heretofore made against bankrupts, shall extend to strangers born, as well aliens as denizens, as effectually as to natural-born subjects, both to make them subject to the laws as bankrupts, as also to make them capable of the benefit or contribution as creditors by these laws.

(e) ||The 21 J. 1, c. 19, is repealed by the new bankrupt act, 6 G. 4, c. 16; but the new act, § 135, expressly extends its provisions to aliens and denizens. ||

(A) Of Alien Merchants.

The sons of an alien, though born here, being merchants, for the first generation shall pay alien (a) customs and duties: said to be the practice of the Exchequer.

Lit. Rep. 140; Hard. 335, S. P. (a) For this vide Molloy, 305, 322.

But though alien merchants, in the payment of customs and otherwise, (b) lie under some disadvantages different from natural subjects, yet in other respects are they said to have advantages above them; in that by the common law an action of account lay for a merchant stranger against executors; that a defendant could not wage his law to an action of debt brought by a merchant stranger; and that merchant strangers were not to be sworn in leets, &c. (c)

Palm. 14. || (b) The 24 Geo. 3, sess. 2, c. 16, repeals the alien duty, though not the right of the city of London to package and scavage, or other duties granted to them by charter. (c) But a commission of bankrupt founded on the petition of a British subject resident here, for a debt due to himself and partners resident and carrying on trade in an enemy's country, cannot be supported. *McConnell v. Hector*, 3 Bos. & Pul. 113; and see *De Metton v. De Mello*, 12 East, 234; *Kensington v. Inglis*, 8 East, 275.]

As to merchant strangers, whose prince is in war with the crown of England, if they are found within the realm at the beginning of the war, they shall be attached with a privilege and limitation without harm of body or goods, until it be known to the king how merchants of England are used and entreated in their country, and accordingly they shall be used in England, the same being *jus belli*; but for merchant strangers that come into the realm after war begun, they may be dealt withal as open enemies.

7 E. 4, 13, 14, Bro. tit. *Property*, 38; 2 Inst. 58; Molloy, 417, 418; Skin. 204. ¶ Property of an alien enemy, found, on the breaking out of the war, in the territory, is not confiscable as prize; but he may retain it till the end of the war, unless it has been confiscated by the sovereign. *The Adventure*, 1 Wheat. 128.]

If an alien enemy comes here *sub salvo conductu*, he may maintain an action; so, if an alien enemy comes hither in time of peace, *per licentiam domini regis*, as the French protestants did, and lives here *sub protectione*, and a war afterwards happens between the two nations, he may maintain an action; for suing is but a consequential right of protection; and therefore an alien enemy, that is here in peace under (d) protection, may sue upon a bond; *aliter* of one commorant in his own country. (e)

Salk. 46, pl. 1; Ld. Raym. 282, Wells v. Williams. ¶ An alien resident in the United States at the time of breaking out of a war between his country and the United States, or who came to this country after the commencement of the war, under an express or implied condition, may sue and be sued, as in time of peace. *Clarke v. Morey*, 10 Johns. 69; and see 1 Johns. Cas. 206; 13 Johns. 1. ¶ (d) But an alien enemy who has such protection must plead it. 7 Mod. 150, *Sylvester's case*; Ld. Raym. 283, 853; 2 Stra. 1082. (e) By stat. 14 G. 3, c. 84, Persons naturalized shall not have British privileges of trade in foreign countries, unless they shall have resided seven years in British dominions, without being above two months absent at a time.

¶ And aliens having quitted France on account of the troubles, were exempted from arrest for debts contracted out of the British dominions.

41 Geo. 3, c. 106; 43 Geo. 3, c. 155, § 28; and see 38 G. 3, c. 50, § 9; *Sinclair v. Charles Philippe, Monsieur de France*, 2 Bos. & Pull. 363.]

[But no action can be maintained by or in favour of an alien enemy. Therefore it was adjudged, that alienage was pleadable to an action on a policy of insurance brought in the name of an English agent for his principal, an alien enemy, such interest appearing on the record; and that a replication to such a plea, that the alien was indebted to the agent (the plaintiff) in more money than the value of the property insured, could not be supported.

Brandon v. Nesbitt, 6 Term Rep. 23.] ¶ And see *Flindt v. Waters*, 15 East, 260.]

(B) Of Principals and Agents, and Factors.

§ See *Crawford v. The William Penn*, Pet. C. C. 106; *Mumford v. Mumford*, 1 Gall. 366; *Wilcox v. Henry*, 1 Dall. 69. When the plaintiff becomes an alien enemy after judgment, the event will not, on motion, stay or set aside an execution. *Buckley v. Lytte*, 10 Johns. 117. And where a judgment is obtained, on which a writ of error is brought, and war occurs pending such writ, the judgment may be affirmed. *Owens v. Hanney*, 9 Cranch, 180. §

§ A person residing in an enemy's country, whether he be a neutral, or even a citizen of the United States, is considered, not only as to his property, but also as to his capacity to sue, an alien enemy.

Society v. Wheeler, 2 Gall. 105. §

|| A contract with an alien enemy made in time of war, cannot be enforced in the courts here, although the plaintiff do not sue until the return of peace. Nor is the debt arising upon it provable under a commission of bankruptcy. But where at the time of the contract the two nations were at peace, Lord Erskine permitted a claim to be admitted, and a dividend reserved on the ground that the right was only suspended by the subsequent war.

Willison v. Pattison, 7 Taunt. 439, S. C.; 1 Moore, 339; *Ex parte Schmalzing*, Buck. 93; *Ex parte Boussemaker*, 13 Ves. 71. § An alien enemy is entitled to a distributive share of personal estate as next of kin, though he cannot recover during the war; it remains with the administrator in trust for him, until the restoration of peace. *Bradwell v. Weeks*, 1 Johns. Cas. 206. Reversed on error. 13 Johns. 1. §

The crown may, however, license a trading with the enemy; (a) and the legal effect of the king's license to an alien enemy to trade is, that not only may he sue in respect of such licensed commerce in our courts, but the commerce itself is to be regarded as legalized for all purposes of its due prosecution. (b)

(a) *Potts v. Bell*, 8 Term Rep. 548; *Alciator v. Smith*, 3 Camp. 245; *Vandyck v. Whitmore*, 1 East, 475. (b) *Usparicha v. Noble*, 13 East, 332; *Fenton v. Pearson*, 13 East, 419.

And where one British subject, detained in an enemy's country in time of war, drew a bill on a drawee in England in favour of another British subject, also detained in the enemy's country, which was endorsed to an alien enemy; it was held, that after the return of peace the alien might sue on it in this country; for the contract was not void originally, being between British subjects, and the return of peace took off the plaintiff's disability to sue.

Antoine v. Morshead, 6 Taunt. 237; 1 Maule, 558, S. C.

And it is no defence that the plaintiff sues in trust for an alien enemy.

Daubuz v. Morshead, 6 Taunt. 332; § *Hamersly v. Lambert*, 2 Johns. Ch. R. 508; § and see *ante* tit. *Aliens*. §

(B) Of Principals || and Agents, || and Factors.

As no one person, whose trade is extensive, can transact all his own affairs, so it is necessary for him to depute another in his place, on whose ability and honesty he can rely; and such person so deputed is called a factor, who is in nature of a servant, whose acts shall bind his master or principal, so far as he acts pursuant to the authority given him. (c)

Molloy, 421. {See 1 Cain. 342, *Lyle v. Clason*; 1 Wash. 23, *Hoe & Harrison v. Oxley & Hancock*; 3 Cran. 503, *Randolph v. Ware*.} || See this title in vol. 3, Chit. on Commercial Law; *Paley on Princ. & Agent*, *passim*; § *Story on Agency*, *passim*. §

(c) The character of factor differs materially from that of broker: the former, from its being usual for him to make advances upon the goods, has a special property in, as well as a general lien upon them, and may sell in his own name; but the latter is not trusted with the possession of the goods, nor ought he to sell in his own name. *Baring*

(B) Of Principals and Agents, and Factors.

v. Corrie, 2 Barn. & A. 137. § The definition of a factor, in the text, is not exactly correct. A factor is an agent employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation, commonly called factorage or commission. Bouv. L. D. *Factor*; Paley on Ag. 13; 1 Liv. on Ag. 68; Story on Ag. § 33; 3 Chit. Com. Law. 193; 2 Kent, Com. 622, note (d), 3d ed.; 1 Bell's Com. 385, § 408, 409; 2 B. & Ald. 143. Factors are divided into, 1, home factors, when they reside in the same state or country with their principal; and, 2, foreign factors, when they do not. 3 Chit. Com. Law, 193; 1 T. R. 112; 4 M. & S. 576.g

||THE AGENT'S AUTHORITY.||—If the commission be general, as to *dispose, do, and deal therein as if it were your own*, hereby the factor is excused if a loss happens; but if the commission be to *sell and dispose*, hereby the factor is not enabled to sell upon tick, nor can he sell for an unreasonable time, as ten or twenty years, though there be the words *as if it were your own*, but he must sell according to the usual time for which credit is given for the commodities he disposes of.(a)

Molloy, 422; Buls. 103. {A factor must pursue the orders given to him; he will be responsible for any injury consequent on his departing from them. 1 Bay. 169, Wilkinson v. Campbell; 1 Johns. Ca. 459, n., Le Guen v. Gouverneur and Kemble; 4 Johns. Rep. 103, Urquhart v. M'Iver; 3 Cain. 238; 3 Cran. 415, Manella, Pujals & Co. v. Barry; vide 2 Cain. 310, Drummond v. Wood. So a merchant who accepts a consignment, though not obliged so to do, is answerable, if he does not observe the orders given, for a loss which ensues. 4 Dall. 389, Walker v. Smith. But a factor who is not particularly instructed, but in whom a discretion is vested, is entitled to protection so long as he acts according to the best of his judgment, and is innocent of fraud and gross abuse of the confidence placed in him. If a loss ensue from mistake or error of judgment, where there is no *lala culpa* or *crassa negligentia*, his principal and not he must bear it. 3 Cain. 226, Liotard v. Graves. And in cases where a factor has rendered himself liable, in the first instance, for misconduct, he is discharged from the responsibility, if the principal adopts his acts. 1 Johns. Ca. 110, Towle and Jackson v. Stevenson; 1 Cain. 539, 540, Codwise v. Hacker; 2 Cain. Er. 36, 49, 63, Ludlow v. Simond.} |(a) But see Scott v. Surman, Willes' Rep. 406, 407; Houghton v. Matthews, 3 Bos. & Pull. 489, in which cases it was held that a factor may sell on credit although not particularly authorized by the terms of his commission so to do; he must, however, if employed generally to do any act, do it only in the usual way of business. Wiltshire v. Simms, 1 Camp. 258; see also Fenn v. Harrison, 3 Term Rep. 757; S. C. 4 Term Rep. 177; Olive v. Eames, 2 Stark. 181. And in equity, under a general power to sell, assign, and transfer, an agent cannot pledge for his own debt. De Bouchout v. Goldamid, 7 Ves. 21; and that a factor cannot pledge, see *post*, p. 566.}]

§ A cashier of a bank has *prima facie* authority to endorse, on behalf of the bank, the negotiable securities held by it; and any restriction upon this authority must be proved.

Wild v. Bank of Passamaquoddy, 3 Mason, 505.g

||And where the power to the agent was a power for receiving money, and concluded with the general words, "to transact all business;" it was decided that the power to transact business did not authorize the agents to endorse a bill which they had received under it.(b)

(b) Hogg v. Snaith, 1 Taunt. 347; Murray v. The East India Company, 5 Barn. & A. 204. § A power to buy and sell goods on a credit, does not necessarily include a power to sign notes or other securities for the principal. Emerson et al. v. The Providence Hat manufacturing Co., 12 Mass. R. 237.g

But where an agent has been authorized to underwrite a policy, he may settle for a loss. And the authority to an agent to act may be implied from the circumstances.(c)

Richardson v. Anderson, 1 Camp. 43, n. (c) Dyer v. Pearson, 3 Barn. & C. 38; S. C. 4 Dow. & Ry. 648; Todd v. Robinson, 1 Ry. & Moo. 217; Hicks v. Hankin, 4 Esp. 114; Whitehead v. Tuckett, 15 East, 400.

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§ So an agent who makes insurance for his principal, has authority to abandon without a formal letter of attorney.

The Chesapeake Ins. Co. v. Starke, 6 Cranch, 268.*g*

So, if goods be delivered to an agent to sell at a particular place, he cannot send them elsewhere.

Catlin v. Bell, 4 Camp. 183; *East India Company v. Hensley*, 1 Camp. 112.

But the liability incurred by the agent exceeding his commission may be discharged by the subsequent express or implied assent of the principal to the acts of his agent.*(a)*

(a) See *Prince v. Clark*, 1 Barn. & C. 186; 2 Dow. & Ry. 266.

§ A recognition of the acts of an agent, by his principal, is equivalent to an original authority.

Conn. et al. v. Penn. et al., 1 Peters' C. C. R. 496. But a ratification of the unauthorized acts of an attorney in fact, without a full knowledge of all the facts connected with those acts, is not binding on the principals. *Owings v. Hull*, 9 Pet. 607; *Howatt et al. v. Davis and Chalmers*, 5 Mun. 34. And see as to what amounts to a recognition, *Rogers et al. v. Kneeland*, 13 Wen. 114; *Vianna v. Barclay*, 3 Cow. 281. And the acts of a principal are to be liberally construed in favour of an adoption of the acts of an agent. *Codwise et al. v. Hacker*, 1 Caines' Rep. 527. But a parol ratification is not sufficient to give validity to a deed made by an agent, not having authority *under seal* to bind his principal. *Stetson v. Patton*, 2 Greenl. 358. See further as to ratification, *Frothingham et al. v. Haley et al.*, 3 Mass. R. 70; *Erick v. Johnson et al.*, 6 Mass. R. 193; *Clement v. Jones et al.*, 12 Mass. R. 60; *Bredin v. Dubarry*, 14 S. & R. Rep. 30.*g*

The construction of mercantile commissions, like that of other mercantile instruments, is to be assisted by the usages *(b)* of trade; and for that purpose the evidence of persons conversant in mercantile affairs is resorted to. Therefore, a commission to a factor to sell is now held to give him a power to sell on credit in those trades where it is the usual course of dealing.*(c)*

(b) See *ante*, p. 553, as to evidence of usage of merchants. *(c)* 12 Mod. 514; *Willes*, 407; 3 Bos. & Pull. 489; 1 Camp. 259; § *James v. McCredie*, 1 Bay, 294; *McConico et al. v. Curzen*, 2 Call, 358; *Goodenow v. Tyler*, 7 Mass. R. 36; *State of Illinois v. Delafield*, 8 Paige, 527; S. C. 26 Wend. 192; S. C. 2 Hill's N. Y. Rep. 160; *Bingham v. Bahe*, cited 1 Y. R. 487; *Randolph v. Hollingsworth*, cited 1 Yeates, R. 487; *Laussat v. Lippincott*, 6 S. & R. 392.*g*

§ Every authority given to an agent or attorney to transact business for his principal, must, in the absence of any counter-proof, be construed to be to transact it according to the laws of the place where it is to be done. The law will never presume that parties intend to violate its precepts.

Owings v. Hall, 9 Pet. 607.*g*

An agent's authority is to be so construed as to include all necessary or usual means of executing it with effect. As an instance illustrative of this maxim, a general bailiff of a manor may make leases at will without any special authority; the reason assigned for which is, because great inconvenience would arise to the lord by absence, sickness, or other incapacity, if he had not that power. But he has no general power to make leases for years, to which the same reasons do not apply. And it seems that a receiver appointed by the Court of Chancery, with a general authority to let the lands to tenants from year to year, has also authority to determine such tenancies by regular notice to quit.

2 H. Black. 618, tit. *Leases*, 1, 8; *Doe v. Read*, 12 East, 57. § An agent to let and receive rents has authority to determine the tenancy. *Doe v. Mizem*, 2 M. & Rob. (N. P.) 80. And see *Story on Agency*, § 58.*g*

So, a letter of attorney to sue for, and receive, and recover a debt,

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authorizes the attorney to arrest the debtor. But an authority to demand, sue for, recover, and receive moneys, and to give sufficient discharges, does not authorize the agent to endorse bills for his principal.

1 Roll. Rep. 300; Palm. 394; and see 10 Ves. 441; Murray v. East India Company, 5 Barn. & A. 209; and see 1 H. Black. 155; 1 Taunt. 347; Attwood v. Munnings, 7 Barn. & C. 278. β But under a power to purchase articles for the use of the principal, who engaged to become responsible for all contracts made or entered into by the attorney, it was held, that the attorney had a right to bind the principal by a promissory note, given for money borrowed for the purpose of purchasing articles for the principal. Frost v. Wood, 2 Conn. Rep. 23. γ

β So a power to sell does not give a power to warrant the title.

Nixon v. Hyserott, 5 J. R. 58; Gibson v. Holt, 7 J. R. 390. But an attorney who has power to convey land, has necessarily the power to receive the purchase-money. Peck v. Harriott, 6 S. & R. 149. γ

• And a broker employed to get a policy effected may adjust the loss. And an agent who underwrites and settles losses for another has an implied authority to refer a dispute about a loss to arbitration.

1 Camp. 43; Goodson v. Brooke, 4 Camp. 163.

An agent employed to get a bill discounted, may, unless expressly restricted, endorse it in the name of his employer, so as to bind him.

Fenn v. Harrison, 3 Term Rep. 757.

So, a servant employed to sell a horse may warrant it, unless forbidden.

Fenn v. Harrison, 3 Term Rep. 757; and 5 Esp. 75.

A principal is often bound by the acts of his agent, though contrary to the agent's instructions. This depends on whether the agent be a general or a special agent. A general agent is one put in the place of his principal, to transact all his business of a particular kind; as to buy and sell certain wares, to negotiate certain contracts, and the like. An authority of this kind empowers the agent to bind his employer by all acts within the scope of his employment; and that power cannot be limited by any private order or direction not known to the party dealing with the agent. But a special agent, who is employed about one specific act, or certain specific acts only, does not bind his employer, unless his authority be strictly pursued, for it is the business of the party dealing with him to examine his authority; and therefore, if there be any qualification or express restriction annexed to the commission, it must be observed, otherwise the principal is discharged. For instance, in case of sale of a horse, the distinction is, that if a person keeping livery stables intrust his servant with a horse to sell, and direct him not to warrant, and the servant does, nevertheless, warrant him, still the master will be liable on warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed cognisant of any private conversation between the master and the servant; but if the owner of a horse send a *stranger* (α) to a fair, with express directions *not to warrant* the horse, and he do warrant it, the purchaser can only have recourse to the person actually selling the horse, and the owner is not liable on the warranty.

Paley on Principal and Agent, p. 164, *et seq.*; 3 Salk. 233; 1 Ld. Raym. 295. β Murin v. The Commission Company, 15 J. R. 44; Perkins v. The Washington Ins. Co., 4 Cow. 659; Andrews v. Kneeland, 6 Cow. 354; Allen v. Ogden, 1 W. C. C. R. 174; Walker v. Skipwith, Meigs' R. 508. The United States are not bound by the declarations of their agent, founded on a mistake of the fact; unless it clearly appear that the agent was acting within the scope of his authority, and had authority, in his capacity of agent, to make such a declaration. Lee v. Munroe, 7 Cranch, 366.

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But where a public agent acts in the line of his duty, and by legal authority, his contracts made on account of government are public and not personal. *Hodgson v. Dexter*, 1 Cranch, 363. § 15 East, 400; 1 Holt, Ca. 278. § *Bank of Columbia v. Patterson*, 7 Cranch, 299; *Leverick v. Meigs*, 1 Cow. 645; *Beals v. Allen*, 18 J. R. 363; *Thompson v. Stuart*, 3 Conn. Rep. 171; *Hopkins v. Blane*, 1 Call, 361; *Blane v. Proudfit*, 3 Call, 207; *Gordon and Walker v. Buchanan and Porterfield*, 5 Yerger's R. 71; *Banergee v. Hovey et al.*, 5 Mass. R. 11; *Schimmelpennick et al. v. Bayard et al.*, 1 Pet. 264. But if the principal has by his declaration or conduct, authorized the opinion that he had given more extensive powers to his agent than were in fact given, he could not be permitted to avail himself of the imposition, and protest bills of exchange, the drawing of which his conduct had sanctioned. *Ibid.* § 3 Term Rep. 760; and see per Lord Eldon, 1 Dow. R. 45; and per Bayley, J., 15 East, 45. (a) However, if a stranger have no directions *not to warrant*, the person employing him is bound by his warranty. 5 Esp. Ca. 75; 3 Esp. Ca. 65; 2 Camp. 555. § *But a stranger cannot disaffirm an agreement made with an agent, on the ground that he had exceeded his authority.* *Jackson ex dem. McCarty v. Van Dalsen*, 5 J. R. 43. See as to nature and extent of agent's authority, *Story on Agency*, c. vi. §

§ It is a general rule when an agent exceeds his authority, if the principal takes a benefit under it he cannot afterwards allege a want of authority. This rule is applicable to sovereign states as well as individuals.

Blair and Johnson v. Pathkiller's Lessee, 2 Yerger's Rep. 407.

No man can bind another by deed, unless he have been authorized by deed to do it; and if a person, however authorized, if not by an instrument under seal, make and execute a deed, expressed to be in behalf of his principal, the principal is not bound by the deed, although he who made it is bound.

Banergee v. Hovey et al., 5 Mass. R. 11; *Hatch v. Smith and Trustees*, 5 Mass. R. 52; *Cooper v. Rankin*, 5 Binn. 613; *Gordon v. Bulkley*, 14 S. & R. 331; *Blood v. Goodrich*, 12 Wend. R. 525. And the attorney must in some form or other execute the deed in the name of the principal, otherwise it will not be binding on the latter. *Heferman v. Adams*, 7 W. R. 121; *Wells v. Evans*, 20 Wend. R. 251; *Story on Agency*, § 147. But a written or parol authority is sufficient to authorize a person to make a simple contract, as agent or attorney, and to bind his principal to the performance of it, without a formal letter of attorney under seal. *Stackpole v. Arnold*, 11 Mass. R. 27; *Long v. Colburn*, 11 Mass. R. 97; *The Pres't, &c. of Northampton Bank v. Pepoon*, 11 Mass. 288; *Story on Agency*, c. 5. An authority may be implied from certain relations proved to exist between the person who acts as agent, and him for whom he undertakes. *Long v. Colburn*, 11 Mass. R. 97; see 12 Mass. R. 237. §

If in account the defendant pleads before auditors, that the goods for which he is to account were *bona peritura*, and notwithstanding his care in keeping them, grew worse, and that they remained in his hands for want of buyers, and were in danger of growing worse, and that therefore he sold them upon credit to a man beyond sea; this is no good plea, for a factor cannot sell even *bona peritura*, upon (a) credit, without a particular commission so to do.

2 Mod. 100, adjudged. (a) It is the common practice to give factors power to sell upon credit. *Bulst.* 101. {A factor may sell on credit where that is the usage and course of trade at the place of sale; and he will not be responsible for a loss by the insolvency of the purchaser. *Willes*, 406, *Scott v. Surman*; 3 Bos. & Pul. 489, *Houghton v. Matthews*; 2 Cain. Er. 341, *Brown and others v. Robinson and Hartshorne*; 3 Johns. Rep. 319, *McKinsty v. Pearsall*; 1 Bay, 294, *James v. McCredie*. Vide 3 Mass. T. Rep. 211, *Brown v. Bull.*} ¶ And see *ante*, n. (a), p. 558. §

§ An agent cannot delegate any portion of his power requiring the exercise of discretion or judgment; otherwise, however, as to powers or duties merely mechanical in their nature.

Commercial Bk. of Lake Erie v. Norton & Fox impleader, &c., 1 Hills. R. 501. §

¶ AGENTS ACCOUNTING. ¶—In favour of trade and merchandise, an ac-
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tion of account lies at common law against a factor as against a bailiff, in which he shall have all (a) reasonable allowances.

2 H. 4, 12 b; Co. Lit. 90 b, 172 a; 11 Co. 90 a; F. N. B. 117; 2 Roll. Abr. 161. *§* The law implies a promise by a factor that he will render an account of goods delivered to him to be disposed of, whenever called upon by his principal; and if he refuses to account, he is liable to an action for breach of his implied contract. Clark v. Moody et al., 17 Mass. R. 148. *¶* [Topham v. Braddick, 1 Taunt. 572.] (a) Therefore it is a good discharge before auditors for a factor to say, that in a tempest, because the ship was surcharged, the goods were cast over-board into the sea. Roll. Abr. 124; Bro. tit. *Account*, 10.—So, that he was robbed of his goods without his default or negligence. Co. Lit. 89.—So, that he durst not buy for fear of loss. Roll. Abr. 124.

Also, if a man by obligation acknowledges that he has received money *ad proficiendum et computandum*, the obligee may either sue the (b) bond, or have an action of account, at his election.

Roll. Abr. 118; Dyer, 20; Cro. Eliz. 644. (b) Where a man covenanted to render a true account, &c., and held that an action of covenant lay on the deed. Roll. Rep. 59; 2 Bulst. 256.—So, an *assumpsit* will lie on a promise to dispose of goods, and to give an account thereof. Salk. 9, pl. 1; Carth. 89; Comb. 149.—But where the demand is of consequence, and the matter of an intricate nature, it is most usual to resort to a court of equity, where matters of account are most commodiously adjusted, and more advantageously determined for both parties; the plaintiff being in that court entitled to a discovery of books, papers, the defendant's oath, &c. Vide tit. *Account*.

§ Where goods are consigned to an agent or factor to sell, and he refuses to render any account of the sales, the most unfavourable presumption which the evidence admits of, ought to be made against him, in respect to the amount and value of the goods sold and unaccounted for.

Pope et al. v. Barret, 1 Mason, 117. *¶*

If goods are consigned to a factor, and upon arrival he makes a false entry at the custom-house, or lands them without paying the customs, whereby they become forfeited and are seized, whatever the principal hereby suffers the factor must inevitably make good, although his commission was general; but if the factor makes his entry according to the invoice, or his letter of advice, and it falls out the same are erroneous, though the goods are lost, yet is the factor excused.

Molloy, 423; Cro. Ja. 265; Lan. 65; *§* Williams v. Nutting, 3 Mass. T. R. 434. *¶* {3 Mass. T. Rep. 434, Wellman v. Nutting, acc.}

{If a factor employed by several distinct and unconnected merchants resident abroad, and authorized to remit by good bills of exchange or merchandise as he should think best, make a remittance by a general bill payable to one merchant, with separate drafts on him in favour of each of the other merchants interested in the amount, this is a good and lawful execution of his trust and authority. But it is essential to such a remittance that notice of the distributive appropriation should be given to the parties. And the factor will not be liable, if the drawer was in credit when the bill was taken, though the bill should afterwards prove bad.

2 Dall. 136, n. 4; Dall. 136, Schenkhous v. Gibbs.}

If a home factor be brought to account, he shall not be allowed the customs, unless he swear that he hath paid them; because it were a matter of great scandal, that any thing should pass the allowance of a court of justice that is gotten by defrauding the government.

Chan. Ca. 30, Boer v. Landall.

If a factor beyond sea be brought to account in equity, he shall be allowed the customs payable beyond sea, because he runs the venture; and

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if the goods had been lost by non-payment of such customs, he must have answered the value of them.

Chan. Ca. 25, *Smith v. Oxenden*. Two merchants having certified the customs to be so against two others, who held that the benefit belonged to the principal. Chan. Ca. 76, *S. P.*, and *Skin*. 149, *S. P.*, so held to have been determined by Lord Clarendon.—But North, *L. K.*, said, he was not satisfied herewith, for that though in the saving the customs the factor ventured his own life, yet the principal's goods were ventured also.

β A factor cannot buy up the debts of his principal, at an under-rate, and claim credit for the nominal amount; but in such case, he will be allowed only what he *actually paid*; notwithstanding the purchase was made after the factorage had ceased, and the principal had brought suit for an account.

Alexander v. Morris, 3 Call, 89.*g*

It hath been ruled in equity, that if one employs a factor, and intrusts him with the disposal of merchandise, and the factor receives the money, and dies indebted in debts of a higher nature, and it appears by evidence that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factor's. But if the factor have the money, it shall be looked upon as the factor's estate, and must first answer the debts of superior creditors, &c.; for as money has no ear-mark, equity cannot follow that in behalf of him who employed the factor.

Salk. 160, pl. 13, *Whitecomb v. Jacob*.

If A employs B as his factor to sell cloth, and B sells the cloth on credit, and, before the money is paid, B dies indebted by specialty more than his assets will pay; this money shall be paid to A, and not to the administrator of B, as part of his assets, but thereout must be deducted what was due to B for commission; for a factor is in nature only of a trustee for his principal.

2 Vern. 638, *Burdett v. Willett*.

¶If goods are consigned to joint factors, they are in the nature of co-obligors, and are answerable for one another for the whole.

Godfrey v. Saunders, 3 Wils. 114.¶

The plaintiff, being a factor in Blackwell Hall, advanced money for his principal, relying, as was surmised, on the credit of cloths resting in his hands to reimburse himself: the clothier died, his administrator sued at law for the cloth, and the factor prayed that he might be allowed on account the moneys he advanced; but his bill was dismissed; for if there are debts of a higher nature, it would be a *devastavit* in the administrator to pay or discount the plaintiff's debt.

2 Vern. 117, *Chapman v. Derby*.

[But it has been long settled, that a factor has a lien on goods consigned to him, not only for incident charges, but as an *item* of mutual account for the general balance due to him. And though it be in general true, that by parting with the possession of the goods he parts with the lien, yet, (a) if the factor sell the goods, he has still a lien on the price of them in the hands of the buyer; for though he has not the actual possession in such case, yet as he has the power of giving a discharge, or bringing an action for them, he must also have a right to retain the money for them.

Krutzer v. Wilcox, in *Cano*. 12th March, 1754; [Ambl. 252;] *Gardiner v. Coleman*, 2d June, 1755, cited in *Godin v. London Assurance Company*, 1 Burr. 493; [1 Johns. Ca. 459, n., *Le Guen v. Gouverneur* and *Kemble*; 4 Johns. Rep. 103, *Urquhart v. M'Iver*; 2 East, 523, *Man v. Shiffner*. See 3 Bos. & Pul. 485, *Houghton v. Matthews*;] [S. C. 1 W. Bl. 104, *per Buller, J.*, in *Lickbarrow v. Mason*, 6 East,

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28, n., S. P.; *Kinlock v. Craig*, 3 Term Rep. 119, 783.] (a) *Drinkwater v. Goodwin*, Cowp. 251; [and see *Sweet v. Pyne*, 1 East, 4; *Hudson v. Granger*, 5 Barn. & A. 27.] β But where an agent who had the charge of a stock of goods for the purpose of carrying on the business of a retail store, bought goods to replenish the stock and paid for them, or became personally liable for them, it was held that he did not thereby acquire a lien on the goods for such payments and liabilities. *Gray v. Wilson*, 9 Watts R. 512. And see as to agent's right of lien, *Story on Agency*, c. xiv.g

β But an agent or factor, who is ordered by his principal to ship goods in his possession, has no right to retain more than enough to secure such lien as he may have. And if he retain the whole, because of a lien of a small amount, and any loss results from his breach of orders, he is responsible.

Jolly v. Blanchard, 1 Wash. C. C. R. 259.g

{And if a principal gives notice to his factor of an intended consignment of a ship to him for the purpose of sale, and in consequence draws bills on him, which the factor accepts, and then the principal dies, and his executors direct the captain to follow his former orders, who thereupon delivers the ship into the possession of the factor, and he sells the same; the factor has a lien on the proceeds, not only for the amount of the money disbursed by him for the necessary use of the ship on her arrival, but also for his acceptances, whether paid or outstanding.

2 East, 327, *Hammonds v. Barclay*.}

But though the general rule of law be, that a factor has a lien on the goods of his principal for the general balance, yet this, like other general rules, may be controlled by the agreement of the parties; as, if A deposit goods with B for sale, and B promise to pay the proceeds to A when sold, B has no lien on these goods, (if not sold,) for the balance of his general account arising from other articles, the express stipulation in this case negating the general rule of law.

Walker v. Birch, 6 Term Rep. 258. [But see *McGillivray v. Simpson*, 9 Dow & Ry. 35; S. C. 2 Car. & P. 320.]

β When a factor makes advances, it is legally to be inferred, independent of any actual agreement to that effect, that they were not made without recourse to the principal: the general rule is, that they are made on the joint credit of the fund and the party; and the factor may relinquish his lien on the fund, without at all affecting his personal remedy.

Burrell v. Phillips, 1 Gallis. C. C. R. 360; *Corlies v. Widdifield*, 6 Cow. 181. If he agree that for advances made, "he will hold for reimbursement on the amount and nett proceeds of the goods, which are only considered answerable for said amount advanced," it is a waiver of any personal claim. *Peisch v. Dixon*, 1 Mason's C. C. R. 9. Where a commission merchant receives goods to sell at a certain limited price, and makes advances upon them, if the consignee refuses upon application and after a reasonable time to repay the advances, the consignee has a right to reimburse himself by selling them at the fair market price, though below the limit. 22 Pick. R. 40.g

||PRINCIPAL'S RESPONSIBILITY FOR AGENT'S ACTS.||—The principal shall answer for his factor in all cases where he is privy to the act of wrong; and so in contracts, if a factor buy goods on the account of the principal, especially where he has been used so to do, the contract of the factor will oblige the principal to a performance of the bargain.

Molloy, 423; and vide tit. *Master and Servant*. [See the cases in note, p. 558, and *Taylor v. Sir T. Plumer*, 3 Maul. & S. 562; that though an agent departs from his authority so as to discharge the principal, yet the latter may in general adopt the contract, and sue for any breach of it. S. C. 3 Maul. & S. 562; *Grojan v. Wade*, 2 Stark. 443. See also *Norfolk (Duke of) v. Worthy*, 1 Camp. 337. An agent cannot dispute the right of his principal. *Dixon v. Hamond*, 2 Barn. & A. 310; *Roberts v. Ogilby*, 9 Price, 269.] β When the agent has acted illegally, in refusing to deliver goods sent by his principal to him for others, upon a contract for their sale or delivery made with

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the principal; the remedy is by action against the principal and not against the agent. *Bradford v. Eastbourn*, 2 Wash. C. C. R. 219. But the principal is not in general responsible for a wilful and unauthorized trespass, committed by his agent, overseer, or servant. *Harris v. Nicholas*, 5 Mun. 483. And the doctrine that a principal is answerable for the fraud of his agent or factor, does not apply to special agents. *Sherwood v. Marwick*, 5 Greenl. 295; see *Locke v. Stearns*, 1 Metcalf R. 560; *The Bank of U. S. v. Davis et al.*, 2 Hill's R. 451. When principal bound by implied authority to agent, see *Dodsley v. Varley*, 4 Perr. & D. (2 B.) 448; and 12 Ad. & Ell. 632, and see as to rights of third persons against principals, *Story on Agency*, c. xvii. §

¶ Thus, where a person had several times allowed an agent to subscribe policies in his name, he was held to be bound by such signature.

Neal v. Irving, 1 Esp. 61; and see *Goodson v. Brooke*, 4 Camp. 163; *Dickenson v. Lodge*, 1 Stark. 226; *Watkins v. Wince*, 2 Stark. 368.

And in equity, upon evidence of assent, a vendor has been held bound by the signature of the agent's clerk, though, in general, clerks have no authority to bind the principal.

Coles v. Trecothick, 9 Ves. 234.

§ Money paid on account of suretiship for an agent when he was acting for his principal, creates a debt against the principal.

Teirnan v. Andrews, 4 Wash. C. C. R. 474. §

Where a party gives an order for another, and at the same time tells the tradesman for whose use he orders the goods, he is not personally liable unless the tradesman refuse to deliver them to the order of the person for whom they are directed, and will only give credit to the person ordering them.

Owen v. Gooch, 2 Esp. 567; and see *Rabone v. Williams*, 7 Term Rep. 360, n.

If, however, the goods, bought in the name and upon the credit of a third party unobjected to, be in reality on the pretended agent's own account, he will be liable for them. (a) And if a person describing himself as agent for another residing abroad, enter into a contract here, he will be personally liable. (b)

(a) *Railton v. Hodgson*, 15 East, 67; *Peele v. Hodgson*, *Ibid.* (b) *De Gaillon v. L'Aigle*, 1 Bos. & P. 368; *Redhead v. Cator*, 1 Stark. 14.

The seller of goods dealing with an agent, and electing to give him credit in his own name, knowing him to be an agent, and knowing his principal, cannot afterwards recover against the known principal. But unless the seller know the name of the principal, he will not be precluded by merely debiting the agent with the price from afterwards suing the principal, when discovered. (c)

Patterson v. Gandasequi, 15 East, 61; *Addison v. Gandasequi*, 4 Taunt. 574; *Bramah v. Lord Abingdon*, cited by Lord Ellenborough; 15 East, 66. (c) *Thomson v. Davenport*, 9 Barn. & C. 78. § And see *Pentz v. Stanton*, 10 Wend. 271; *Mulden v. Whitlock*, 1 Cow. 290; *Porter v. Talcott*, 1 Cow. 359; *Beebe v. Robert*, 12 Wen. 413; *Upton v. Gray*, 2 Greenl. 373. But this rule does not apply to a case in which the vendor at the time of sale, merely has the means of knowing the principal; but is confined to cases in which he has actual knowledge. *Raymond v. Crown & Eagle Mills*, 2 Metc. R. 319. §

If one take the security of the agent unknown to the principal, and give the agent a receipt as for the money due from principal, and on the faith of this receipt the principal deal differently with the agent, the principal is discharged. *Aliter*, if the principal do not show that he was injured by reason of such receipt.

Wyatt v. Mayor of Hertford, 3 East, 147. ||

§ The taking of the note of an agent at an extended credit, for goods furnished for the benefit of the principal, does not discharge the principal, un-

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less it is affirmatively shown, on his part, that on the supposition that the debt was paid, or the personal responsibility of the agent accepted for it, he dealt differently with the agent than he would have done had the note not been taken and the extended credit given.

Rathbone v. Tucker, 15 Wen. 498.g

If A being possessed of certain artificial and counterfeit jewels of the value of 168*l.*, and knowing them to be such, delivers them to B his servant, commanding him to transport the said jewels to Barbary, and to sell them to the king of Barbary, or to such other person as would buy them, but gives B no charge to conceal their being counterfeit; and thereupon B goes into Barbary, and, knowing these jewels to be counterfeit, shows them to C for good and true jewels, and affirming to C that they were worth 810*l.*, desires C to sell them to the said king; whereupon C does sell them to the said king for 810*l.*, which money C pays B, and B thereupon immediately returns to England, and pays the 810*l.* to A his master; and after the jewels being discovered to be counterfeit, C is imprisoned by the said king till he repays the 810*l.* out of his own effects; of all which matter C gives notice to A, and demands satisfaction, &c., yet no action lies against A; for jewels are in themselves of an uncertain value, and B was not by A particularly directed to C, and all that was done *quoad* C was the voluntary act of the servant, for which the master is not bound to answer.

Bridgm. 125, 126; Cro. Ja. 469; 2 Rol. Rep. 5, 26; Poph. 143; Southern v. Haw. [See 3 Term Rep. 760; 1 Dow. 45; 5 Esp. Ca. 75; 2 Camp. 555.]

¶ Where a person is employed by an agent, he may call upon the principal for payment for the services rendered; and he may do so, although he knows that the agent has charged the demand to the principal, and received the amount, unless he has agreed to discharge the principal, and rely upon the responsibility of the agent.

Lincoln v. Battelle, 6 Wend. 475.

Damages incurred by an agent in the course of the management of the principal's affairs, or in consequence of such management, must be borne by the principal.

D'Arcy v. Lyle, 5 Binn. R. 450.g

¶ [PLEDGES BY FACTORS.]—A factor has no authority to pledge the goods of his principal as a security for his own debt, nor even to the amount of his lien for a general balance. Where he has done so, (a) the principal has recovered the value of the goods in trover against the pledgee, on tendering to the factor what was due to him, without making any tender to the pledgee.

Paterson v. Tash, 2 Str. 1178; {1 East, 335, Maaness v. Henderson; 6 East, 538, M'Combie v. Davis; 5 Ves. J. 211, De Bouchout v. Goldsmid; 2 Mass. T. Rep. 398, Kinder v. Shaw. He cannot pledge them by endorsing the bill of lading any more than by the delivery of the goods themselves; 6 East, 17, Newsom v. Thornton. But if a banker, with whom bills endorsed in blank are deposited to be received when due, pledge the bills to a person who has no notice that they were so deposited, the owner cannot recover them from the pledgee, on account of their negotiability; 1 Bos. & Pul. 648, Collins v. Martin.} [Newsom v. Thornton, 6 East, 17; Martini v. Coles, 1 Maul. & S. 140; Shipley v. Kymer, 1 Maul. & S. 484; Queiroz v. Trueman, 3 Barn. & C. 342; S. C. 5 Dow. & Ry. 192; Kuchein v. Wilson, 4 Barn. & A. 443; see also Solly v. Rathbone, 2 Maul. & S. 298; Cochran v. Irlam, 2 Maul. & S. 301; Jackson v. Clarke, 1 You. & Jer. 216; Gill v. Kymer, 5 Moore, 503; Fielding v. Kymer, 2 Brod.

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& B. 639; *Graham v. Dyster*, 6 Maul. & S. 1; S. C. 2 Stark. 24; *Guichard v. Morgan*, 4 Moo. 36; *Boyson v. Coles*, 6 Maul. & S. 14; || β *Kinder et al. v. Shaw et al.* 2 Mass. R. 398; *Jarvis v. Rogers*, 15 Mass. R. 396; *Laussat v. Lippincott*, 6 S. & R. 392; *Newbold v. Wright*, 4 Rawle's R. 195; *Evans v. Potter*, 2 Gallis. C. C. R. 13. But he may lawfully pledge them for the duties accruing thereon, or for any other purposes which the usage of the trade sanctions and approves. *Ibid.* If a factor pledge the goods of the principal for his own debt, it is a conversion. *Kennedy v. Strong*, 14 J. R. 128. *g* (a) *Daubigny v. Duval*, 5 Term Rep. 606; *per Buller and Grose, Js., hesitante Kenyon, C. J.*, who inclined to think that the principal ought to tender to the pledgee the sum for which they are pledged, if under or to the amount of the money due from him to the factor, but not more; || and see *McCombie v. Davies*, 7 East, 5. || {A factor may, however, deliver goods on which he has a lien to a third person as a security, with notice of his lien, and as his agent to keep the possession for him, in order to preserve that lien. *Id. ibid.* 4 Johns. Rep. 103, *Urquhart v. M'Iver*; 2 East, 523, *Man v. Shiffrer*; } β *Van Amringe v. Peabody*, 1 Mason's C. C. R. 440. But although a factor cannot pledge the goods of his principal as his own, yet he may deliver them to a third person as security, with notice of his lien, and as his agent to keep the possession for him, in order to preserve that lien. *Urquhart v. M'Iver*, 4 J. R. 103; see further, *Skinner & Co. v. Dodge & Cobbs*, 4 H. & M. 432. *g*

|| So a factor, having an authority to sell for money, is not entitled to barter. If he do so, no property passes, and the principal may maintain trover against the party with whom the goods were bartered, although the latter was ignorant that he had been dealing with a factor.

Guereiro v. Peile, 3 Barn. & A. 616.

But by the 6 Geo. 4, c. 94, altering and amending the 4 Geo. 4, c. 83, factors or agents having goods, wares and merchandise of *their principals* in their possession are to be deemed the owners, so as to give validity to their contracts with persons dealing *bonâ fide* upon the faith of such property. (a) And persons in possession of bills of lading, warrants, certificates, and orders, are to be deemed the owners of the goods and merchandise mentioned therein, so far as to make valid contracts, provided the parties contracting have not notice that the persons intrusted with the said bills of lading, &c. are not the *bonâ fide* owners, &c. of such goods and merchandise. (b) And provided that no person shall acquire a security upon goods in the hands of an agent, for an antecedent debt, beyond the amount of the agent's interest in the goods. (c)

(a) § 1, see also 7 Geo. 4, c. 7; an act to facilitate the advancing of money by the governor and company of the Bank of England upon deposits or pledges. (b) § 2. (c) § 3.

And by § 5, of the same statute, it is further enacted, "That from and after the passing of the act, it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any such goods, wares, or merchandise, or any such document as aforesaid, (d) in deposit or pledge from any such factor or factors, agent or agents, notwithstanding such person or persons, body or bodies politic or corporate, shall have such notice as aforesaid, that the person or persons making such deposit or pledge is or are a factor or factors, agent or agents; but then and in that case such person or persons, body or bodies politic or corporate, shall acquire no further or other right, title and interest (e) in or upon or to the said goods, wares, or merchandise, or any such document as aforesaid, for the delivery thereof, than was possessed or could or might have been enforced by the said factor or factors, agent or agents, at the time of such deposit or pledge as a security as last aforesaid; but such person or persons, body or bodies politic or corporate, shall and may acquire, possess, and enforce such right, title, or inte-

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rest, as was possessed and might have been enforced by such factor or factors, agent or agents, at the time of such deposit or pledge as aforesaid :” Provided that nothing in the said act contained shall be deemed to prevent the true owner from following his goods while in the hands of the agent, or in the case of bankruptcy in the hands of his assignees, or to recover them from a third person, upon paying his advances secured upon them. And further provided, that in case of the bankruptcy of the factor, the owner of the goods so pledged and redeemed shall be held to have discharged, *pro tanto*, the debt due by him to the estate of such bankrupt. (g)

(d) The bills of lading, &c. mentioned in § 2. (e) *Fletcher v. Heath*, 7 Barn. & C. 517. (g) See § 6.

And effectually to prevent the improper pledging of goods consigned to factors, the statute provides, § 7, that agents *fraudulently* pledging the goods of their principals shall be deemed to be guilty of a misdemeanor. And it is provided, that the acceptance of any bills of exchange by the factor on account of his principal, shall not be considered as constituting a part of the debt due from the principal within the meaning of the act, so as to excuse the consequence of such pledge, unless such bills be paid when due, § 8. And that the penalty annexed by the act, as above mentioned, shall only extend to the partner or partners privy to the commission of the offence of fraudulently pledging, § 9. ||

β The right of a factor, under 6 Geo. 4, c. 94, s. 5, to pledge the goods of his principal, depends upon the question, whether, upon the face of the whole account between them, the principal is indebted to the factor.

Robertson v. Kensington, 5 M. & R. 381. g

|| WHERE FACTORS AND AGENTS MAY PERSONALLY BE SUED AND SUE. ||—Where a factor to one beyond the sea buys or sells goods for the person to whom he is factor, an action will lie against or for him in his own name; for the credit will be presumed to be given to him in the first case, and in the last, the promise will be presumed to be made to him; and the rather so, as it is so much for the benefit of trade. If a factor who receives cloths, and is authorized to sell them in his own name, makes the buyer debtor to himself; (a) though he is not answerable for the debt, yet he has a right to receive the money. His receipt is a discharge to the buyer, and he has a right to bring an action against him to compel the payment; and it will be no defence for the buyer in that action to say, that, as between him and the principal, he (the buyer) ought to have that money, because the principal is indebted to him in more than that sum; for the principal himself can never say that but where the factor has nothing due to him.

Gonzales v. Sladen, Tr. 1 Ann. Guildhall, Salk. MSS.; Bull. N. P. 130. {If one sells goods, part of which are his own, and the residue the property of others, from whom he has authority to sell as their agent, he may maintain an action for the whole in his own name. 3 Cran. 311, *Harris v. Johnston*; } and see *Houghton v. Matthews*, 3 Bos. & Pul. 490; *Paterson v. Gandasequi*, 15 East, 62; *Seymour v. Pychlaw*, 1 Barn. & A. 14; *Thompson v. Davenport*, 9 Barn. & C. 78. || β A factor or agent who has authority to sell, and does sell in his own name, not disclosing his agency, may maintain an action for the price. *Dougherty v. Halloway*, 5 Monr. R. 316. So upon an express promise to pay to the factor of any one for the use of the principal, the factor may maintain an action in his own name. *Van Staphorst et al. v. Pearce*, 4 Mass. R. 258. But a public agent or officer cannot maintain an action in his own name, on a contract entered into with him in that capacity. *Bainbridge v. Dounie*,

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6 Mass. R. 253; *The Medway Cotton Man. Co. v. Adams et al.*, 10 Mass. R. 360.
(a) Cowp. 255, 256.

§ A public agent contracting for the use of government, and by legal authority, is not personally responsible, though the contract be under his seal.

Hodgson v. Dexter, 1 Cranch, 345; *Syme v. Butler*, exec. 1 Call, 105; *Tutt v. Lewis*, 3 Call, 233.

It is rule of law which does not admit of dispute, that an agent is bound to keep his principal informed of all material occurrences in the agency: if he fails to do so, it is negligence, and a palpable violation of duty, for which the factor is clearly liable to suit.

Harvey v. Turner, 4 Rawles' R. 229; but see *Arrott v. Brown*, 6 Whart. R. 23.^g

|| Where an agent has a beneficial interest in the performance of a contract, as for commission, &c., he may bring the action in his own name, though the principal might sue.

Johnson v. Hudson, 11 East, 180; *Shields v. Davis*, 6 Taunt. 65.

But if a party enter into a written contract, expressly stating himself as agent for a third person, he cannot sue in his own name, at least without giving notice to the defendant that he is really intended. And the mere endorsement of a bill of lading to an agent, to enable him to receive the goods, without any consideration, will not enable the agent to sue in his own name. And so also, if after an agent has made a written contract the principal sign it, expressing his sanction and approbation, the agent is not personally responsible on the contract.

Bickerton v. Burrell, 5 Maul. & S. 383; *Coxe v. Harden*, 4 East, 211; *Spittle v. Lavender*, 2 Brod. & B. 452; 5 Moo. 270, S. C. || § But if a promissory note be given to one as agent, the contract is made with him personally, and he may maintain an action thereon. *Buffum v. Chadwick*, 8 Mass. R. 103.^g

|| PAYMENT TO FACTORS AND SET-OFF. ||—A factor's sale by the general rule of law creates a contract between the owner and the buyer; and therefore if a factor sell for payment at a future day, if the owner give notice to the buyer to pay him and not the factor, the buyer will not be justified in afterwards paying the factor: and it is the same, notwithstanding the factor acts upon a *del credere* commission.(a)

Bull. N. P. 130; Cowp. 255. (a) *Scrimshire v. Alderton*, 2 Stra. 1182; § *Kelly v. Munson*, 7 Mass. T. R. 319; *Golden v. Levy*, 1 Car. Law Rep. 528; *Titcomb v. Seaver*, 4 Greenl. 542.^g A *del credere* commission is, where a factor, in consideration of an additional premium, acts as an insurer, and takes upon himself all risks. Thus, the common factorage between St. Petersburg and London is 2 per cent.; but in consideration of an additional 3 per cent., the factor engages to stand as the middle man, and to run the hazard of bad debts. Commissions *del credere* are more common in this country than perhaps in any other, the characters of the buyers being better known, and the risk of course less. || As to the effect of such a commission, see 1 Maul. & S. 494; 4 Ibid. 566, Paley, p. 216; 6 Maule & S. 166. || § See as to rights of principals against their persons, Story on Agency, c. xvi.^g

|| So the buyer will not be justified in paying the agent, if he knows that the agent has no authority to receive the proceeds of the sale.(b)

(b) *Stiernelnd v. Holden*, 4 Barn. & C. 5; *Powell v. Nelson*, 15 East, 65, n. What will amount to a knowledge of the agency, see *Manks v. Henderson*, 1 East, 335; *Moore v. Clementson*, 2 Camp. 22; *Escott v. Milward*, 7 Term Rep. 361 (b). And see further as to payment to factors, Paley, Princ. & Ag. ch. 3, p. 1, § 8, and p. 2, § 5. § *Warner v. McKay*, 1 Mees. & W. (Ex.) 591; and 1 Tyr. & Gr. 965; *Sykes v. Giles*, 5 Mees. & W. (Ex.) 645.^g

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But where a factor sells goods as his own, and the buyer does not know of any principal, the buyer may, in an action brought against him by the principal, set off a debt due to him from the factor.

George v. Claget, 7 Term Rep. 359; and see Morris v. Cleasby, 1 Maul. & S. 576; Blackburn v. Scholes, 2 Camp. 343; Waring v. Favenck, 1 Camp. 85; Carr v. Hinchcliffe, 4 Barn. & C. 547.

Secus, if the circumstances were such as must have raised a presumption that the sale by the party was in the character of broker.

Baring v. Corrie, 2 Barn. & A. 137.]

The plaintiffs were merchants in London, and in June, 1783, had a quantity of wheat consigned to them from Ostend, the sale of which they intrusted to one Farrer, as their factor. The factors in the corn trade, like those in the linen trade, receive a *del credere* commission, besides their factorage, and never communicate the names of the purchasers to the owners, except in case of the factor's failure. Farrer, on the 9th June, 1783, sold 211 quarters of the plaintiff's wheat to the defendant Milward. On the 16th June, Farrer, being about to stop payment, gave up the wheat under his care to the plaintiffs, and sent them the names of the buyers. On the 20th June, Farrer stopt payment, and a short time afterwards his creditors executed a deed of composition. On the 21st June, the plaintiffs delivered the defendant a bill of parcels of the wheat sold to him by Farrer, as their factor, and desired him to accept a bill at a month for the amount, which he refused, insisting that he had a right to set off a debt due to him from Farrer against the price of the wheat. Mr. Justice Buller, in his charge to the jury, declared the doctrine laid down by Lord Chief Justice Lee, in *Scrimshire v. Alderton*, to be law, and the plaintiffs recovered a verdict.

Escott v. Milward, Sitings at Guildhall, after Mich. Term, 1783; Co. Bankrupt Laws, 456. [And see 7 Term Rep. 360.]

Again, one Murray of Belfast, in 1782, consigned a quantity of linens to Bate and Henkell of London, to be disposed of by them as his factors, upon a *del credere* commission. Bate and Henkell sold the linens for 192*l.* 14*s.*, and before they received the money became bankrupts. The assignees afterwards received the money of the purchaser, which Murray demanded of the assignees, who refused to pay it, insisting, that Murray might come in as a creditor under the commission. Murray presented a petition to the Lord Chancellor, praying, that the assignees might be ordered to pay him the money his linen sold for, after deducting the commissions and charges, and a small sum due from Murray to the bankrupts, on another account. His lordship, after hearing the point of law argued, was clearly of opinion, that the purchaser not being paid for the linens previous to the bankruptcy, Murray the consignor was entitled to receive the price of the linens, and accordingly ordered the assignees to pay him the money.

Ex parte Murray, Dec. 1783; Co. Bankrupt Laws, 457.

Upon this principle it has been determined, that goods of the principal, found in the possession of the factor at the time of his becoming bankrupt, though he have a *del credere* commission, will not pass by the assignment.

Garret v. Cullum, Bull. N. P. 5th ed. 42; Godfrey v. Furzo, 3 P. Wms. 185; *Ex parte* Dumas, 2 Ves. 586; 1 Atk. 232; *Ex parte* Oursell, Amb. 297.

So, bills remitted by the principal to his factor, whilst unpaid, are in the nature of goods unsold, and if the factor become bankrupt, the principal

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may recover them in an action for money had and received, subject to such lien as the factor may have upon them.

Zinck v. Walker, 2 Bl. Rep. 1154. [The agent's power is determined by his bankruptcy. Hovill v. Lethwaite, 5 Esp. 158. As to the other modes by which it may be determined, see Chit. on Commercial Law, 3d vol. p. 223.]

So where a factor with a *del credere* commission sells the goods of his principal, and takes negotiable securities in payment, and fails before they become due, having assigned these securities to his assignees, in favour of his creditors, and the assignees, when the notes fall due, received the money; the principal may recover the amount, subject to a deduction of the lien of the factor for his commission and charges.

Thompson v. Perkins et al., 3 Mason's C. C. R. 232.g

But a *del credere* commission will have the effect of enabling a policy-broker, under the clause in the 5 G. 2, c. 30, [(see 6 Geo. 4, c. 16, § 50,)] for setting mutual debts one against the other, to give in evidence upon the general issue a loss upon a policy happening before the bankruptcy, in an action by the assignees of the underwriter, for premiums upon policies underwritten by him.

Grove v. Dubois, 1 Term Rep. 112; Bize v. Dickason, Ibid. 285.] [But the *del credere* commission will not have the effect of enabling the policy broker to set off losses, unless the policies are effected in his own name, (which was the case in Grove v. Dubois, and Bize v. Dickason.) Koster v. Eason, 2 Maul. & S. 112; and see 1 Maul. & S. 494; and Wienholt v. Roberts, 2 Camp. 586, in which it does not appear whether the policy was in the broker's name or not. And if the policies are in his own name he may set off losses against the underwriters' assignees, although he have no *del credere* commission, provided he have a lien, as by accepting bills on credit of the consignment insured. Parker v. Beasley, 2 Maul. & S. 423. But unless there is a bankruptcy, *unadjusted* losses cannot be set off, though the broker have a *del credere* commission, and have accounted for the losses to his principal; for they are unliquidated damages, which, though they may be set off under the bankrupt laws as *mutual credit*, are not *mutual debts*, within the statutes of set-off. Cumming v. Forrester, 1 Maul. & S. 494; and see further as to set-off between insurance brokers and underwriters, tit. *Set-off*.]

{When a factor has a *del credere* commission, and besides acting as a factor buys and sells on his own account, sells goods as his own, and the purchaser knows nothing of any principal, the purchaser has a right to consider the factor to all intents and purposes as the principal; and may set off a demand he has against him in an action brought by the principal for the price of the goods.

2 Esp. Rep. 557; George v. Claget, 7 Term, 359; S. C. Ibid. 360, n.; Rabone v. Williams, 3 Bos. & Pul. 489, 490. See 1 Bay, 299, Atkinson v. Teasdale.

But where goods are purchased from a factor *scienter*, with intent by the purchaser to set off against the purchase a demand which he may have against the factor, the principal may, in such case, and as on a sale made immediately by himself, have a suit against the purchaser at any time before payment to the factor; every purchase so made, with intent solely thereby to obtain payment or security from the factor, being, as against the principal, fraudulent.

2 Cain. E. 341, Brown & others v. Robinson & Hartshorne. And see 1 East, 335, Maans v. Henderson.

A factor having procured freight for a vessel of his principal, the vessel was attached, after she was loaded, for a debt due from the principal, whereby the voyage was broken up; and it was ruled, that the factor was not answerable for the damages sustained by the freighters.

2 Dall. 223, Joyce v. Sims.}

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¶ **AGENT'S PERSONAL LIABILITY.**—It has been decided, that an agent purchasing foreign bills for his principal, and endorsing them to him *without qualification*, is liable to the principal on his endorsement, however small be the commission which he gets upon the purchase. And where a factor took a security payable to himself from a purchaser of goods, and gave his own security to his principal, without disclosing the name of the purchaser, it was held that he could not compel his principal to refund the money paid him on failure of the purchaser.^(a) In these cases it is to be observed, the agent went beyond what was required of him in his capacity of agent, and volunteered his own liability.

Goupy v. Harden, 2 Marsh. 454; S. C. 7 Taunt. 159; S. C. at N. P., Holt, 342; and see Le Fevre v. Lloyd, 1 Marsh. 318; S. C. 5 Taunt. 749. ^(a) Simpson v. Swan, 3 Camp. 291; Leadbitter v. Farrow, 5 Maul. & S. 345; Morris v. Stacey, Holt, 153. ^β See, as to liabilities of agents to principals and third persons, Story on Agency, c. viii. x. xii. ^γ

¶ An agent who has stipulated to account semi-annually, is liable to pay interest on all sums received and not accounted for, at the stipulated time. Where he holds back the funds and mixes them with his own, the court might charge him with interest from the time he received them.

Wardlaw v. Gray, C. W. Dud. Eq. 85.

If an agent or factor sell the goods of his principal, and having received payment, invests it in property for the use of his principal, or marks and puts it away as his, the latter has a right to it, and is entitled to all the profits made from it either as against the factor or his general creditors.

Howrquebie v. Girard's Adm., 2 Wash. C. C. R. 212. *Aliter*, if the factor apply the money to his own use, charging himself with the same in account with the principal. Ibid. And see Price v. Ralston, 2 Dal. 67; Veil v. Mitchell, 4 Wash. C. C. R. 105. ^γ

But an agent selling goods on credit is not liable to his principal until he is paid by the vendee, unless the delay in payment is occasioned by his own neglect, or unless he act under a *del credere* commission.^(b)

^(b) Varden v. Parker, 2 Esp. 710. ^β But a factor who sells goods on credit, contrary to the directions of his principal, becomes personally responsible; and the principal may recover of him the entire amount of the debt. Walker v. Smith, 4 Dall. 389. See M'Kinstry v. Pearsall, 3 Johns. R. 319. ^γ

¶ A factor who sells under a *del credere* commission, and guaranties the debt, guaranties only the sales and receipts of the money. If after receiving the money, he purchases a bill from a person in good credit, for the purpose of remitting the proceeds pursuant to directions, he is not answerable for the loss in case the bill is protested. If, however, he receives a bill in payment, which he remits, in case that is dishonoured he is responsible.

Muller v. Bolens, 2 Wash. C. C. R. 378.

An agent is bound to pursue the orders of his principal, and is answerable for any injury consequent upon his departing from them, however fair may have been his motives for such departure.

Mannella v. Barry, 3 Cranch, 415; see Morris v. Summers, 2 Wash. C. C. R. 203; Bell et al. v. Cunningham, 3 Peters, 69; Courcier v. Ritter, 4 Wash. C. C. R. 559. If foreign merchants send out, by their general agent, written orders to their factors in this country to purchase tobacco on their account, but to ship it in the name of the factor, and by those orders the factor is referred to the verbal communications of the general agent, who directs the shipment to be made in the name of another person, and declares he has authority from the foreign merchants thus to control and vary their orders, the factor is justified in obeying him, though contrary to the written orders. Mannella et al. v. Barry, 3 Cranch, 415. An agent who does not comply with instructions is liable for the loss incurred thereby: although the services were gratuitous.

(C) Of Partners and Joint-traders.

Walker v. Smith, 1 Wash. C. C. R. 152; French v. Reed et al., 6 Binn. R. 308. If a factor or agent having sold goods belonging to his principal, be ordered by him, while they are yet *in transitu*, not to deliver them to the buyer, of whose solvency doubts are entertained, and he deliver them, notwithstanding such order, and without demanding any security for his indemnity, the principal is entitled to an action against him in case the buyer should prove insolvent. Howatt et al. v. Davis & Chalmers, 5 Munf. 34. §

An agent cannot dispute the title of his principal; and therefore a person having, as agent to two partners, insured a ship and freight, and charged them with the premiums, and on a loss happening received the money from the underwriters, is estopped from showing that the property in the ship was in one partner only, and holding himself accountable to him.

Dixen v. Hammond, 5 Barn. & A. 310; and see 9 Price, 269; 5 Taunt. 447.

§ A factor is bound to ordinary diligence in relation to the property confided to him; when his orders leave the management of the property to his discretion, he is bound only to good faith and reasonable conduct; and unless his orders restrict him, to whatever the course and usage of the trade requires.

Evans v. Potter, 2 Gallis. C. C. R. 13; 1 Gallis. C. C. R. 360; Van Allen v. Vanderpool, 6 J. R. 69. §

If a broker, being authorized to sell goods for a certain price, sell them at an inferior price, he is not liable in trover for the amount of the goods. The proper remedy is an action on the case.

Dufresne v. Hutchinson, 3 Taunt. 117.

If A employs B to ship goods, and B without A's knowledge, employ C, who executes the business, there is no privity between C and A, and C cannot sue A for his charges, though A has never paid them to B.

Schmaling v. Tomlinson, 6 Taunt. 147. §

§ The sale of several parcels of goods by a factor, belonging to several of his principals respectively, on a credit to one person, and taking one note from the vendee, payable to himself, will not, *per se*, render him liable to his principals.

Corlies v. Widdifield, 6 Cow. 181. But if an agent employed to settle a debt due to his principal, instead of the money, receive a note specially endorsed to him by the debtor, he becomes personally answerable for the amount to his principal. Floyd v. Day, 3 Mass. T. R. 402; and where a factor sold the goods of his principal, together with some of his own, and took in payment for the whole a promissory note, made by another person, payable to himself, *it was held* that the purchaser was discharged, and that therefore the factor became himself responsible for the price of the goods. Symington v. M'Lin, 1 Dev. & Bat. 291.

If an agent locate land for himself, which he ought to locate for his principal, he is, in equity, a trustee for, and liable to, his principal.

Massie v. Watts, 6 Cranch, 148; and see Heacock v. Cotesworth, 1 Clarke, 85; Lear v. Matthews, Wright R. 374. So if an agent discovers a defect in the title of his principal to land, he cannot misuse it to acquire a title for himself; and if he does, he will be held as a trustee holding for his principal. Ringo v. Binns, 10 Peters's Rep. 269. §

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§ PARTNERSHIP, HOW DEFINED. Partnership, often called copartnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labour, and skill, or some, or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them.

Story on Partnership, § 2; Bouvier's Law Dic. h. t. §

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are joint-tenants in all the stock and partnership effects; and they are so not only of the particular stock in being at the time of entering into the partnership, but they continue joint-tenants throughout, whatever changes may take place in the course of trade; for if it were otherwise it would be impossible to carry on partnership trade. Hence assignees, under a commission of bankrupt against one partner, can only be tenants in common of an undivided share, subject to all the rights of the other partner. And if a creditor of one partner takes out execution against the partnership effects, he can only have the undivided share of his debtor; and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner. So that one partner can have no right against the other, in his capacity of partner, but to what is due from him out of the joint-stock, after making all just allowances, let the fluctuations of trade be what they may. The whole of this doctrine seems to arise out of the very principle upon which partnership is founded, namely, probable profit and the risk of loss; the advantages or disadvantages of which cannot, in common justice, be confined to one side only, but must be reciprocal throughout.

1 Ves. 242; §see Gow on Partnership; Montagu on Partnership; and Chit. on Commercial Law, 3d vol. p. 225, tit. *Of Partners*.] §Story on Partnership, *passim*.g Fox v. Hanbury, Cowp. 449; 12 Mod. 446. βThe interest of each partner in the partnership fund, is only what remains after the partnership accounts are taken; and unless, upon such an account the partner be a creditor of the fund, he is entitled to nothing; and if the partnership be insolvent, the same effect follows. Lyndon v. Graham et al., 1 Gallis. C. C. R. 367: and the partnership property cannot be taken in execution and sold to satisfy the several debts of one partner; unless such partner would have an interest in the property after settlement of all accounts, and then to the extent of that interest only. Lyndon v. Graham et al., 1 Gallis. C. C. R. 367. A purchaser, under an execution against one partner, becomes a tenant in common with the other partners, in an undivided share of the land purchased, subject to all the rights of the other partners. Gilmore v. The North American Land Co., Pet. C. C. R. 460. There is no partnership in real estate; the parties are tenants in common. Baker v. Wheeler, 8 Wend. 405; Coles v. Coles, 15 J. R. 160; Anderson et al. v. Tompkins et al., 1 Brockenb. C. C. R. 456; Greene v. Graham et al., 5 Ohio R. 264; Delaney v. Hutchinson, 2 Rand. R. 183; but see Baird v. Baird, 1 Dev. & Bat. R. 524. But see M'Dermot v. Lawrence, 7 Serg. & R. 441. But *semble* that as between the executor or administrator of a deceased partner, and his heir or devisee, real estates purchased by the partnership is considered as personalty. Hoxie v. Carr, 1 Sumner's C. C. R. 173. But see Yeatman v. Woods, 6 Yerg. R. 20; Smith v. Jackson, 2 Edw. 28.g

β Partnerships for commercial purposes, for trading with the world, for buying and selling from and to a great number of individuals, are necessarily governed by many general principles which are known to the public, which subserve the purposes of justice, and which society are concerned in sustaining. One of them is, that a man who shares in the profit, although his name may not be in the firm, is responsible for its debts. Another is, that a partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be; and consequently, to bind his partners in such transactions as entirely as himself. This is a general power, essential to the well conducting of business, which is implied in the existence of a partnership.

Winship et al. v. The Bank of the United States, 5 Pet. R. 529.

To constitute a partnership, there must be a community of interests, a participation in profit and loss; and to make one liable as partner, his joint interest must continue to the time of the contract.

Felichy v. Hamilton, 1 Wash. C. C. R. 491.g

¶From the unity of interest which each partner has in all the stock in

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trade of the partnership, he cannot, whatever share of the stock or profits he may be entitled to, or in whatever sum the firm may be indebted to him, exercise an *exclusive right* to enjoy or receive it, until a balance of accounts has been struck between him and his fellow-partner.

Holmes v. Higgins, 1 Barn. & C. 74. See Bovill v. Hammond, 6 Barn. & C. 149; Milburn v. Codd, 7 Barn. & C. 419. β And no action lies by one partner against another, unless there has been a settlement of accounts, and a promise to pay the balance. Atwater v. Fowler, 1 Hall's R. 180; Murray v. Bogart, 14 Johns. R. 318; Lamalere v. Caze, 1 Wash. C. C. R. 435; Killam v. Preston, 4 Watts & Ser. R. 14. One partner cannot maintain *assumpsit* against the executor or administrator of the other for the proceeds of a partnership adventure, unless they have settled their accounts, and struck a balance. Ozeas v. Johnson, 4 Dall. R. 434; S. C. 1 Binn. R. 191; Andrews v. Allen, 9 Serg. & Rawle, 241. The remedy of one partner against another where no balance has been struck, is in equity only, and not at law. Kennedy v. McFadon, 3 Harr. & Johns. 194. γ

Thus, one member of a company of partners, performing work for the partnership, cannot sue any of the subscribers to the partnership for his charges. And so, if one member of a company, as agent for the company, draw a bill on a stranger, in payment for goods sold by the company to the stranger, and endorse it to the actuary, who endorses it to the managing director, such director cannot sue the drawer on the bill being dishonoured by the acceptor.

Holmes v. Higgins, *supra* Tague v. Hubbard, 8 Barn. & C. 345; and see Neale v. Turton, 4 Bing. 149; Caster v. Drury, 18 Ves. 157.

But as soon as a balance is struck there is an implied promise in law, on the part of him against whom the balance is found, to pay his copartner, and an express promise to pay is not necessary.

Foster v. Allanson, 2 Term Rep. 479; Fromont v. Coupland, 2 Bing. 171; S. C. 9 Moore, 313; Rackstraw v. Imber, Holt, 368; and see Bosanquet v. Wray, 6 Taunt. 597; S. C. 2 Marsh, 319; Brooke v. Enderby, 4 Moore, 501. β Notwithstanding the partnership, however, an action at law may be maintained by one partner against the other for a balance due him, growing out of the partnership transaction, if there be but a single item to liquidate. Musier v. Trumbour, 5 Wend. R. 274. See Lamalere v. Caze, 1 Wash. C. C. R. 413. γ

If two are partners as attorneys and conveyancers, and one of them receives money to be laid out on mortgage, the other is liable for the amount, though his partner should even have given a separate receipt for it.

Willett v. Chambers, Cowp. 814; $\parallel$ Rothwell v. Humphreys, 1 Esp. 406; $\parallel$ β M'Farland v. Crary, 8 Cow. 253. A payment to one partner will be a payment to the company, and his receipt (unless perhaps where such payment is forbidden by the company) will bind the whole. Scott v. Trents, 1 Wash. R. 77. γ

On a motion for a new trial, the following facts were disclosed: An action was brought against Smith alone as a secret partner with one Robinson, to whom the goods were delivered, and who became bankrupt in 1770. On the 30th of March, 1767, Smith and Robinson entered into partnership for seven years, but in November afterwards, some disputes arising, they agreed to dissolve the partnership. The articles were not cancelled; but the dissolution was open and notorious, and was notified to the public on the 17th of November, 1767. The terms of the dissolution were, that all the stock in trade and debts due to the partnership should be carried to the account of Robinson only. Smith was to have back 4200*l.* which he brought into the trade, and 1000*l.* for the profits then accrued, since the commencement of the partnership. He was to lend Robinson 4000*l.*, part of this 5200*l.*, or let it remain in his hands for seven years, at five per cent. interest, and an annuity of 300*l.* *per annum* for the same seven years. For all this

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Robinson gave a bond to Smith. In June, 1768, Robinson advanced to Smith 600*l.* for two years' payment of the annuity, and other sums by way of interest, and gratuities, and other large sums at different times to enable him to pay the partnership debts; Smith having agreed to receive all that was due to the partnership, and to pay its debts, but at the hazard of Robinson. On the 1st of August, 1768, the demands of Smith were all liquidated and consolidated into one; viz. 5200*l.* due to him on the dissolution of the partnership, 1500*l.* for the remaining five years of the annuity, and 300*l.* for Smith's share of a ship: in all 7000*l.*; for which Robinson gave a bond to Smith. On the 22d of August, 1769, an assignment was made of all Robinson's effects to secure the balance then due to Smith, which was stated to be 10,000*l.* Soon after the commission was awarded.

Grace v. Smith, 2 Bl. Rep. 998.

De Grey, C. J.—The only question is, What constitutes a secret partnership? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trade relies for his payment. If any one advances or lends money to a trader, it is not lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment: and there is no difference whether that money be lent *de novo*, or *left behind* in the trade by one of the partners who retires: and whether the terms of that loan be kind or harsh, makes also no manner of difference. I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment: a distinction not more nice than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits; and I think there is no foundation for granting a new trial. Blackstone, J., concurring in opinion with the chief justice, said, I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a *loan*, (whether usurious or not is not material to the question,) in the latter a *partnership*. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in trade to any amount.

Where the defendant had been partner with one Brooke, and they agreed to separate, and Brooke agreed to give him his bond for 2485*l.* with interest, which sum had been brought by the defendant into trade, and an annuity for 200*l.* for seven years, if Brooke so long lived, as in lieu of the profits of the trade; and the defendant had at all times liberty to inspect Brooke's books; he was adjudged to be a partner and liable; for the charge had reference to the profits; it was *casual* as depending on Brooke's life, and his right to inspect the books was that of a partner.

Bloxam v. Pell, 2 Bl. Rep. 998; [and see Gilpin v. Enderby, (in error,) 5 Barn. & A. 954; S. C. 1 Dow. & Ry. 570.]

But, in order to constitute a partnership, and to make a person liable as a partner, there must be an agreement between him and the ostensible person to *share in all risks of profit or loss*, or he must have permitted the other to use his credit, and to hold him out as jointly liable with himself. A man entering into an agreement, and afterwards subdividing his beneficial interest

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under it, among others, is alone liable to the performance, and the subcontract does not constitute a partnership. Thus, an action was brought by the plaintiffs, who were the owners of a Greenland ship, against the defendants, upon an agreement to purchase a cargo of oil. The declaration stated, that on the 29th of August, 1786, the plaintiffs sold the cargo to the defendants, at the rate of 20*l.* per ton, to be received as soon as it was boiled and ready. That by way of collateral security, two bills of exchange were deposited in the hands of the plaintiffs, one of which was accepted by the defendants, Eyre, Atkinson, and Walton. That the sale being so made, and it being expected that the defendants would not take away the oil pursuant to the terms of the sale, it was afterwards agreed between the plaintiffs and defendants, by the name of Benjamin Eyre and Co., that the plaintiffs should keep the oil in their possession, till the 1st of January following; and if the defendants did not pay for it on or before that day, the plaintiffs were to be at liberty to authorize the broker to re-sell it at the best price he could get; and if upon such resale the oil should not produce 20*l.* per ton, with all charges, the plaintiffs were to deduct the difference of the price out of the bills placed in their hands as a collateral security. The declaration then stated, that the defendants neither paid for the oil, nor took it away, and therefore the plaintiffs authorized the broker to resell it. That the deficiencies upon the resale amounted to 400*l.* besides brokerage, &c. 100*l.*, and that the bill of exchange accepted by the defendants was presented to them for payment, and refused. Before this action was brought, Eyre and Co. had become bankrupts. It appeared in evidence on the trial, that on the 24th of August, 1786, the defendants, Eyre for himself and partners, who were Atkinson and Walton, general merchants, Hattersley for himself and Stephen, who were oil merchants, and Pugh for himself and son, who were also oil merchants, agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise; that Eyre should be the ostensible buyer, and the others share in his purchase, at the same price which he might give. Hattersley and Co. were to have one-fourth, Pugh one-fourth, and Eyre and Co. the remaining moiety. That they bought large quantities of oil, belonging to other ships, and other traders, besides the plaintiffs, in the name of Eyre and Co. That Hattersley and Pugh occasionally came forwards and gave directions as to the delivery of the oils, and otherwise interfered in the transaction; and also made many declarations, that they were all jointly interested in the different purchases, and that there was a general concern between them. On the part of the defendants it was insisted, that the contract of sale was made between the plaintiffs and Eyre and Co. only; and that the agreement entered into between themselves was only a subcontract, and did not constitute a partnership; and the learned judge who tried the cause being of the same opinion, directed a verdict to be found for the defendants, which was accordingly done. The plaintiffs therefore moved the court for a new trial, on the ground of misdirection; and after the case had been fully argued, the court refused to grant a new trial, being of opinion that the verdict was proper. For as this was an action on a contract of sale, the vendor can have no remedy against any person with whom he has not contracted, unless there be a partnership; in which case all the partners are liable as one individual. It was justly observed, that a secret partnership can be no consideration to the vendor, though, for reasons of policy and general expedience, the law is positive with respect to the secret partner,

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that when discovered he shall be liable to the whole extent. In many parts of Europe limited partnerships are allowed, provided they be entered on a register; but the law of England is otherwise, the rule being, that if a partner shares in advantages he also shares in all disadvantages. In order to constitute a partnership, a communion of profit and loss is essential; and the shares must be joint, though it is not necessary that they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale; otherwise they are not partners. In the present case Eyre was a mere speculator, and the other defendants were to share in the purchase, but were not jointly interested in any subsequent disposition of the property. Though they may by other purchases have concluded themselves as to some particular vendors, yet in the transaction in question there was not that communion between them which is necessary to make them partners; their agreement was a subcontract, which may be executory, as it was to share in a purchase to be made. The seller looked to no other security than Eyre and Co. To them the credit was given, and they only were liable.

Hoare v. Dawes, Dougl. 371; Coope v. Eyre, 1 H. Bl. 37.] [And see Young v. Axtell, 2 H. Bl. 242; Morse v. Wilson, 4 Term Rep. 353; Saville v. Robertson, 4 Term Rep. 794; Leveck v. Shaftoe, 1 Esp. 468; Waugh v. Carver, 2 H. Bl. 235; Benjamin v. Porteus, 2 H. Bl. 590; Swan v. Steele, 7 East, 210; *Ex parte Gellar*, 1 Rose's Ca. 297.]

{A having neither money nor credit, offers to B that if he will order with him certain goods to be shipped upon an adventure, if any profit should arise from them, B should have half for his trouble. B lends his credit on this contract, and orders the goods on their joint account, which are furnished accordingly, and afterwards paid for by B alone. As to third persons, this contract constitutes them partners, for B was to share half the profits: but as between themselves it is no partnership, but only an agreement for so much as a compensation for B's trouble and lending his credit. And therefore B may, in assumpsit against A, who does not account to him for the profits, recover the whole money paid.

4 East, 144, *Hecketh v. Blanchard*. See 2 H. Black. 235, *Waugh v. Carver*.

Partners in a stock divided into shares and transferable (but who are not incorporated) are responsible beyond the amount of the shares for which they subscribe, though it is one of the terms of the association that they shall not be. As to the subscribers themselves, they may stipulate with each other for this limited responsibility; but as to the rest of the world, each partner is liable to the whole amount of the debts contracted by the partnership.

9 East, 527, *The King v. Dodd*.}

||A participation of profits is sufficient to constitute a partnership, because an agreement to share profits alone cannot prevent the legal consequence of also sharing losses for the benefit of creditors. Thus A and B, ship agents at different ports, entering into an agreement to share in certain proportions the profits of their respective commissions, and the discount on traders' bills employed by them in repairing the ships consigned to them, &c., are liable as partners to all persons with whom either contracts as such agent, though the agreement provides, that neither shall be answerable for the acts or losses of the other, but each for his own.

Waugh v. Carver, 2 H. Bl. 235; *Cheap v. Cramond*, 4 Barn. & A. 663, and see

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Gouthwaite v. Duckworth, 12 East, 421; Wightman v. Townroe, 1 Maul. & S. 412; Gilpin v. Enderby, (in error,) 5 Barn. & A. 954; S. C. 1 Dow. & Ry. 570. β But where an agreement was made between several persons, by which each stipulated that he would, upon his own account, and with his own funds, conduct a store; that each was to bear his own loss, but that whatever profit was made by either should be equally divided among all. This does not constitute a partnership as between themselves, or as regards others knowing the character of the connection. Jordan v. Wilkins, 2 Wash. C. C. R. 483; and see Rice v. Austin, 17 Mass. R. 206. But see Walden v. Sherburne, 15 Johns. R. 409; Champion v. Bostwick, 18 Wend. R. 175. Cox v. Delano, 3 Dev. 89; Purviance v. M'Clint, 6 S. & R. 259; Chase v. Barrett, 4 Paige, 148; Simpson v. Feltz, 1 M'Cord's Ch. 218; Ex'rs of Shubrick v. Fisher, 2 Deasus. 148. A dormant partner is liable, because he takes part of the profits, which is part of the fund the creditor looked to for the satisfaction of his demand. Freel v. The Campbells, Cooke's R. 8. γ

So where A, having neither money nor credit, offered to B, that if he would order with him certain goods to be shipped on an adventure, *if any profit should arise from them B should have half for his trouble*; B having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by B alone, the contract, though it was held not to constitute a partnership as between themselves, but only an agreement for a compensation for trouble, was held to make B liable as a partner to third persons who were creditors.

Hesketh v. Blanchard, 4 East, 144; Meyer v. Sharpe, 5 Taunt. 74; Smith v. Watson, 2 Barn. & C. 401; S. C. 3 Dow. & Ry. 751; and see Reid v. Hollinshead, 4 Barn. & C. 867; Peacock v. Peacock, 2 Camp. 45; S. C. 16 Ves. 56; De Berkomp v. Smith, 1 Esp. 29; β Miller v. Hughes, 1 Mass. R. 54. Although men may be liable as partners, in a question between them and third persons, notwithstanding an agreement between themselves to the contrary; yet as between themselves, the agreement will govern. Gill v. Kuhn, 6 S. & R. 333; Hazard v. Hazard, 1 Story, 371. γ

But an agreement, that a broker employed to sell goods shall keep for himself whatever he can obtain on the sales beyond a stated sum, does not render the broker a partner; nor does an agreement by a lighterman with the person employed to work the lighter, that he shall have half the *gross earnings*; *aliter*, if it be half the *profits*.

Benjamin v. Porteus, 2 H. Blac. 590; Dry v. Boswell, 1 Camp. 329, and see 5 Esp. 182; Wish v. Small, 1 Camp. 331, note; Meyer v. Sharpe, 5 Taunt. 74; β Miller v. Bartlett, 15 Serg. & Rawle, 157; Ambler v. Bradley, 6 Vermont, 119; Bowman et al. v. Bailey, 10 Vermont, 170; γ but see Reid v. Hollinshead, 4 Barn. & C. 867; and see Lord Eldon's disapprobation of the principle of the above cases, 17 Ves. 404.

A party may become liable as a partner, though not so in reality, by suffering his name to be held out to the world as a partner.

Per Ld. Eldon, 18 Ves. 301; Guidon v. Robson, 2 Camp. 302; Parsons v. Crosby, 5 Esp. Ca. 199. β And see Tabb's Adm'rs v. Gist et al., 1 Brockenb. C. C. R. 33; Osborne v. Boennar, 2 Nott & M'Cord, 427. But a general reputation is not sufficient to charge a particular person as partner. Hunt v. Jucks et al., 1 Hay. R. 173. γ

If two or more engage in a joint undertaking in the way of trade, or enter into copartnership, it is not necessary to provide against survivorship; for, by a maxim of the common law, *jus accrescendi inter mercatores locum non habet*; and this is for the benefit of trade and commerce, that the fruits of each person's labour and industry should descend to his children and family.(a)

Vern. 217; $\parallel$ 15 Ves. 227, and see Devaynes v. Noble, 1 Mer. 563; β Egbert v. Wood, 3 Paige, 517; Jones v. Hardesty, 10 Gill & J. 405. But lands bought by partners in trade, on speculation, do not, on the death of one, survive to the other. Hart v. Hawkins, 3 Bibb, 506; γ and vide tit. *Joint-tenants and Tenants in Common*. β Partners in the practice of medicine are within the law merchant, which excludes the *jus accres-*

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ceudi between traders. *Allen v. Blanchard*, 9 Cow. 631.*g* (a) It has been determined, that upon a partnership *without articles* the good-will survives. *Hammond v. Douglas*, 5 Ves. 539; but the authority of this case was doubted in *Crawshay v. Collins*, 15 Ves. 218. Though *semble* that, on a partnership between professional persons, the good-will of a business on the death of one survives. *Farr v. Pearce*, 3 Madd. 74.*h* *g*The good-will of a trade does not survive, but is partnership property. *Dougherty v. Van Nostrand*, 1 Hoff. 68.*g*

But if two joint merchants make B their factor, and one dies, leaving an executor, this executor and the survivor cannot join in an action (a) against the factor; for though the duty does not survive, yet the remedy does; and therefore, on recovery, the survivor must be accountable to the executor for that.

2 Salk. 444, pl. 3; *Ld. Raym.* 340, *Martin v. Crump*. *β* And see *Peter's Adm'r v. Davis*, 8 Mass. R. 257; *Austin v. Walsh*, 2 Mass. R. 405.*g* {A payment made to the executor of the deceased partner will not discharge the debtor. 1 Dall. 248, *Wallace v. Fitzsimons*.} (a) Nor can an executor and the surviving merchant be jointly sued, because the first is to be charged *de bonis testatoris*, and the other *de bonis propriis*. *Carth.* 170, 171; 3 Lev. 290; 2 Lev. 228; *Fortesc. Rep.* 181. {The surviving partner alone is liable. *Taylor*, 124, *Burgwin v. Adm. of Hostler*.}

The plaintiff's husband (to whom she is administratrix) and the defendant were copartners for many years in the trade of a druggist; the plaintiff brought her bill for a discovery of the estate, and her proportion and dividend thereof, &c., the defendant answered; and it appearing that many debts owing to the joint trade stood out, it was moved on behalf of the plaintiff, that an able attorney might be appointed to sue for and recover those debts; it being alleged in the bill, that the defendant carrying on a distinct trade for himself with the persons that were debtors to the joint trade, to oblige them he forbore to call in their debts; and it was ordered accordingly, unless the defendant, within a week, would give security to the plaintiff to answer her moiety of the debts that were standing out.

Vern. 118, *Estwick v. Conninsby*. *¶* The death of one partner is not a sufficient cause for the appointment of a receiver, though the death of both partners is sufficient. *Phillips v. Atkinson*, 2 Bro. C. C. 272; and see *Dacie v. John*, 1 M'Clel. Rep. 201.*h*

β One partner can bind the other only for objects within the scope of the business of the firm. Secret restrictions of the rights of partners, do not affect those persons who deal with the firm, in ignorance of them.(b)

Bank of U. S. v. Binney, 5 Mason's C. C. R. 176; *Windship et al. v. Bank of U. S.*, 5 Peter's R. 529. (b) *Tillier v. Whitehead*, 1 Dal. R. 269; *Churchman v. Smith*, 6 Whart. 146.

But the principle, that, in the course of trade, the act of one partner is the act of both, does not authorize one partner to execute a deed for the other.

Gerard v. Basse, 1 Dal. R. 119; *United States v. Astley*, 3 Wash. C. C. R. 508; *Hart v. Withers*, 1 Penn. R. 285; and see *Overton v. Tozer*, 7 Watt's R. 331.*g*

By the custom of England, where there are two joint traders, and one accepts a bill drawn on both, for him and partner, it binds both if it concerns the trade; otherwise if it concerns the acceptor only in a distinct interest and respect.(c)

Salk. 126, pl. 3; *Pinkney v. Hall*, *Ld. Raym.* 175; *¶* *Harrison v. Jackson*, 7 Term Rep. 207. One partner may bind his copartners by procuration. *Williamson v. Johnson*, 1 Barn. & C. 146; *S. C.* 2 Dow. & Ry. 281; and see *Lacy v. Woolcott*, 2 Dow. & Ry. 458; *Ridley v. Taylor*, 13 East, 175; *Ex parte Agace*, 2 Cox, 312; *Ex parte Gardom*, 15 Ves. 286. *β* Under what circumstances a partner will be subjected to the payment of a note, given without his assent, in the name of the firm by his copartner, in a matter not relating to the business of the firm, see generally *Gansevoort v. Williams*, 14 Wend. R. 133, where the English and American cases are examined and

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commented upon. *g* (c) Greenslade v. Dower, 7 Barn. & C. 635; Green v. Deakin, 2 Stark. 347; Arden v. Sharpe, 2 Esp. 524; Wells v. Masterman, 2 Esp. 731; Emly v. Lye, 15 East, 7; Bond v. Gibson, 1 Camp. 185; *||* *β* Brown v. Duncanson, 4 Har. & M'Hen. 350.*g*

|| But the authority of one partner to bind another by signing bills and notes in their joint names is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it.

Lord Galloway v. Matthew, 10 East, 264; S. C. 1 Camp. 403; and see Shirreff v. Wilks, 1 East, 48; *β* Boyd et al. v. Plumb. et al., 7 Wend. R. 309. And if one of two partners in trade give a bond or note, without the consent of the other, and for a debt, not contracted with, nor due from the partnership; such bond or note is not binding on such other partner at law. Poindexter v. Waddy, 6 Munf. R. 418; and see Noble v. McClinton, 2 Watts & Ser. R. 152. And a bond so given releases the other partners. Williams v. Hodgson, 2 Harr. & Johns. 474.*g*

And one partner cannot bind his copartners by signing the partnership firm to a *guarantee*, without an authority from them to do so; for it is not incidental to the general power of a partner: (a) nor can he bind his copartners by a submission to arbitration, even of matters arising out of the business of the firm; (b) nor by deed. (c)

(a) Duncan v. Lowndes, 3 Camp. 478; *Ex parte* Peale, 6 Ves. 602; 8 Ves. 540. (b) Stead v. Salt, 3 Bing. 101. *β* Karthaus v. Ferrers, 1 Peters's R. 228; Adams v. Bankart, 1 C. M. & R. 781; 5 Tyr. 425; 1 Gale, 48, but see Taylor v. Coryell, 12 Serg. & Rawle, 249; Wilcox et al. v. Singletary, Wright, 420.*g* (c) Harrison v. Jackson, 7 Term Rep. 207. *β* But one partner, on the condition of an assignment of property, may sign and seal a release in the name of the firm. Halsey v. Whitney, 4 Mason's C. C. R. 206. And an assignment by the only partner residing in this country, of the partnership funds, in the name of the partnership, is valid. Harrison v. Sterry et al., 5 Cranch, 289. And see, as to power of partner to bind his co-partner by seal, Gram v. Seaton & Bunker, 1 Hall's R. 262; Gates v. Graham et al., 12 Wend. R. 53; M'Bride v. Hagan, 1 Wend. R. 326; Bruen v. Marquand, 17 Johns. R. 58; Clement v. Brush, 3 Johns. C. 180; Green v. Beals, 2 Caines's R. 254; Torn v. Goodrich, 2 Johns. R. 213; Ludlow v. Simonds, 2 Caines's Cases in Error, 1; 2 Hay. R. 99; 2 Hay. R. 23; Person v. Carter et al., 3 Mur. R. 321; Posey v. Bullitt et al., 1 Black. R. 99; Flood v. Yandes et al., 1 Black. R. 103; Blackburn v. M'Alister, Pecks. R. 371; Nunnely v. Doharty, 1 Yerg. R. 26; Gerard v. Basse, 1 Dal. R. 119. But equity will give relief against the copartner not bound by the deed. Blanchard v. Pasteur, 2 Hay. 393.*g*

Where, however, one of several partners, with the privity of the others, drew bills in his own name in favour of persons who advanced him the amount, which he applied to the use of the partnership, it was held, that although the partners were not jointly liable on the bills, yet that they might be jointly sued by the payees for money lent.

Denton v. Rodie, 3 Camp. 493.

However, if one partner draw bills in his own name, and procure them to be discounted, the party discounting has no remedy, either on the bills or for money lent, against the other partners, though the proceeds are actually carried to the partnership account; for the money is advanced solely on the credit of the names on the bills.

Emly v. Lye, 15 East, 7; and see 1 Rose, Ca. 61. *β* But where a note signed by one partner, is proved to have been given on behalf of the firm, the firm will be liable. Owens & Co. v. Trotter & Scott, 1 Bibb's R. 157.*g*

But if a firm, consisting of several parties, carry on business in the name of one of them, the firm will be bound by the endorsement of that individual on bills endorsed for the partnership account.

South Carolina Bank v. Case, 8 Barn. & C. 427; *β* Bank of the U. S. v. Binney, 5 Mason's C. C. R. 176; Aspinwall v. Williams, 1 Ohio R. 98; Austin et al. v. Williams et al., 2 Ohio R. 64.*g*

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§ And all the members of a firm are liable where money is borrowed by one member on the credit of the firm, whether the money be applied to the business of the firm, or be misappropriated.

Onondaga County Bank v. Depuy, 17 Wend. 47; *Church v. Sparrow*, 5 Wend. R. 223, and see *Bank v. Gore et al.*, 15 Mass. R. 75. *Aliter*. If one partner borrows on his own credit, and gives his own separate security and obligation for the amount, although it was applied to the use of the firm. *Willis v. Hill*, 2 Dev. & Bat. R. 231. And see *Sylvester v. Smith*, 9 Mass. R. 119; *Barker et al. v. Blake*, 11 Mass. R. 16; *Græff v. Hitchman*, 5 Watts R. 454; *Bevin v. Lewis*, 1 Sim. 376.g

And where one of two partners made a contract as to the terms on which some business was to be transacted by the firm, although such business was not in their usual course of dealing, and even contrary to their arrangement with each other, and the business was afterwards transacted with the knowledge of the other partner, he was held bound by the contract made by his partner.

Sandilands v. Marsh, 2 Barn. & A. 673. § And third persons are not bound to inquire whether the partner with whom they are contracting is acting on the partnership account, or for his individual advantage. The interest of the partner in the joint stock of the concern, and his consequent authority to use the partnership name, raises a presumption that the contract was made for joint account; which is sufficient to bind the firm, unless the contrary be shown; and that the person with whom the partner deals had notice, or reason to believe that the former was acting on his separate account. *Le Roy v. Johnson*, 2 Pet. Rep. 198. But when there is a special and limited partnership, and persons deal with it knowing it to be such, they are bound by the terms of the partnership, and cannot make the other partners liable beyond them. *Ensign v. Wanda*, 1 Johns. C. 171.g

§ And partners are all liable for articles furnished for the benefit of the firm, though the vendor does not know of the existence of the firm, and though he supposes himself dealing with, and giving credit to an individual partner by charging him alone in his books.

Reynolds v. Cleveland, 4 Cow. R. 282. A dormant partner is not liable for the debts of the firm, contracted after he has withdrawn from the partnership and has ceased to receive the profits of the business. *Armstrong v. Husey*, 13 S. & R. 315.g

And a pledge by one partner of joint partnership property will bind his copartners, although such pledge be made without their privity or consent, provided the pledgee had no notice that the property was partnership property, and there be no fraud in the transaction.

Raba v. Ryland, *Gow's Ca.* 132, S. P.; *Tupper v. Heythorne*, *Ibid.* 135, n.; and see *Hooper v. Lusby*, 4 Camp. 66; *Lacy v. M'Neale*, 4 Dow. & Ry. 7; *Rapp v. Latham*, 2 Barn. & A. 795; *Lacy v. Woolcott*, 2 Dow. & Ry. 458.

But one of several partners in a contract with government cannot pledge goods consigned to him by another partner, for the purpose of performing the contract.

Snaith v. Burridge, 4 Taunt. 684.

And a firm cannot acquire property in goods obtained by the fraud of one partner, although the others are not privy to it.

Killer v. Wilson, 1 Ry. & Moo. 178. § And a fraud committed by one of the copartners shall not charge the partnership. *Peirce v. Johnson*, 6 Mass. R. 242.g

§ The power of one partner to bind another ceases with the dissolution of the copartnership.

Lansing v. Gaine et al., 2 Johns. R. 300. And one partner cannot endorse notes or bills given to the firm before their dissolution, although authorized to settle partnership concerns. *Sandford v. Mickels*, 4 Johns. R. 224.g

In bankruptcy it may be observed, one partner is allowed to act for

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another for various purposes; as to prove debts, to execute powers of attorney, to vote in the choice of assignees, sign the certificate, &c.

Ex parte Mitchell, 14 Ves. 597.]

A and B were partners as woollen-drappers, A received money in the shop of S S, and gave a note for it signed by himself and partner; A and B being both dead, and A not leaving sufficient assets, it was held, on a bill brought by S S against the executors of both the partners, that this note being given by one of the partners, it should bind them both; and that though at law it binds only the executor of the surviving partner, yet in equity the creditor may follow the estate {1} of the other, though no (a) proof was made that this money was brought into the stock, or used in trade.

2 Vern. 277, *Lane v. Williams*. {1} 3 Ves. J. 277, *Daniel v. Cross*; *Ibid.* 566, *Stephenson v. Chiswell*; 1 Cain. Er. 122, *Marshall & Jenkins v. De Groot*; 1 Bin. 123, *Lang v. Kepple*; *Watson*, (Am. ed.,) 270, S. C. (a) That the act of one partner shall be presumed the act of the other, and shall bind him, unless he can show a disclaimer, and a refusal to be concerned. *Salk.* 292, pl. 33; [and see *Swan v. Heald*, 7 East, 209; S. C. 3 Smith, 199.] β A bill to charge the executors of a deceased partner with a partnership debt, where the other party survives, must expressly charge an insolvency of the survivor. *West v. Randall*, 2 Mason's C. C. R. 181; *Horsey v. Heath et al.*, 5 Ohio R. 355. And see *Grosvenor & Co. v. Austin's Adm'rs*, 6 Ohio, 112; *Lang v. Kepple*, 1 Bin. R. 123; *Sale v. Dishman*, 3 Leigh, 548; *Wardlaw v. Gray*, C. W. Dud. Eq. 85.g

{If one partner gives a note of the firm for his own debt, the other partners are not bound, when the note is given without their knowledge or consent, and the person receiving it knows that it is not for a partnership debt. The transaction is, with regard to the other partners, fraudulent and void. But it is otherwise if the person receiving the note has no such knowledge; or if the note gets into the hands of a *bonâ fide* holder without notice; or if the subsequent approbation of the other partners is shown.

2 Cain. 246, *Livingston v. Hastie*; 2 Johns. Rep. 300, *Lansing v. Gaine & Ten Eyck*; 4 Johns. Rep. 251, *Livingston v. Roosevelt*; *Ibid.* 262, n., *Dubois v. Roosevelt*; 2 Esp. Rep. 524, *Arden v. Sharpe & Gibson*; *Ibid.* 731, *Wells v. Masterman*; 1 East, 48, *Shirreff v. Wilks*; *Ibid.* 53, *Hope v. Cust*, (in 1774,) stated by Mr. J. Lawrence; 7 East, 210, *Swan v. Steele*; 6 Ves. J. 602, *Ex parte Peele*; 8 Ves. J. 540, *Ex parte Bonbonus*. See 1 Day, 136, *Barber v. Minturn*.

And the creditor receiving such a note cannot recover even against an endorser, who endorsed it merely as a surety of the firm, believing it to be good against all the partners, and unacquainted with the circumstances under which it was issued. For if he could recover from the endorser, the latter, being an innocent payee, would, in another action, be enabled to recover from all the partners. The note also was not such a one as the party supposed he was endorsing.

2 Cain. 246, *Livingston v. Tyrie*.

Where there is a special partnership in any particular trade or business, one partner cannot bind his copartner by a contract, not connected with such trade or business, entered into with a third person having or chargeable with notice of the limited nature of the partnership.

1 Esp. Rep. 29, *De Herkom v. Smith*; 1 Johns. Ca. 71, *Ensign v. Wands*; 2 Johns. Rep. 300, *Lansing v. Gaine & Ten Eyck*; 4 Johns. Rep. 251, *Livingston v. Roosevelt*; 1 Dall. 269, *Tillier v. Whitehead*. From the case of *Livingston v. Roosevelt*, it seems that a publication in the gazette of the nature of the copartnership, at the time of its commencement, is constructive notice thereof to all those who may afterwards take the copartnership security. But the partners must be careful not to do or consent to any act, which holds them out to the world as general partners.}

[Two entered into articles of copartnership, and each brought in 1000/.

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stock. There was to be no benefit of survivorship, neither was to become indebted without the other, nor either to take out of the stock without the other. One became *indebted without the consent of his partner*, and made his wife executrix, and died. The wife *confessed judgment* for the debt. The other sues for an account and relief against the creditor and the wife. They confess the *articles*, and the obtaining judgment. Lord Chancellor granted an injunction against the judgment, because the debt related not to the partnership, saying, if this be suffered, no trade could be in such case.

2 Chan. Ca. 38.

So, where three persons entered into partnership in the trade of sugar-boiling, and agreed that no sugars should be bought without the consent of the majority; one of them afterwards makes a protest that he would no longer be concerned in partnership with them: the two other persons after make a contract for sugars: the seller having notice that the third had disclaimed the partnership, he shall not be charged.

Minnitt v. Whitney, Vin. Abr. tit. *Partners* (A), pl. 12.]

{After a dissolution of the partnership, the power of one partner to bind the others wholly ceases. He cannot, though authorized to settle the affairs of the firm, bind them by adjusting an account {¹} and acknowledging a balance to be due from the firm; or by issuing notes in the name of the firm antedated, {²} as they are valid only from the day of the delivery, and are to be considered as drawn on that day; or by endorsing notes or bills {³} given to the firm before the dissolution;—all the partners should join in endorsing them.

{¹} 3 Johns. Rep. 536, Hackley v. Patrick. {²} 2 Johns. Rep. 300, Lansing v. Gaine & Ten Eyck. {³} 1 H. Black. 155, Kilgour v. Finlyson; 3 Esp. Rep. 108, Abel v. Sutton; 4 Johns. Rep. 224, Sanford v. Mickles & Forman.

Notice of the dissolution must, however, be given, or all the partners will continue liable to be bound by the contract of one in the name of the partnership, with a person not actually knowing the dissolution. Publication in the newspapers is sufficient notice to all persons who have had no previous dealings with the firm; but it is incumbent on the parties to send particular notice to all those with whom they have had dealings in partnership.

Peake, N. P. 42, Gorham v. Thompson; Ibid. 154, Graham v. Hope; 1 Esp. Rep. 371, Godfrey v. Turnbull; 3 Esp. Rep. 248, Parkin v. Carruthers; 4 Esp. Rep. 89, Evans v. Drummond; 2 Johns. Rep. 300, Lansing v. Gaine & Ten Eyck.

One of two partners may give an authority to a clerk under the firm of the house; and the clerk may, in consequence thereof, accept bills, and sign or endorse notes, in the name of the company.

1 Dall. 269, Tillier v. Whitehead.

One partner cannot, by virtue of the general authority derived from the articles of copartnership, execute deeds, binding the other. A particular power must be given for that purpose. Were the law otherwise, they would be enabled to dispose of the real property of each other, or create liens on it.

7 Term, 207, Harrison v. Jackson; 2 Cain. 254, Green v. Beals; 1 Dall. 119, Gerard v. Basse; Taylor, 113, Anonymous; 2 Cain. Er. 5, Becker v. Kirk, cited by Lansing, Ch. Vide 1 Hen. & Mun. 423, Shelton v. Pollock & Co.

But a bond given by one in the name of both, is binding as the several bond of him who executed it.

2 Bos. & Pul. 338, Elliott v. Davis; 2 Cain. 254, Green v. Beals. If judgment be entered up against both by virtue of a warrant of attorney accompanying the bond, the

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judgment will not be set aside, but the court will either give leave to the plaintiff to strike out the name of the partner who did not sign, 1 Dall. 119, or order that no execution shall go against his person or property. 2 Cain. 254. See 2 W. Black. 1133, *Motteux v. St. Aubin*.

And a deed executed by one in behalf of both, in the presence and by the authority of the other, binds both, though only sealed once.

4 Term, 313, *Ball v. Dunsterville*; *W. Jones*. 268, *Lord Lovelace's case*; 3 Ves. J. 578, *Burn v. Burn*; 2 Cain. Er. 7, 8, 41, 42, 55, *Ludlow v. Simond*.

Also, the principle does not apply to a release. A release by one under hand and seal, in the name of the copartnership, of a debt due to the copartnership, is binding on all the partners; on the general principle of law, that where two have a joint personal interest, the release of one {1} bars the other.

3 Johns. Rep. 68, *Pierson v. Hooker*; *Watson*, (Am. ed.) 225. A payment to one partner is a payment to all, unless perhaps it is forbidden by the company. 1 Wash. 79, *Scott v. Trent*. {1} 6 Rep. 25, *Ruddock's case*.)

A and B are copartners, and a judgment is had against A, and the goods of both are taken in execution: it was held *per Cur.* that the sheriff must seize all, because the moiety is undivided; for if he seize but a moiety and sell that, the other will have a right to a moiety of that moiety; therefore he must seize the whole, and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner.

Salk. 392, pl. 1, *Heydon v. Heydon*; and vide *Show*. 173, 174; *Comb*. 217. [And see *Chapman v. Hoops*, 3 Bos. & Pul. 289.]

{But the separate creditor of one partner has, in equity, no right against the joint property beyond the separate interest of that partner, that is, his share of the property, subject to the accounts of the partnership; one item of which is, that enough must be left for the partnership debts. Therefore joint property of an insolvent partnership, taken in execution for a separate debt, cannot be held against the joint creditors.

4 Ves. J. 396, *Taylor v. Fields*; 2 Johns. Rep. 280, *Wilson & Gibbs v. Conine*. Vide 11 Ves. J. 85, *Barker v. Goodair*; 2 Dall. 277, *McCart v. Emlen*.)

[The *defendant* was partner with one *Bernie*, against whom a commission of bankrupt had issued, but, before the bankruptcy, the *plaintiff* had sued out execution on a bond of the *defendant's* for 700*l.*, and the sheriff had levied on the partnership effects. *Bernie's* assignees obtained this rule to show cause why the sheriff should not pay them a moiety of the money arising from the sale of the goods so taken in execution, upon an affidavit of *Bernie's* that he was entitled to an equal share of the partnership effects, as partner with *Davidson*. The *plaintiff's* affidavit, on showing cause, denied that *Bernie* had an equal share in the partnership effects, and stated that he had embezzled the joint stock to a considerable amount. The court directed that it should be referred to the master to take an account of the share of the partnership effects to which *Bernie* was entitled; and that the sheriff should pay a part of the money levied, equal to the amount of such share, to the assignees.

Eddie v. Davidson, Dougl. 650; [Smith v. Stokes, 1 East, 363. {See 3 Bos. & Pul. 254, *Morley v. Strombom*; Ibid. 288, *Parker v. Pistor*; Ibid. 289, *Chapman v. Hoops*.}

Judgment was entered against one of two partners, and upon a *fieri facias*, all the goods being undivided, were seized in execution. Upon application to the King's Bench by him against whom the judgment was not, the court

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held, that the sheriff could not sell more than a moiety; for the property of the other moiety was not affected by the judgment, nor by the execution.

Jacky v. Butler, 2 Ld. Raym. 871; [and see Taylor v. Fields, 4 Ves. jun. 396.] *β* Shaver v. White, 6 Munf. R. 113. The purchaser of partnership effects, under a *fi. fa.* against one copartner, takes them subject to the accounts of the copartnership, and can only claim a share of the surplus after payment of the debts. Tredwell v. Rascoe, 3 Dev. R. 50. And see Peirce v. Jackson, 6 Mass. R. 242; Fisk et al. v. Herrick et al., 6 Mass. R. 271; Phillips et al. v. Bridge, 11 Mass. R. 242; Goodwin v. Richardson, Adm'r., 11 Mass. R. 469; Doner v. Stauffer, 1 Penn. R. 198; Moody v. Paine, 2 Johns. Ch. 548.*g*

Richardsons senior and junior, and one Janson, were partners together in trade, and Janson embezzled and wasted the joint stock, and, contracting private debts, became a bankrupt. The court seemed to think, that out of the produce of the goods the debts owing to the joint trade ought to be paid in the first place; and that, out of Janson's share, satisfaction must be made for what Janson had wasted or embezzled; and that the assignees could be in no better case than the bankrupt himself, and were entitled only to what his third part would amount unto, clear after debts paid, and deductions for his embezzlement.

Richardson v. Goodwin, 3 Vern. 293; [West v. Skip, 1 Ves. 232; 12 Mod. 446; Smith v. De Silva, Cowp. 469; Smith v. Stokes, 1 East, 363; Smith v. Oriel, 1 East, 368.]

A bill was brought, setting forth that Goss, Neaulme, Gromvegan, and Prevost became partners: that Prevost was intrusted with the goods in the shop and warehouse, but became profuse, and embezzled the partnership stock, and applied the same to his own use, and suffered the partnership debts to be unpaid; and having contracted private debts on his own account, became a bankrupt, and a separate commission was taken out against him. A question was raised, Whether Prevost's share of the partnership stock ought to be applied, in the first place, to pay what he was indebted to the partnership? Lord Talbot ordered an account of what Prevost had embezzled of the partnership estate, and that the partnership debts should in the first place be paid to the joint creditors in proportion to their debts, and as far as the partnership estate would extend; and that if any of the partnership estate remained, after the joint debts were paid, then the same to be divided, and the partnership to be paid out of Prevost's share what he had embezzled.

Goss v. Dufresney, Dav. Bankrupt Laws, 371; [Ryal v. Rowles, 1 Ves. 353; *Ex parte* Ruffin, 6 Ves. 127; Montagu on Partnership, vol. i. p. 244; and see *Ex parte* King, 17 Ves. jun. 115.] *β* A partner withdrawing the funds of the firm, thereby diminishing the stock, and applying it to his own use, shall account to the others for the injury. Honore v. Colmesnil, *et vice versa*, 1 J. J. Marsh. R. 507.*g*

Although a moiety of a joint stock may be taken in execution on a judgment against one partner, yet if copartners become bankrupts, the joint estate is to discharge the joint debts in the first place, and the separate estate to pay the separate debts: and if there be no separate estate, then the residue of the joint estate, after the joint creditors are satisfied, to be applied among the separate creditors, and so *vice versa*; for the commissioners of bankrupts are intrusted both with a legal and equitable jurisdiction, and may therefore marshal (*a*) the different effects, and apply them in discharge of the different creditors according to equity and justice.

2 Chan. Rep. 228; 2 Vern. 293, 706; Pasch. 4 G. 2, Grace v. Hyam, Barnard. K. B. 469; [Taylor v. Fields, 4 Ves. 396; *Ex parte* Janson, 3 Madd. 229;] *β* Ridgely v. Carey, 4 Har. & M'Hen. R. 167; White v. Dougherty et al., Martin & Yerg. R. 309; Egbert v. Wood, 3 Paige, 517; Devean v. Fowler, 2 Paige, 400; Tunno v. Trezevant,

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2 Desau. 270; Woodrop v. Price's Ex'r, 3 Desau. 203; Payne v. Matthews, 6 Paige, 19; Simmons v. Tonge, 3 Bland, 341; Pierce v. Tierman, 10 Gill & J. 253. The rule, that partnership debts must be first paid out of partnership effects, is only applicable to the cases of bankruptcy and actual insolvency. M'Carty v. Emlen, 2 Yeates R. 193; Bell v. Neuman, 5 Serg. & Rawle, 87, 90. *g* [(a) But not without an order. 1 Atk. 68, pl. 23.]

¶ Where a partnership firm, being indebted to the United States for duties, makes an assignment of all their effects for the payment of their debts, for which the social fund is inadequate, this is an act of insolvency, *quoad* the social fund, under the act of Congress, which gives the United States the preference to other creditors, "in all cases of insolvency;" and it seems, that such an assignment amounts to an act of general insolvency; and that the private property of the individual partners will also be subjected to the payment, in the first instance, of the debt due to the United States, in the event of the inadequacy of the partnership fund.

United States v. Shelton & Co. 1 Brockenb. C. C. R. 517. *g*

¶ OF DISSOLUTION. — [A and B, goldsmiths and partners, were bound to J S in a bond for payment of 1000*l.* and interest, in 1693. Afterwards in the same year they dissolved the partnership, when A by money and bond secured to B his share of the stock, and took upon himself the partnership debts. Public notice was given to creditors of the joint stock to receive their money, or to look upon A only as their paymaster. J S, in 1708, called in his money from A, but continued it on A's subscribing the bond at 6 per cent. A was solvent till 1711, and till then J S might have had his money when he pleased; but then A became a bankrupt. Lord Chancellor Parker held, that the executor of B was still liable; that the notice was *res inter alios acta*, and could not bind J S: and that changing the interest did not alter the security; for still it was the bond of both; but B's executor could not be liable to more than 5*l.* per cent. interest; and J S was decreed his debt and costs.

Heath v. Percival, 1 P. Wms. 682; ¶ Smith v. Jameson, 5 Term Rep. 601; and see Lodge v. Dicas, 3 Barn. & A. 611; David v. Ellice, 5 Barn. & C. 196. Notice of the dissolution of a partnership in the Gazette is not notice to persons who have trusted them as partners, unless they have seen the Gazette; Graham v. Hope, Peake, 154; or it has been sent to them. Newsome v. Coles, 2 Camp. 617. *Secus* as to those who have never dealt with them, 1 Esp. Ca. 371; and see 1 Stark. Ca. 420. ¶ Graves v. Merry, 6 Cow. R. 701; Martin v. Walton, 1 M'Cord's R. 16; Watkinson v. Bank of Pennsylvania, 4 Whart. R. 482; Lucas v. Bank of Darien, 2 Stew. 280; Hart v. Alexander, 2 Mees. & W. (Ex.) 484; and 7 C. & P. (N. P.) 746. *g* A change of partners in a banking-house is sufficiently notified to the customers by a change of the printed checks. Barfoot v. Goodall, 3 Camp. 147. *¶*

¶ So where one of three partners, after a dissolution of partnership, undertook by deed to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate debts of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills; it was held, that the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking, under these circumstances, the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt.

Bedford v. Deakin, 2 Barn. & A. 210; S. C. 2 Stark. 178.

And where one of four partners having retired, the other three continued the business, assuming the funds, and charging themselves with the partnership debts, and A, a creditor of the old firm, was informed of this ar-

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rangement, and his account was with his consent transferred from the old firm to the new, with whom he continued to have dealings, drawing upon them and making them payments for above twelve months, when they failed in his debt; it was held, that the retired partner was still liable to A for the balance due to him by the old firm, though if A had drawn for that balance at any time during the solvency of the new firm it would have been paid.

David v. Ellice, 5 Barn. & C. 196; and see Parkins v. Carruthers, 3 Esp. 248; Brown v. Leonard, 2 Chit. 120.¶

β On the dissolution of a partnership between A & B, it was agreed that A should retain the funds and pay the debts of the firm; of which arrangement the plaintiff, a creditor of the firm, had notice. A entered into a new partnership, and the plaintiff gave credit to the new firm, which also was dissolved, being indebted to the plaintiff at the time. An arrangement was then made by which the old and new debts were consolidated, and for the whole sum thus ascertained, three notes were given by A to the plaintiff, none of which corresponded with the balance due by A and B, payable at different periods; and the plaintiff agreed to pass these notes to the credit of A when paid: *Held*, that by this arrangement B was discharged.

Harris v. Lindsay, 4 Wash. C. C. R. 98, 271.γ

Gibson and Sutton were partners in the business of a scrivener and banker. The mother of the plaintiff, Mrs. Jacomb, and the mother of the plaintiff, Mrs. Long, both kept cash in this shop; and each of them, out of the cash belonging to her, ordered a sum to be written off from her account, and that a note or security for each of these sums should be given to each of the plaintiffs; which was done, and signed by the cashier belonging to the partnership. Gibson survived this about a year, and made Sutton and another executors. The cashier, by his answer, (there being no other evidence,) believed, from entries in the books, that interest for this was paid to the death of Gibson, and mentioned payments of interest also for three years at four per cent. by Sutton after Gibson's death, when in point of law the partnership effects survived to Sutton; but after that the two plaintiffs separately called upon Sutton for a further security than those bare notes; and therefore judgment was entered up in an action against him, not as executor of Gibson, but as surviving partner, for a partnership debt. That judgment was defeasanced by an instrument signed by the plaintiffs as to their respective demands, agreeing that no execution should be taken on either of these judgments till such a time. In that agreement it was particularly inserted, that these judgments thus obtained by the two plaintiffs should not hinder either of them from any remedy they might be entitled to in a court of equity against Gibson's estate or effects, if they were not otherwise paid or discharged. Immediately before the respite of the execution expired, Sutton being called on, or knowing that the time was near, mortgaged part of a leasehold estate, which was confessedly part of the separate estate of Gibson his deceased partner. The plaintiffs filed their bill, as copartnership creditors, to subject the chattel interest in that mortgage to a satisfaction of both their demands, by a sale thereof. It did not appear, otherwise than from the two notes, in what manner the money that had been ordered by the mothers of the plaintiffs to be carried from their two accounts was left in the hands of the partners, whether as cash kept generally, or only those two sums. The master of the Rolls strongly inclined to think, that the debt, notwithstanding the judgment, still continued a partnership debt, being obtained against defendant as surviving partner. But if not

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so, if it were his own debt, it was certain that the defendant, possessed as executor of the personal estate of Gibson, might apply any part thereof even to the satisfaction of his own demand, unless there was fraud or collusion, of which there was no evidence in the present case. The plaintiffs were most undoubtedly creditors unsatisfied; and therefore it was not an application of the separate estate of Gibson to demands which ought not to be countenanced in equity, but to that which the executor had a right to apply it, and which perhaps that estate of his without this act of Sutton must have been subject to have made satisfaction; for the partnership creditors would have a right to go against the separate estate of either of the partners after the partnership effects. But that this was nothing to the justice of the plaintiffs' demands, who had used diligence to get at their money in a lawful and honest way; that they were not to be blamed, supposing their demands were against Sutton on the judgment, in getting the best security they could for their money, which was this mortgage. His honour therefore held them entitled to the relief they prayed.

Jacomb v. Harwood, 2 Ves. 265.] ||And see Devaynes v. Noble, 1 Mer. 587; and 1 Montagu on Partnership, 142, 143.]

||Partnership between two is *ipso facto* dissolved by the death of one of the partners.

Vulliamy v. Noble, 3 Meriv. 614. By the Roman law, even where the contract consisted of more than two, it was entirely dissolved by the death of one. Inst. lib. 3, tit. 26, § 5. β The death, insanity, or bankruptcy of a partner, works a dissolution of the partnership. Griswold v. Waddington, 15 Johns. R. 57; S. C. 16 Johns. R. 438, in error. The death of a partner works a dissolution of the partnership so effectually, that want of notice of it does not have the effect of making the estate of the deceased partner liable to debts contracted by the surviving partners, or for their misconduct. Caldwell v. Stileman, 1 Raw. R. 212.g

And this notwithstanding the partnership is for a stipulated term of years, unless there is an agreement to the contrary.

Gillespie v. Hamilton, 3 Madd. 251. β And see Bishop v. Breckles, 1 Hoff. 534.g

But a partner may stipulate that his widow or children, or such person as he may appoint, shall, in case of his decease, be entitled to his share. In such case if the person appointed refuse the share, or do not comply with the stipulations of the articles, the partnership is dissolved.

Balmain v. Shore, 9 Ves. 500; Kershaw v. Matthews, 2 Russell, 62. β A partnership may be continued after death by the agreement of the parties. Gratz v. Bayard, 11 Serg. & Rawle, 41.g

Lunacy of one partner does not *ipso facto* dissolve the partnership. It must be done, on consideration of all the circumstances, by decree of a court of equity.

Waters v. Taylor, 2 Ves. & B. 303; and see Wrexham v. Hudleston, 1 Swanst. R. 514, n.; 1 Cox, Ca. 107; β James v. Noy, 2 My. & Keen, 125.g

Where no term is expressly limited for the duration of partnership, and there is nothing in the contract to fix its existence to any particular period, it is dissoluble at the will of either party.

Peacock v. Peacock, 16 Ves. 50; Crawshay v. Maule, 1 Swanst. 508; 1 Wils. 181, S. C.; β Griswold v. Waddington, 15 Johns. R. 57; S. C. 16 Johns. R. 438, in error. But one partner cannot withdraw himself against the terms of the articles of association, or voluntarily, by an act of his own, terminate it without the assent of the others. Pierpont et al. v. Graham, 4 Wash. C. C. R. 232; *contra* Mason v. Connell, 1 Whart. R. 381.g

And such dissolution may be effected by a notice of either partner.

Ex parte Nokes, Gow on Part. 276; and see Jefferys v. Smith, 3 Russell, 158.

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A partnership formed by parol agreement may be dissolved by parol, and this notwithstanding the partnership agreement contain a stipulation for a partnership deed.

Rackstraw v. Imber, Holt, Ca. 368.

And though the partnership is by deed, a notice of dissolution, signed by the parties for the purpose of being inserted in the Gazette, is sufficient evidence of the dissolution against the parties signing it.

Doe v. Miles, 4 Camp. 373; 1 Stark. Ca. 181; and see *ante*, 587.

The effect of the marriage of a *feme sole* partner has never been decided expressly; but it would probably be held to operate a dissolution of the partnership.

Wats. on Part. 384; 1 Swanst. 517, n.

Although the misconduct of a partner in trifling circumstances seems not to be a sufficient cause for dissolving the partnership, (a) yet if the conduct of partners has been such as to render it impossible to carry on the partnership on the terms on which it was entered into, (b) or if one partner be entirely excluded from his interest in the partnership, (c) or if there be a gross abuse of good faith between the parties, (d) a dissolution will in such cases be decreed at the instance and on the complaint of a single partner, notwithstanding the other partners object to it. (e)

(a) Goodman v. Whitcomb, 1 Jac. & Walk. 593. β The court will not decree a dissolution of partnership unless the defendant has substantially failed in the performance of his part of the agreement. It is not the office of a court of equity to enter into the consideration of mere partnership squabbles. Wray v. Hutchinson, 2 My. & Keen. 235. γ (b) Waters v. Taylor, 2 Ves. & B. 299. (c) 1 Jac. & Walk. 593. (d) Chapman v. Beach, 1 Jac. & Walk. 594. (e) Baring v. Dix, 1 Cox, Ca. 213. β But some members of a partnership cannot file a bill for dissolution without making all the partners, however numerous, parties. Long v. Yonge, 2 Sim. 369. γ

A society for relief in sickness by means of a fund raised by subscription of the members has been considered as a partnership, it having no corporate character; and where it has been found that the society has existed on erroneous principles, making the whole a bubble, it has been dissolved.

Beaumont v. Meredith, 3 Ves. & B. 180; 17 Ves. 15; and see Reeve v. Parkins, 2 Jac. & Walk. 390.

The bankruptcy of one partner operates a dissolution: and it appears settled that the dissolution is not effected till the *adjudication* of bankruptcy; though, when that takes place, it has relation back to the act of bankruptcy.

Hague v. Rolleston, 4 Burr. 2174; *Ex parte* Ruffin, 6 Ves. 126; *Ex parte* Williams, 11 Ves. 5; Wilson v. Greenwood, 1 Swanst. 480; *In re* Wait, 1 Jac. & Walk. 609; Smith v. Stokes, 1 East, 363; Dutton v. Morrison, 17 Ves. 204; Barker v. Goodair, 11 Ves. 78. β Whether an assignment of the partnership effects is of itself a dissolution of the partnership. See Pleasants v. Mengs, 1 Dal. R. 390; Deckard v. Case, 5 Watts R. 22. γ

But if the commission be fraudulently taken out for the express object of working a dissolution, it will be superseded.

Ex parte Brown, 1 Rose, Ca. 151; and see 2 Rose, 203; *Ibid.* 424. *Sed vide* 5 Madd. 1. As to the consequences of a dissolution of partnership, 1 Mont. on Part. 119, *et seq.*; Gow on Part. ch. v. § 2; and see Crawshaw v. Collins, 2 Russ. R. 325. γ

β A commercial partnership existing between a citizen of the United States and the citizen or subject of a foreign country is dissolved by the breaking out of war between the two countries; for as soon as war is commenced, all trading, negotiation, communication, or intercourse with the

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enemy, without the direct permission of government, is unlawful; and no valid consideration can exist, nor any promise arise by implication of law from any transaction with an enemy.

Griswold v. Waddington, 15 Johns. R. 57; S. C. in error, 16 Johns. R. 438; Seaman v. Waddington, 16 Johns. R. 510.

The dissolution of a partnership has the effect of withdrawing all express and implied authority from each partner to bind his late copartners with new contracts. (a) But this is subject to some qualification. An express or actual notice must be given to all persons who had before dealt with the partnership; (b) a constructive notice, however, such as the publication of the dissolution of the partnership, in a paper printed and published at the place where the partnership transacted its affairs, will, in general, be sufficient with regard to all persons who had not previously dealt with the partnership; (c) and when the partnership is dissolved by the mere operation of law, as when one of the partners dies, or becomes insane, or a bankrupt, no notice is required. (d)

(a) Lansing v. Gaine, 2 Johns. 300; Bell v. Morrison, 1 Pet. 370; Foulz v. Pourie, 2 Desaus. 40. (b) Graves v. Merry, 6 Cowen, 701; Shaffer v. Snyder, 7 S. & R. 504; Ketcham v. Clark, 6 Johns. 144. (c) 6 Cowen, 701; Mowatt v. Howland, 3 Day, 353; Lansing v. Ten Eyck, 2 Johns. 300; Watkinson v. Bank of Pennsylvania, 4 Whart. 482. (d) Griswold v. Waddington, 15 Johns. 57; S. C. 16 Johns. 438; Caldwell v. Stileman, 1 Rawle, 212.

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[[See Abbott on Shipping, 5th edit. (by J. H. Abbott.)]]

[[DISAGREEMENT AMONG PART-OWNERS.]]—If there are several part-owners of a ship, and some of them refuse to navigate the ship, or to send her to sea, those who are willing may compel the others in a Court of Admiralty, on giving security to answer for the ship in case she be lost. Also, if a partner dislikes the voyage, but does not expressly prohibit it, and the ship is lost in the voyage, he shall have no recompense for his part; but if the ship return, he shall have an account for what is earned, and it shall be intended a voyage with his consent, without an express prohibition proved.

Molloy, 202, 203; Skin. 230, pl. 9; 2 Chan. Ca. 36. β If the minority have possession of the ship, the majority in value may obtain the possession of her and send her to sea by giving security. 2 Bro. Civ. & Adm. Law, 131; Abbott on Ship. pt. 1, c. 3, § 4, p. 71; Ouston v. Hebden, 1 Wils. 101; The Apollo, 1 Hagg. Adm. R. 306; Willings v. Blight, 2 Pet. Adm. R. 288.

But if the major part of the owners refuse to navigate the ship, there, says Molloy, by reason of the inequality, they cannot be compelled; but then such vessel is to be valued and sold, in like manner as where part of the owners become deficient, or unable to set out the ship.

Molloy, 203. β Where there was an equality of interest, in one case, a sale of the ship was ordered by the court. The Seneca, Conk. Pr. 155.

If there are several part-owners of a ship, and the major part of them are for sending her a voyage to sea, to which the rest disagree; whereupon, according to the common usage in such cases, the greater number suggest in the Admiralty Court the disagreement of their partners; and then, according to their usage there, they order certain persons to appraise the ship, who accordingly set a value thereon; and then the major part, who agreed to the voyage, enter into a recognisance, wherein they bind themselves jointly and severally, to the disagreeing parties, in a sum proportionable to their shares, according to the value set by the appraisers, to secure the shares in

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the ship of those who disagree to the voyage, against all adventures; though there can be no suit on this agreement or stipulation in the Admiralty Court, (a) the contract being made on land, and therefore of common law consuance, yet a special action on the case lies for the violation thereof at common law.

Carth. 26; Knight v. Berry, Hard. 473, S. P.; 6 Mod. 162, S. P.; {2 Pet. 288, Willings and Francis v. Blight.} [(a) That the Admiralty have jurisdiction upon such a stipulation, though once much disputed and denied by Lord Holt, is now settled.] See Grave v. Hedges, Holt, 470; Lambert v. Aeretree, 1 Ld. Raym. 223; Blacket v. Ansley, Ibid. 235; Dimock v. Chandler, 2 Stra. 890; Fitzg. 197, S. C.; Ouston v. Hebden, 1 Wils. 101.] But the Admiralty has no jurisdiction to compel a sale; see the last case, and Abbott on Shipping, 5th ed. 74.]

|| This security (b) may be taken on a warrant obtained by the minority to arrest the ship, and it is the best means of protecting their interest; for one part-owner cannot sue another at law for deceitfully sending the ship to foreign parts where she was lost, and he has no redress in equity: since part-owners being tenants in common, no action lies by one against the other, except for the destruction of the ship. But if a part-owner expressly notify his dissent, the Court of Chancery will not compel him to contribute to a loss. If the minority happen to have possession of the ship, and refuse to employ it, the majority also, by a similar warrant, may obtain possession of it, and send it to sea upon giving such security. And the same thing may be effected by one part only in case of equality of partnership. But the Admiralty has only jurisdiction where the shares are ascertained; and where they are not ascertained the Court of Chancery will restrain the sailing of the ship by injunction till the shares are ascertained and security given.

(b) See the form, Abbott, Appendix, No. 6; Sir T. Raym. 15^e; 1 Keb. 38; 1 Lev. 29; 1 Vern. 297; Skin. 230; Barnardiston v. Chapman, Abbott on Shipping, 72; Ambl. 255; Abbott, 72, 75; Haley v. Goodson, 2 Meriv. 77.

Some foreign writers on maritime law have laid it down as a rule, that if a ship is in need of repair, and one part-owner is willing to repair it at their common expense, and if the other will not pay his quota within four months, he shall lose his share in the ship; and they found their doctrine on a passage in the Digest, in which the same opinion is delivered with regard to the repairs of a house. But this rule does not appear to be adopted in practice. And in case of poverty of the party it would be extremely cruel.

Dig. 17, 2, 52, 10; Abbott, 69.]

THE MASTER.—A master of a ship is one who, for his knowledge in navigation, fidelity, and discretion, hath the government of the ship committed to his care and management; but he hath (c) no property, either general or special, by the constituting of him a master; yet the law looks upon him as an officer who must render and give an account for the whole charge, when once committed to his care and custody, and upon failure to render satisfaction; and therefore if misfortunes happen, if they be either through negligence, wilfulness, or ignorance of himself or his mariners, he must be responsible.

Molloy, 208; Hob. 11. {As to the power of the owners to dismiss him, see 2 Pet. 397, Montgomery v. Wharton; 1 Dall. 49, S. C.} (c) But hath usually shares or parts in the vessel; Molloy, 203. He is eligible by the part-owners in proportion to their shares, and not according to the majority; Molloy, 203. § The duty of a master of a vessel to his owners, will not oblige him to violate the good faith even of an enemy, in order to preserve his ship; nor to employ fraud in order

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to effect that object; *Hannay v. Eve*, 3 Cranch, 242. The master has authority to displace the mate and all other subordinate officers during the voyage. If he abuses his authority, he is responsible for the wrong; *United States v. Savage*, 5 Mason's C. C. R. 460; and see the *Nimrod*, Gilp. R. 87; *Ingersoll v. Van Bokkelin*, 7 Cow. 670. The master of a ship is responsible for the goods which he has undertaken to carry, if stolen or embezzled by the crew, or any other person, though no fault or negligence may be imputable to him; *Schieffelin v. Harvey*, 6 Johns. R. 170; *Watkinson v. Laugh-ton*, 8 Johns. R. 213.g

But where a master of a ship brought an action on the case, and declared, that the ship was laden with corn in such a harbour, ready to sail for Dantzick, and that the defendant entered and seized the ship, and detained her, *per quod impeditus et obstructus fuit in viago*; it was held, that it well lay; for though the master has not the property of the ship, but the owners, and he is only a particular officer, and can only recover for his particular loss, yet he may bring trespass, as a bailiff of goods may; and then as bailiff he can only declare on his possession, which is sufficient to maintain trespass.

Salk. 10, pl. 4, *Pitts v. Gainee*, *Ld. Raym.* 558.

If the master of the ship takes goods on board for hire, and is robbed in port, he must answer the damage; otherwise it is if he be robbed by pirates on the high sea, for then the owner must be the loser; for if he undertakes for hire to carry the goods, the common law cannot look upon him in a different aspect from a common carrier; for he cannot be looked upon as a mere servant to the owner, but rather as an officer of the ship, and to sell the *bona peritura*, which is beyond the condition of a servant; but the civil law of the Admiralty excuses the masters when robbed by pirates, or on losing the goods by any inevitable accident, for the dangers of the sea are so various and so formidable, that a master shall not be understood to undertake against them, unless it had been included in the express words of the contract; for where, in a well-ordered society, a man undertakes for the custody of another's property, he secures him against all loss; but where a man is bound to encounter dangers which civil society cannot guard against, he cannot be supposed to undertake farther than for his care; and by the general custom of commerce, the merchant is the person that runs the venture, and not the master of the ship; and it is the merchant that makes the gain of the venture.

Morse v. Slue, *Vent.* 190, 238; *Raym.* 220, 3 Keb. 72, 112, 135; *Mod.* 85; 2 *Lev.* 69; 3 *Lev.* 259; *S. C.* cited, 2 *Ld. Raym.* 918; *β Crosby et al. v. Fitch et al.*, 12 *Conn. R.* 410. The captain of a vessel is not answerable for the loss or damage of goods, by unavoidable accident. *Hennen v. Monroe*, 11 *Mar. La. R.* 579.g

{B, the master of a ship, took on board some cochineal of C at New Orleans, to be delivered at New York, and signed bills of lading, one of which he kept, accompanied with the customary proofs of neutral property, without which he refused to take the goods. During the voyage the ship was captured by the British. The captors took away all the papers relative to the ship and cargo, which were libelled as Spanish property. There were thirty different shippers of goods. B put in a claim in behalf of the owners; and, in his answer to the interrogatories, said that he had signed no bill of lading for the cochineal; that it belonged to P, who was a passenger, and had gone to New York after the capture; but he gave a particular account of the owners and consignees of the other goods. The only part of the cargo that was condemned was the cochineal; the residue being either acquitted, or detained for further proof. In an action against B for his negligence and misconduct in not protecting the property of C, but giving a false

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account of it in consequence of which it was condemned, it was held that he was not answerable; for it might be that he had forgotten that he had signed a bill of lading, and his answer did not justify the condemnation, so that it could not be said that he occasioned the loss; there being, besides, no evidence of fraud or intentional neglect.

1 Johns. Rep. 364, *Cheviot v. Brooks.*}

And as the master himself is answerable in the cases *suprà*; so likewise hath it been held, that the owners are liable to the freighters, in respect of the freight, for the embezzlement, &c. of the master and mariners.

Carth. 58; 2 *Salk.* 440, pl. 1; 3 *Lev.* 258; 3 *Mod.* 332, *Boson v. Sandford.* β The owner of a vessel is answerable for the carelessness or unskilfulness of his master; and by the common law, nothing but the act of God, or of the enemy, or of the party complaining, can excuse; *Dusar v. Murgatroyd*, 1 *Wash. C. C. R.* 13; *Stone et al. v. Ketland*, 1 *Wash. C. C. R.* 42. But when a brig, which was towed at the stern of a steamboat employed in the business of towing vessels, was, through the negligence of the master and crew of the steamboat, over whom those in the charge of the brig had no control, brought into collision with a schooner lying at anchor. It was held, that the master and crew of the steamboat were not the servants of the owners of the brig, and were not so employed by them as to make such owners responsible for their negligence. *Sproud v. Hemmingway*, 14 *Pick. R.* 1.

LIMITATION OF OWNER'S LIABILITY.—But this proving a great discouragement to trade, by the 7 G. 2, c. 15, reciting that, *Whereas it is of the greatest consequence and importance to this kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein; and whereas it has been held, that in many cases owners of ships or vessels are answerable for goods and merchandise shipped or put on board the same, although the said goods and merchandise, after the same have been so put on board, should be made away with by the masters or mariners of the said ships or vessels, without the knowledge or privity of the owner or owners; by means whereof merchants and others are greatly discouraged from adventuring their fortunes, as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this kingdom; therefore for ascertaining and settling how far owners of ships and vessels shall be answerable for any gold, silver, diamonds, jewels, precious stones, or other goods or merchandise which shall be made away with by the master or mariners, without the privity of the owners thereof, it is enacted*, “That no person or persons, who is, are, or shall be owner or owners of any ship or vessel, shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage by reason of any embezzlement, secreting, or making away with (by the master or mariners, or any of them,) of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandise, which, from and after the 24th of June, 1734, shall be shipped, taken in, or put on board any ship or vessel, or for any act, matter, or thing, damage or forfeiture done, occasioned or incurred from and after the said 24th day of June, 1734, by the said master or mariners, or any of them, without the privity and knowledge of such owner or owners, further than the value of the ship or vessel, with all her appurtenances, and the full amount of the freight, due or to grow due, for and during the voyage wherein such embezzlement, secreting, or making away with, as aforesaid, or other malversation of the master or mariners, shall be made, committed, or done; any law,” &c.

[This act was made in consequence of the case of *Boucher v. Lawson*, H. 5 Geo. 2, where the goods were lost by the negligence or embezzlement of the master, and the

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master was entitled to the freight of those goods for his own benefit, and the action was brought against the owners. The court thought that it was not to be distinguished from the common case of the carrier, and that the owner was liable for the act of the master where he acted within the compass of his employment; 1 Term Rep. 78.]

And by § 2, it is further enacted, "That if several freighters or proprietors of any such gold, silver, diamonds, jewels, precious stones, or other goods or merchandise, shall suffer any loss or damage by any of the means aforesaid, in the same voyage, and the value of the ship or vessel, with all her appurtenances, and the amount of the freight, due or to grow due, during such voyage, shall not be sufficient to make full compensation to all and every of them, then such freighters or proprietors shall receive their satisfaction thereout in average, in proportion to their respective losses or damages; and in every such case it shall and may be lawful to and for such freighters or proprietors, or any of them, in behalf of himself, and all other such freighters or proprietors, or to or for the owners of such ship or vessel, or any of them, on behalf of himself, and all the other part-owners of such ship or vessel, to exhibit a bill in any court of equity for a discovery of the total amount of such losses or damages, and also of the value of such ship or vessel, appurtenances, and freight, and for an equal distribution, and payment thereof amongst such freighters or proprietors, in proportion to their respective losses or damages, according to the rules of equity.

"Provided (by § 3) that if any such bill shall be exhibited by or on the behalf of the part-owners of such ship, the plaintiff or plaintiffs shall annex an *affidavit* to such bill or bills, that he or they do not collude with any of the defendants thereto; and shall thereby offer to pay the value of such ship or vessel, appurtenances and freight, as such court shall direct; and such court shall thereupon take such method for ascertaining such value as to them shall seem just, and shall direct the payment thereof in like manner as is now used and practised in cases of bills of interpleader.

"Provided also (by § 4) that nothing in this present act contained shall extend, or be construed to extend to impeach, lessen, or discharge any remedy which any person or persons now hath, or shall or may hereafter have, against all, every, or any the master or mariners of such ship or vessel, for or in respect of any embezzlement, secreting, or making away with any gold, silver, diamonds, jewels, precious stones, or merchandise, shipped or loaded on board such ship or vessel, or on account of any fraud, abuse, or malversation of and in such masters and mariners respectively; but that it shall and may be lawful to and for every person or persons, so injured or damaged, to pursue and take such remedy for the same, against the said master and mariners respectively, as he or they might have done before the making of this act."

[Upon this statute it hath been adjudged, that the owner of a ship is liable to the value of the ship and freight in the case of a robbery, in which one of the mariners is concerned, by giving intelligence, and afterwards sharing the spoil, the latter part of the first section being sufficiently comprehensive to include a transaction of this nature.

Sutton v. Mitchell, 1 Term Rep. 18.

However, by stat. 26 G. 3, c. 86, which is explanatory and in amendment of the above act of 7 G. 2, the owners are not liable beyond the value of the ship and freight for any goods shipped without their privity, although the master or mariners be in nowise concerned in or privy to the robbery, embezzlement, secreting, or making away therewith.

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By § 2, no owners of any ship or vessel shall be liable to answer for any loss or damage which may happen by fire to any goods or merchandises that may be shipped on board. Nor by § 3, for any loss or damage to any gold, silver, diamonds, watches, jewels, or precious stones, that may be shipped on board, by reason of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of landing, or otherwise declare in writing to the master, or owners of the ship or vessel, the true nature, quality, and value of such gold, &c.

By § 4, if the freighters or proprietors of any such gold, &c., or other merchandise, shall suffer any loss or damage by any of the means aforesaid, in the same voyage, (fire only excepted,) and the value of the ship or vessel, with all her appurtenances, and the amount of the freight due or to grow due during such voyage, shall not be sufficient to make compensation to all of them, then such freighters or proprietors shall receive their satisfaction thereout in average, in proportion to their respective losses or damages. And in such case the freighters or proprietors, or any of them, or on behalf of himself and all other the freighters or proprietors, or the owners of such ship or vessel, or any of them, or on behalf of himself and all other the part-owners, may exhibit a bill in any court of equity, for a discovery of the total amount of such losses or damages, and also of the value of such ship or vessel, appurtenances, and freight, and for an equal distribution and payment thereof amongst such freighters or proprietors, in proportion to their respective losses or damages, according to the rules of equity: Provided, that if any such bill be exhibited on behalf of the part-owners of such ship, the plaintiff shall annex an affidavit to such bill, that he does not collude with any of the defendants thereto; and shall thereby offer to pay the value of the ship, appurtenances, and freight, as the court shall direct; and the court shall thereupon take such method for ascertaining the value as to them shall seem just, and shall direct the payment thereof, in like manner as is used and practised in cases of bills of interpleader.

By § 5, it is provided, that this act shall not lessen or discharge any remedy which any person now hath, or shall hereafter have, against any master or mariners for embezzlement, &c.

¶ By the 53 Geo. 3, c. 159, this limitation of the responsibility of the owners has been still further extended, for it is enacted, ^(a) "That no person or persons who is, are, or shall be owner or owners, or part-owner or part-owners, of any ship or vessel, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted, or occasioned without the fault or privity of such owner or owners, which may happen to any goods, wares, merchandise, or other thing laden or put on board the same ship or vessel after the 1st of September, 1813; or which after the said 1st of September may happen to any other ship or vessel, or to any goods, wares, merchandise, or other thing, being in or on board of any other ship or vessel, further than the value of his or their ship or vessel, ^(b) and the freight due or to grow due for and during the voyage which may be in prosecution or contracted for at the time of the happening of such loss or damage."

^(a) § 1. ^(b) This is to be construed as if the words "with all her appurtenances" had been inserted after "ship or vessel." See *Gale v. Laurie*, 5 Barn. & C. 156.

By this statute it is also enacted, that the value of the carriage of goods belonging to any of the owners of the ship, and also the hire due or to grow

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due under any contract, except only such hire as in the case of a ship hired for time may not begin to be earned until the expiration of six calendar months after the loss, shall be considered as freight within the meaning of this act, and also of the two prior acts.(a) It is also further enacted, that in case any such loss or damage shall happen by more than one separate and distinct accident, and so forth, or on more than one occasion in the course of a voyage, or in the interval between the end of one voyage and the commencement of another, every such loss or damage shall be compensated according to the provisions of the act, in the same way and to the same extent as if no other loss or damage had happened during the same voyage, or in the same interval ;(b) but this act does not extend to any vessel used solely in rivers or inland navigation, or to any ship or vessel not duly registered according to law.”(c)

(a) 7 G. 2, c. 15, and 26 G. 3, c. 86, see § 2. (b) § 3. (c) § 5.

This act also contains a provision against taking away the responsibility of any master or mariner of any ship, notwithstanding he may be owner or part-owner thereof,(d) and also provisions for equal distribution and relief in equity ; (e) and further enacts, “That all and every sum and sums of money which shall be paid for or towards, or on account of any loss or damage, in respect whereof the responsibility of the owners of any ship or vessel is limited by this act, or by the said acts or either of them,(g) or any costs incurred in relation thereof, shall and may be brought into account among the part-owners of the same ship or vessel, in such and the like manner as money disbursed for the use thereof.”(h) The value of the ship is to be calculated at the time of the loss or damage: in calculating the value of the freight, money actually paid in advance is to be included ;(i) but the value is to be only the amount that the ship would have earned if she had completed her voyage, and not the amount estimated at the commencement of the voyage, if diminished by jettison or other losses.(k) If an action be brought against the several part-owners, one of whom happened to be master of the ship at the time of the loss, all the defendants are in that action entitled to the benefit of the statute. By the law of England, the damage to be recovered in an action brought against several persons must be one and the same sum ; judgment cannot be given against one defendant for a sum differing from that for which it is given against another.(l) These acts do not extend to lighters and gabbets.(m)

(d) § 4. (e) § 7, 8, 10, 12, 13, 14, 15. (g) 7 G. 2, c. 15, and 26 G. 3, c. 86. (h) § 16. (i) *Wilson v. Dickson*, 2 Barn. & A. 2. (k) *Cannan v. Meabarn*, 1 Bing. 465. (l) *Wilson v. Dickson*, 2 Barn. & A. 2 ; and see *Abbott on Shipping*, 5th edit. p. 269. (m) *Hunter v. McGown*, 1 Bligh, 573. ||

§ Upon the construction of 53 Geo. 3, c. 159, § 1, confining the liability of ship-owners for loss or damage to the value of the ship or freight ; held that it did not include the costs of suit of recovering the compensation, and that the owners were liable for such, although they should exceed the value of the ship and freight.

Rayne, ex parte, 1 Gale & D. (2 B.) 374 ; and see the case of the *Dundee*, 2 Hagg. A. R. 143. §

|| LIABILITIES OF OWNERS. ||—The defendant was sole owner of a ship which he let to J S for a voyage, at a certain sum, and J S was to have the benefit of carrying the goods. The plaintiff had shipped a quantity of moidores, and the bills of lading were signed by the captain : the moidores being lost, an action was brought against the defendant as owner, to charge him under the stat. 7 G. 2, to the amount of the ship and freight. For the de-

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fendant it was insisted, that though the ship was his property, yet he was not so owner as to be liable to the plaintiff; and that J S was for this purpose the owner. But it appearing that the defendant had covenanted for the condition of the ship, and the behaviour of the master, the Chief Justice held, he was liable to the plaintiff, and the freight he had in general from J S was sufficient, though the identical freight for the gold belonged to the other, and J S had only the use of the ship, and no ownership.

Parish v. Crawford, 2 Stra. 1251. [More fully reported in Abbott on Shipping, 5th ed. p. 19; probably this case is not now law. See James v. James, in note 3 Esp. N. P. R. 27; Mackenzie v. Rowe, 2 Camp. 482; and Abbott, 21, 22.]

The master of a vessel was lessee of her for a term of years by agreement with the owners, in which there were covenants on their part, that he should have the sole management of the ship, and employ her for his own sole benefit; and on his part, that he should repair her at his own sole cost and charge, &c. It was holden that, notwithstanding this agreement, the owners were liable for necessaries furnished for the ship by order of the master, though without their knowledge, and though the owners were not known to the persons who supplied them.

Rich v. Coe, Cowp. 636; {1 Dall. 129, Scottin v. Stanley. And see 7 Term, 306, Westerdell v. Dale; 8 East, 10, Young v. Brander;} [Farmer v. Davis, 1 Term Rep. 109; and see addition to note (b) *infra*.] β But where a fishing vessel was let on shares to the master, who was to victual and man her, the owner having nothing to do with the purchase of supplies, nor with the employment of the vessel; it was held that the owner was not liable for supplies furnished to the master. Windsor v. Cutts, 7 Greenleaf, 261; Houston v. Darling, 4 Shepley R. 413. γ

β The owner of a vessel is responsible for all acts of the master within the scope of his employment, even for torts.

Malfrica v. M'Kown, 1 La. R. 254; Arago v. Currell, 1 La. R. 537. γ

In general, whoever supplies a ship with necessaries has a *treble* (a) security. 1. The person of the master. 2. The specific ship. 3. The personal security of the owners, whether they know of the supply or not. 1. The master is personally liable, as making the contract. 2. The owners are liable in consequence of the master's act, because they choose him: they run the risk, and they say whom they will trust with the appointment and office of master. Such is stated to be the general law, which, however, is liable to be varied by any private agreement between the master and owners. For if it appear that the person supplying the necessaries gave credit to the master individually as the responsible person, or on the other hand, that he considered the master merely as a servant, and gave the credit to the owners only, in either of those cases he can have his remedy against that party only to whom he originally looked for payment.(b)

Rich v. Coe, Cowp. 636; β Henshaw v. Rollins, 5 La. R. 835. γ (a) But according to Mr. J. Buller, the creditor when he advances his money has only two securities; viz., the body of the ship, and the person of the master. It is only in respect of the ship, that the master can bind the owners. If the owner keeps the ship, he keeps her subject to the charge the master has brought upon her. If he relinquish the ship, he is not liable to the charge. His keeping the ship is proof of his assent. Upon this ground, that learned judge dissented from the rest of the court, who held, that a promise by a captain on behalf of the owners, when the ship was taken, to pay monthly wages to one of the sailors, in order to induce him to become a hostage, was binding upon the owners, although they abandoned the ship and cargo. Yates v. Hall, 1 Term Rep. 73. β The master of the ship is the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him relative to the usual employment of the ship, and the repairs, and other necessaries furnished for her use. But the authority of the master is limited to objects connected with the voy-

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age; and if he transcends his authority, his acts become, in legal contemplation, nullities. *The Aurora*, 1 Wheat. 96. *g* (b) *Hoskins v. Slayton*, Ca. temp. Hardw. 376; *β James v. Bixly*, 11 Mass. R. 34. *g* || The position that a person supplying a ship with necessaries has not only the personal security of the master and owners, but also the security of the *specific ship*, has been much modified; see *Westerdell v. Dale*, 7 Term Rep. 312; *Ex parte Bland*, 2 Rose, 91; *Franklin v. Hosier*, 4 Barn. & A. 341; *Raitt v. Mitchell*, 4 Camp. 146; and that a shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessaries for a ship, are not by law preferred to other creditors, nor have any particular claim or lien upon the ship itself for their demands, see *Ex parte Hill*, 1 Madd. 61; *Hoare v. Clement*, 2 Show. 338; *Justin v. Ballam*, Salk. 34; S. C. 2 Ld. Raym. 805; *Watkinson v. Barnardiston*, 2 P. Wms. 367, and Mr. Coxe's note thereon. *Hussey v. Christie*, 13 Ves. 594; S. C. 9 East, 426; *Buxton v. Snee*, 1 Ves. sen. 154; and see *Wilkins v. Carmichael*, Doug. 101, where Lord Mansfield said, "Work done for a ship in England is supposed to be on the personal credit of the employer. In foreign parts the master may hypothecate the ship." Also *Smith v. Plummer*, 1 Barn. & A. 581; *Wood v. Hamilton*, in Dom. Proc. mentioned in *Abbott on Shipping*, 115. ||

J S, as master of the ship, of which the other defendants were part-owners, bought several goods of the plaintiffs; as beef, biscuit, sails, and cordage. J S the master failed. The bill was brought to compel the defendants, the part-owners, to pay. They insisted that J S only was liable; and, besides, that he had money from them to pay the plaintiffs. *Per Curiam*,—J S the master was but a servant to the owners; and where a servant buys, the master is liable. If the owners paid their servant, yet if he paid not the creditors, they must stand liable. It was decreed, that the owners should pay the plaintiffs their debts in proportion to their respective shares and interests in the ship.

Speering v. Degrave, 2 Vern. 643. || See also *Stewart v. Hall*, 2 Dow. 29; *Garnam v. Bennet*, 2 Stra. 816; *Evans v. Williams*, mentioned in *Abbott on Shipping*, 103, note (p), and *Cary v. White*, 1 Bro. P. C. 284. ||

|| "Soon after the passing of the Registry acts, the leaning of the courts of law in the construction of them was to say, that the registered owners of ships should at all events be liable for repairs. But the subject having become more accurately understood, a better and more correct principle now prevails; and the recent cases have decided, that the true question in matters of this description is,—upon whose credit was the work done? That question would, in most cases, be decided by the fact of legal ownership, the repairs being generally done for the legal owner. But it may so happen that the name of a person may be retained on the registry after he has ceased to be beneficially interested in the ship, or to interfere with its concerns."

Verba Lord Tenterden, C. J., 1 Ry. & Moo. 43. *β* The register or enrolment of a vessel is not conclusive evidence of ownership. *Colson v. Bonzey*, 6 Greenleaf, R. 474. *g*

Thus, a mortgagee of a ship or share in it, who is not in possession or management of the ship, but the mortgagor remaining in such possession and management, is not liable for repairs and disbursements, or for wages of the master, notwithstanding such mortgagee may have procured the transfer to him to be duly endorsed on the certificate of registry.

Jackson v. Vernon, 1 H. Bl. 114; *Annett v. Carstairs*, 3 Camp. 354; *Briggs v. Wilkinson*, 7 Barn. & C. 30. *β* *Brooks v. Bondsey*, 17 Pick. R. 401; *Colson v. Bonzey*, 6 Greenleaf, R. 474. But a mortgagee who is in possession of a ship, and holds himself out for absolute owner, is liable for repairs. *Tucker v. Buffington*, 15 Mass. R. 477. *g*

β A person who has parted with his interest in a vessel is not liable for

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supplies furnished to her, though his name still stands in the enrolment as part owner.

Dame v. Halleck, 4 Pick. 459.

So, where the purchaser of a ship, in the interval between the inception and completion of his conveyance, ordered the master to take her to a shipwright to be repaired; the seller, although deemed the legal owner at the time, was held not answerable to the shipwright for the repairs.

Young v. Brander, 8 East, 10; and see Trehwella v. Rose, 11 East, 435; Frazer v. Marsh, 13 East, 238; M'Iver v. Humble, 16 East, 169.

If necessary supplies are furnished to a vessel abroad, after the owners of her, when she sailed, have parted legally and *bona fide* with all their interest in her, but without the knowledge of the master or of the merchant furnishing the supplies, the original owners are not liable to the merchant for such supplies.

Hussey v. Allen, 6 Mass. R. 163.

The above decisions, in cases of mortgagees, are now of less importance, since the late registry acts (4 G. 4, c. 41, § 43, and 6 G. 4, c. 110, § 45) provide, that when a transfer is made only as a security for payment of debts by way of mortgage, or of assignment to trustees for sale, on a statement to that effect in the book of registry, and on the endorsement on the certificate of registry, the person to whom the transfer is made is *not to be deemed the owner*; (a) nor is the person making such transfer to be deemed to have ceased to be owner, except so far as may be necessary for the purpose of rendering the ship available, by sale or otherwise, for payment of those debts to secure payment of which the transfer was made.

(a) Notwithstanding this clause, it is held, that accruing freight passes by the mortgage to the mortgagee. Dean v. McGhie, 4 Bing. 45.

One part-owner may, by ordering repairs and other necessities for the ship, bind his companions to pay for them, unless their liability be expressly provided against. But if the person giving the credit does not at the time know of any other part-owners, he is not precluded from suing him only who gave the order; the non-joinder of the others cannot be pleaded in abatement.

Abbott, p. 76; Doe v. Chippenden, Ibid.; Baldrey v. Richie, 1 Stark. Ca. 338, which seems to overrule Dubois v. Ludert, 1 Marsh, 246; 5 Taunt. 610.

But one part-owner has no authority to order an insurance without the assent of his companions, and cannot charge them with the premium; for each owner may insure his own share. It is otherwise, however, if the part-owners are in *partnership*.

Ogle v. Wrangham, Abbott, 76; Bell v. Humphries, 2 Stark. 345; Hooper v. Lusby, 4 Camp. 67.

Nor can one part-owner, though he be the husband, pledge the other to the expenses of a lawsuit.

Campbell v. Stein, 6 Dow. 135.

If a tradesman who has repaired a ship take from some of the part-owners sums equivalent to their shares, they still remain responsible for the residue, unless the tradesman specially discharge them upon some good consideration, such as payment before the expiration of the usual credit; or release them by deed.

Teed v. Baring, Abbott, 84; and see Fitch v. Sutton, 5 East, 230.]

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[If the master borrow money to repair or victual the ship when there is no occasion for it, he alone is debtor, and not the owners.

Lex Mercat. 53; Hob. 11; Moor, 918; ||and see Rocher v. Busher, 1 Stark. Ca. 27. Palmer v. Gooch, 2 Stark. Ca. 428.]

By the law of nations the captain has a power to ransom. This is for the benefit of the owners, but it being doubted, whether it is for the benefit of the public, it is taken away by statute of 22 G. 3, c. 25.]

[See upon the subject of ransom *post*, tit. (F), Of Average.

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MARINERS are persons chosen and appointed by the master to navigate the ship, for whose faults and miscarriages he must answer; and, as they are his servants, he may correct {1} and punish them according as the usage is at sea.

Molloy, 209. {1} 1 Pet. 168, 172; Thorne v. White, 1 Bay, 3, Fleming v. Ball; }
 β Abbott on Ship. 160; 1 Chit. Pr. 73; Thorne v. White, 1 Pet. 168, 172; Fleming v.
 Ball, 1 Bay, 3. The master of a vessel while at sea, may give a mariner moderate
 corrections for misbehaviour; and in case of resistance, or of mutinous conduct, may sup-
 press it the best way he can, and therefore may use a greater degree of force than for
 misbehaviour merely. United States v. Wickham, 1 Wash. C. C. R. 316; 3 Day's
 Rep. 294; Bee's D. C. R. 161, 184; Thorne v. White, 1 Adm. Decis. 168. But the
 imprisonment of a seaman in a foreign jail, at the instance of a master of a vessel, is
 only to be justified by extreme necessity. Magee v. The Moss, Gilpin's R. 232.g

But though the master must answer for them, yet are the owners likewise an-
 swerable for their faults and miscarriages; as, if the owner of a ship victuals
 it, and furnishes it to sea with letters of reprisal, and the master and
 mariners, when they are at sea, commit piracy upon a friend of the king,
 without the notice or consent of the owner, the owner shall lose his ship by
 the admiral law, of which our law ought to take notice.

Roll. Abr. 530, *et vide* Roll. Rep. 285.

By the civil law and custom of merchants, if the ship be cast away, or
 perish through the mariners' default, (a) they lose their wages. So, if taken
 by pirates, (b) or if they run away; for, if it were not for this policy, they
 would forsake the ship in a storm, and yield her up to enemies in any danger.
 [So, if they refuse aid and assistance to their companions on the sea. So,
 if they do not help to save the goods, when the ship perishes. So, if they
 absent themselves when the ship is ready to sail.] {Or if they afterwards
 desert {2} it before the completion of the voyage.}

1 Sid. 179; 1 Mod. 93; 1 Vent. 146; [Moll. bk. 2, c. 3; Com. Dig. tit. *Navi-*
gation, 1, 5;] β Two Catherine's, 2 Mas. R. 319.g (a) But whether the executors of
 those mariners who died before the ship was cast away, may recover the wages due to
 their testators, *quære*, *et vide* Sid. 179; Keb. 684. (b) So, by 8 G. 1, c. 24; ||*accus* if
 recaptured, and the ship arrives at her port of destination. Bergstrom v. Mills, 3 Esp.
 36. || β If a mariner shipped for a cruise, he disabled, and leave the privateer by com-
 mon consent, before the cruise has commenced, he is not entitled to a share of prizes.
Ex parte Giddings, 2 Gallis, C. C. R. 56. But if disabled on the cruise, and so if on
 board a merchant vessel, he would be entitled to a full share or full wages for the
 voyage. 2 Gallis, C. C. R. 56. Where a vessel is detained by the refusal of the seamen
 to work, they are to be charged with the demurrage; and the portion of each seaman
 who refused is to be deducted from his wages. Snell v. The Independence, Gilp.
 R. 145.g {2} 5 Rob. Adm. Rep. (Am. ed.) 199, The Pearl. See 3 Esp. Rep. 71, Signard
 v. Roberts, and Mr. Day's note; 1 Pet. 160, Whitton v. Brig Commerce.}

{A mariner turned off from the vessel, without lawful cause, is entitled to
 wages to the end of the voyage.

1 Pet. 186, Relf v. Ship Maria, 2 Pet. 403; Mahoon v. The Gloucester, and note in
 p. 406; 2 Rob. Adm. Rep. (Am. ed.) 216, Robbinett v. The ship Exeter; 3 Rob. Adm.

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Rep. 79, *The Beaver*; 3 Johns. Rep. 520. So if he is compelled to leave it by cruelty and oppression. 1 Pet. 193; 2 Pet. 420, *Rice v. The Polly and Kitty*.

If a seaman articulated for a certain voyage is prevented from performing the whole of it, by being disabled by an accident happening in the course of his duty, he is entitled to wages for the whole voyage. And so are his representatives {1} if he should die during the voyage.

2 H. Black. 606, n. *Chandler v. Grieves*. See 1 Pet. 132, *Watson v. Brig Rose*; Ibid. 138, *Williams v. Brig Hope*; Ibid. 139, *Malone v. Bell*. {1} 1 Pet. 142, *Walton v. Ship Neptune*; Ibid. 155, *Scott v. Brig Greenwich*; Ibid. 157, *Sims v. Jackson's Adm'r*. See 2 Pet. 263, *Writer v. Ship Richmond*.

If there be a clause in the ship's articles that the seamen may leave her at the end of three months, if the ship is in port or in perfect safety, of which the captain is to be the sole judge, and the ship be in port in safety after three months, the seaman may leave the ship, without the permission of the captain.

5 Bos. & Pul. 408, *Neave v. Pratt*.—As to the responsibility of the mariners when part of the cargo is embezzled, see 4 Bos. & Pul. 347, *Thompson v. Collins*; 3 Johns. Rep. 17, *Lewis v. Davis*; 1 Pet. 239, *Mariners v. Ship Kensington*; Ibid. 242, *Crammer v. Ship Fair American*; Abbott, p. 4, c. 3, s. 5, p. 374. See also 1 Pet. 200, *Knap v. Brig Eliza and Sarah*;

||But the wages are not lost by the hypothecation of the ship, nor even by the sale of it, unless the sale be made under the authority of a competent court; and they are preferred to the claim of the holder of an hypothecation bond.

Sidney Cove, Fudge, 2 *Dodson*, A. R. 11; *Madonna D'Idra*, *Papaghira*, 1 *Dodson*, 37. § Seamen have a lien prior to that of the holder of a bottomry bond, for their wages. *The Virgin*, 8 *Peters's*, 588.g

Nor are the wages forfeited by a mariner's quitting the ship, and refusing to proceed in her on a voyage not designated by the articles.

Eliza, Ireland, 1 *Hagg*. A. R. 163. § But where shipping articles permit the master to touch at certain intermediate ports, "or as he may direct," it is no violation of his contract with the seamen, to stop at a place not named, and affords no justification to them for leaving the vessel. *Wood v. The Nimrod*, Gilp. R. 84. But gross and unnecessary deviation from the designated voyage will free a mariner from his contract. *Morin v. Baudin*, 2 *Adm. Decis.* 415. And see *Brown v. Jones*, 2 *Gallis*. R. 319.g

But where certain mariners, hired in the Downs for a run to the port of Hull, quitted the ship with the consent of the master, but against the positive orders of the owners, on the day after her arrival in the roadstead of that port in the river Humber, the port being so full that the vessel could not enter immediately; Lord Stowell decreed, that they had forfeited their wages, on the ground that they could not be entitled to their dismissal "till after some time of just expectation of the removal of the difficulty."

The Pearl, Denton, 5 *Rob*. A. R. 224. A forfeiture may, however, be waived by the seaman's returning, if he be received by the master. See *Miller v. Brant*, 2 *Camp*. 590. § And a master has power to remit a forfeiture; and his pardon is a redintegration of the seaman in the right of wages. *The ship Mentor*, 4 *Mass. R.* 84. If seamen have incurred a forfeiture of their wages, and in a time of distress when the ship is aground, the captain call on those seamen to assist in getting her off, this is no waiver of the forfeiture, but if the captain continues them in their work after the peril is over it is otherwise. *Train v. Bennett*, 3 *C. & P.* 3; *S. C.* 1 *M. & M.* 82, *Tenterden*. See *Whitton v. The Commerce*, 1 *Adm. Dec.* 160.g

§ But where a seaman left the vessel at the Lazaretto, near Philadelphia, and after her arrival at Philadelphia, her port of destination, he went on board and did work by order of the mate; the captain afterwards promised

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to pay him his wages; no entry of his desertion was made in the log-book. The wages were decreed in his favour.

The brig Betsey, 2 Wash. C. C. R. 272.*g*

In the case of ships of war, the forfeiture of the seamen's wages depends upon the particular contract of the parties, and not upon any legislative enactment.

Neave v. Pratt, 2 New Rep. 408; and see Abbott on Shipping, 465. *||*

§ Wages forfeited for an offence are only such as are earned antecedently, and not subsequently to the offence.

The ship Mentor, 4 Mass. 84.*g*

By the 22 & 23 Car. 2, c. 11, § 7, it is enacted, "That if the mariners or inferior officers of an English ship, laden with goods and merchandise, shall decline or refuse to fight and defend the ship, when they shall be thereunto commanded by the master or commander thereof, or shall utter any words to discourage the other mariners from defending the ship, every mariner who shall be found guilty of declining or refusing as aforesaid shall lose all his wages due to him, together with such goods as he hath in the ship, and suffer imprisonment not exceeding the space of six months; and shall during such time be kept to hard labour for his or their maintenance."

And by § 9, of the said statute, "Every mariner who shall have laid violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his trust, shall suffer death as a felon."

[By the custom of merchants, mariners are entitled to wages at every delivering port; and it hath been holden that they are so, though an agreement was made with them, that they should not demand wages till the return of the ship to the port of London, when the freight was to be paid; and a provision was made before the voyage, that every six months' wages should be paid for one month, during the voyage.

Edwards v. Child, 2 Vern. 727; {1 Pet. 144, 187, n;} *||* and see Buck v. Rawlinson, 1 Bro. P. C. 102, (137, in 2d ed.); but see *contra*, Appleby v. Dods, 8 East, 300. *||* § A port of delivery and a port of destination are the same in legal effect. The Brig Cynthia, 1 Adm. Decis. 204.*g*

{But where the seamen agreed that they would not demand or be entitled to their wages or any part thereof until the arrival of the ship at the port of discharge on her return home, it was held that they could not, when the ship was lost in returning, recover wages for the outward voyage, on account of the express terms of the stipulation.

8 East 300, Appleby v. Dods; *contra*, 1 Pet. 215, Johnson v. Sims.}

*||*In the ordinary case of an embargo, a seaman hired by the month, and remaining with the vessel, has a right to his wages during the embargo, if the ship afterwards perform her voyage and earn her freight; (a) and the master of a vessel which has been seized and restored seems entitled to his wages for the period of detention, notwithstanding during that time he has been separated from her. (b)

(a) Beale v. Thompson, 3 Bos. & Pul. 405; S. C. 4 East, 546; 1 Dow. 299; 1 Smith, 144; see also Johnson v. Broderick, 4 East, 566, in which case the plaintiff was a foreigner. (b) Prat v. Cuff, cited in Thompson v. Rowcroft, 4 East, 43. *||*

§ If, pending the voyage, there be an interdiction of commerce with the port of destination, and the voyage is thereby broken up, no wages are due, But if the mariners be subsequently retained by the master to refit and pre-

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serve the ship, they are entitled to a reasonable compensation in the nature of wages.

The Saratoga, 2 Gallis. R. 162.*g*

It was said by Holt, C. J., that if the ship be lost before the first port of delivery, the seamen lose all their wages; but, if after she has been at the first port of delivery, then they lose only those from the last port of delivery. But if they run away, although they have been at a port of delivery, yet they lose all their wages. It was also ruled by the same judge at *nisi prius*, that if a ship be bound for the East Indies, and thence to return to England, and the ship unlade at a port in the East Indies, and take freight to return to England, and in her return she be captured, the mariners shall have their wages for the voyage to the East Indies, and for half the time that they staid there to unlade, and no more. In an action brought for mariners' wages for a voyage from Carolina to London, it appeared, that the plaintiff served three or four months, and before the ship came to London, which was the delivering port, he was impressed into the queen's service; and afterwards the ship arrived at the delivering port. It was ruled by Holt, C. J., that the plaintiff should recover *pro tanto* as he served, the ship coming safe to the delivering port. But when afterwards, in such an action between Chandler and Meade, it appeared, that the plaintiff was hired by the defendant at Carolina to serve on board the Jane sloop, whereof the defendant was master, from Carolina to England, at 3*l*. per month; that he served two months; that then the ship was taken by a French privateer, and ransomed; that just as she came off Plymouth, the plaintiff was impressed; and then the ship came safe into the Thames, where she disposed of her cargo; it was ruled by Holt, that the plaintiff could have no wages, the ship having been captured and ransomed. It was insisted by the plaintiff's counsel, that in that case he should recover *pro rata*, and that the usage among merchants was so; which, Holt said, if he could prove it, would do; but wanting proof of it he was nonsuited.

1 Ld. Raym. 639; [12 Mod. 408.] *§* A capture, unless followed by condemnation, does not dissolve the contract for mariners' wages. During the prize proceedings, it is suspended, and on a decree of restoration it revives. The Saratoga, 2 Gallis. R. 162. But the right to wages is not complete until after restitution. Willard v. Dorr, 3 Mason's R. 91. So as to capture of neutral ships. Emmerson v. Howland, 1 Mason's R. 45;*g* 1 Ld. Raym. 739. *§* When a vessel is lost on her homeward voyage, full wages are due to the seamen to the last port of delivery of the outward voyage, and half wages from that time until her departure from her last port of departure, at which her return cargo was taken on board. The time of her going from port to port to obtain a cargo, being considered the same as if she had remained at her port of delivery and taken a cargo there. Thompson et al. v. Fausset, Peter's C. C. R. 182, (*contra* Gilp. R. 600;) The Cynthia, 1 Adm. Decis. 203; Hooper v. Perley, 11 Mass. R. 545; Locke v. Swan, 13 Mass. R. 173; Swift v. Clark, 15 Mass. R. 173. And where a voyage is broken up by the capture and condemnation of the vessel by a foreign power, the seamen cannot enforce a claim for wages, even though forbidden by the master to leave the ship. Lemon v. Walker, 9 Mass. R. 404;*g* Wiggins v. Ingleton, 2 Ld. Raym. 1211. *§* An American seaman impressed, or carried off by pirates, and the vessel permitted to proceed, is not entitled to wages. The brig Rose, 1 Adm. Decis. 132. But where a seaman is impressed, escapes, and regains the vessel, full wages are allowed. So if, being impressed, he escapes and tenders his services to re-enter and perform the voyage, which is refused, he will be entitled to wages. 1 Adm. Decis. 132.*g*

§ A vessel was taken by a privateer, and carried to a port in Spain. The plaintiff, a seaman, was compelled to go in the privateer. The owners abandoned to the insurers upon advice of the loss. The vessel was released, and performed her voyage, and came home. The plaintiff returned home

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as soon as he was released. It was held, that he was entitled to wages for the whole voyage.

Brooks v. Dorr, 2 Mass. R. 39.

{ When a ship is captured on her voyage, and is afterwards recaptured, and arrives at her {} port of destination, the seamen are entitled to their wages.

3 Esp. Rep. 36, *Bergstrom v. Mills*, cited 4 East, 560. {} Vide 1 Bos. & Pul. 634, *Curling v. Long*, 4 East, 43. If ship is captured and condemned, wages cannot be recovered, because owner has received the freight from the insurers. 2 Pet. 276, *M'Quirk v. Ship Penelope*.

The emperor of Russia, under pretence of precaution against a supposed act of aggression of the British government, made a hostile seizure of British ships in his ports, and imprisoned the seamen on shore. After six months they were released; and they resumed and concluded their voyage, and the owners received their freight. It was held that such seizure, however hostile in the manner, so far partook of the nature of an embargo in its result, and not of a capture, that it did not put an end to the contract of a mariner for wages even during the time of such detention and imprisonment. But even considering it as a temporary capture, yet as in the case of a capture and recapture, the mariner was still entitled to his wages: for a mariner's title to wages depends on the ship's earning her freight for the voyage, and the performance of his stipulated duty; and here freight for the voyage was ultimately earned, and the mariner was guilty of no breach of duty: as the stipulation in the articles not to be on shore under any pretence without leave, before the voyage was ended, must be understood of a being on shore by the party's own unauthorized act. And even if such imprisonment on shore could be so considered, yet the master having afterwards received him again on board without objection, this amounted to a dispensation of the service in the interval, and entitled him to wages according to his original contract.

4 East, 546, *Beale v. Thomson*; 3 Bos. & Pul. 405, S. C.; 4 East, 566, *Johnson v. Broderick*. See 3 Esp. Rep. 37, *Bergstrom v. Mills*.

An American ship, on a voyage to Europe, taken by a French privateer, and carried into Spain, was released after eight months' detention. A mariner taken on board the privateer, carried to France, imprisoned, afterwards discharged, and returning home, was held entitled to wages until his return.

2 Mass. T. Rep. 39, *Brooks v. Dorr*. So in *Hart v. Ship Littlejohn*, 1 Pet. 115, where a ship was captured, recaptured, and restored on payment of salvage, a mariner under similar circumstances was allowed wages for the whole voyage, deducting a proportion of salvage. 1 Pet. 123, *Howland v. Brig Lavinia*; 2 Pet. 384, *Singstrom v. Schooner Hazard*, *acc.* See 1 Pet. 130, *Bordman v. Brig Elizabeth*; *Ibid.* 132, *Watson v. Brig Rose*. But in the case of *The Friends*, 4 Rob. Adm. Rep. (Am. ed.) 116, Sir William Scott decided that a mariner who, on the capture of his vessel, was taken out by the captors and carried to France, was not entitled to wages, though the vessel was recaptured and brought to her port of destination.

During a voyage from Greenock to New York, a ship called the *Sarah* was, from necessity, abandoned by the crew as a wreck. Before leaving her, the seamen took out seven boxes of the cargo into the boat, and were afterwards taken up at sea by a vessel called the *Morning Star*, and brought to New York. The merchandise saved was libelled by the crew of the *Morning Star* for salvage. In an action brought by a seaman of the *Sarah* against the master, for wages from Greenock to the time the ship was abandoned, it was held, that no freight was earned, and that the salvage of part of the cargo gave the seaman no right of action against the ship-owners or

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master on the contract for *wages*, though he might have a *lien* on the goods saved for an equitable compensation in the light of salvage.

3 Johns. Rep. 154, *Dunnett v. Tomhagen*. See 1 Pet. 54, 58, 79; *Abbott*, p. 4, c. 2, § 6, p. 361; 2 Pet. 424, *Jurgenson v. Snow Catharina Maria*.}

¶ A seaman who has engaged to serve on board a ship is bound to exert himself to the utmost in the service of the ship; and therefore a promise made by the master, when the ship was in distress, to pay an extra sum to a mariner, as an inducement to extraordinary exertion on his part, was, at a trial before the late Lord Kenyon, esteemed to be wholly void.^(a) And a promise to pay to a sail-maker, serving in a ship belonging to the East India Company, a monthly sum beyond the wages mentioned in the ship's articles, which had been signed by him as sail-maker, has been held void.^(b)

^(a) *Harris v. Watson*, Peake's N. P. C. 72; and see *Stilk v. Myrick*, 2 Camp. 317; *Thompson v. Havelock*, 1 Camp. 527. ^(b) *Elsworth v. Woolmore*, *Abbott on Shipping*, 440; and 5 Esp. N. P. C. 84, note; and see *White v. Wilson*, 2 Bos. & Pul. 116; *Dofter v. Criswell*, 7 Dow. & Ry. 650; *Carter v. Hall*, 2 Stark. 361.

¶ When articles belonging to the cargo are embezzled by the fraud or negligence of a seaman, he is chargeable for the value; and the amount may be deducted from his wages.

Edward v. Shuman, Gilp. R. 464; *Brown v. The Neptune*, Gilp. R. 91.¶

Since the former editions of this work, the doctrine of the earning and payment of wages has been much discussed, and the law has become more defined; it is now decided, that if a master, in violation of his contract, discharge a seaman from the ship during a voyage, the seaman will be entitled to his full wages up to the prosperous determination of the voyage, deducting, if the case require it, such sum as he may in the mean time have earned in another vessel; ^(c) and it is the same whether the master actually discharge the seaman, or by inhuman treatment compel him to quit the ship.^(d)

^(c) *Robinet v. The ship Exeter*, 2 Rob. A. R. 261; *The Beaver*, *Grierson*, 3 Rob. A. R. 92; *Veacock v. McCall*, Gilpin's R. 331.¶ ^(d) *Linlaud v. Stephens*, 3 Esp. 269. ¶ *The Maria*, 1 Adm. Decis. 186. But to justify seamen for leaving a vessel before the termination of a voyage on account of the cruelty of the master, it must be apparent that they could not remain without extreme danger to their personal safety. *Magee v. The Moss*, Gilp. R. 225.¶

¶ Where an American seaman is discharged in a foreign port by the master, he may recover, in a libel, the three months' advance authorized by the act of Congress of 1803, ch. 63, if the same have not been paid to the consul abroad, to be distributed according to the law. The *onus probandi* to show the payment abroad is on the master.

Orne v. Townsend, 4 Mason's C. C. R. 541. The payment of three months' wages under the act of 28th February, 1803, is confined to the case of a voluntary discharge of a seaman in a foreign port. *Pool v. Welsh*, Gilp. R. 198, and the sum which the master of a vessel is bound to pay a seaman in discharging him at a foreign port is separate and distinct from his wages. *Erwin v. Butler*, 5 La. R. 332.¶

The payment of wages is generally dependent upon the payment of freight; if the ship has earned its freight, the seamen who have served on board the ship have in like manner earned their wages; and in the case of shipwreck, if part of the cargo has been saved, and a proportion of the freight paid by the merchant in respect thereof, it seems upon principle that the seamen are also entitled to a proportion of their wages; but though the foreign ordinances have gone further, and directed the payment of wages out of the relicts and materials of the ship, in the event of no part of the cargo being saved sufficient for that purpose, there was not until very lately any known decision of

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a British court on this point. But the question having been brought before the Court of Admiralty, in a case where the parts of a stranded ship were sold for more than sufficient to pay the wages of the seamen, no part of the cargo having been saved, and the seamen having exerted themselves very laboriously to save the parts of the ship, and not having departed until they were dismissed by the master; the late learned judge of that court, (Lord Stowell,) after reviewing and commenting upon the several foreign authorities on the subject, admitted the claim of the seamen, who thereupon received their wages from the owners.(a)

Abbott on Shipping, 447, 5th ed. § And see Sheppard et al. v. Taylor et al., 5 Peters, 675; Howland v. The Lavinia, 1 Adm. Decis. 125; Adams v. The Sophia, Gilp. R. 79. If the voyage or freight be lost by the negligence, fraud, or misconduct of the owner or master, or voluntarily abandoned by them; if the owner has contracted for freight upon terms or contingencies differing from the general maritime law, or if he has chartered a ship to take a freight at a foreign port, and none is to be earned on the outward voyage, in all these cases the mariners are entitled to wages, although no freight has accrued. The Saratoga, 2 Gallis. C. C. R. 182. And where freight is recovered, wages re-attach. Hart v. The Little John, 1 Adm. Decis. 119. § (a) Neptune, Clark, 1 Hag. A. R. 227; Abbott on Shipping, 452. § Where a portion of a vessel, or her cargo, is saved by the meritorious and extraordinary exertions of the seamen, a new lien arises thereon for their wages, although the freight is lost, and the original contract annulled. Adams v. The Sophia, Gilp. R. 79; and see Bridge v. The Niagara Insurance Company, 1 Hall, R. 423. §

§ Where upon an entire voyage out and home, the ship and cargo were totally lost on her return; held that the seaman was not entitled to recover wages from the circumstance of the ship and cargo having been insured; the lien for wages is only on the ship and freight appurtenant thereto. If the seaman could look to the insurance as a security for his wages, it would be a substitution for his own private insurance, and defeat the policy of the laws, which does not allow him to insure his wages.

Lady Durham, 3 Hagg. (Adm.) 196. §

If a sailor hired for a voyage take a promissory note from his employer for a certain sum, provided he proceed, continue, and do his duty on board for the voyage, this contract is indivisible; and if he die before the arrival of the ship, no wages can be claimed, either on the contract, or on a *quantum meruit*.

Cutter v. Powell, 6 Term Rep. 320. § On this case it has been remarked, (Abbott on Shipp. 445,) that its facts were very particular, and the decision turned upon them. There is no general decision on the question, whether a seaman dying the course of a voyage, is entitled to wages. The legislature seems to have considered that *some* might be due in such a case. See 37 Geo. 3, c. 73, § 7, and 6 Geo. 4, c. 107, § 15; and this was taken for granted in Armstrong v. Smith, 1 New R. 299; and see Chandler v. Grieves, 2 H. Bl. 606 a. By the laws of Oleron, of Wisbuy, and of the Hanse Towns, the wages in such case were to be paid to the heirs, but what proportion does not appear. Abbott, 445. § Where a mariner shipped to go as mate, from Philadelphia to Batavia, and back again, at a certain rate per month; and performed the voyage to Batavia, where he died; Held, that his representatives were entitled to recover the same amount of wages that he would have been entitled to receive, had he performed the voyage back to Philadelphia. Sims v. Jackson, 1 Wash. C. C. R. 414, and see Hart v. The Little John, 1 Adm. Decis. 119; Luscomb, Adm'r. v. Prince et al., 12 Mass. R. 576. But see The Kitty, Bee's R. 254. §

In a voyage from England to Newfoundland, and thence with fish to Spain, Newfoundland is not the delivering port, and if the ship is taken between Newfoundland and Spain, the mariner loses his wages.

Hernaman v. Bawden, 3 Burr. 1844. {See 1 Pet. 203, Giles v. Brig Cynthia.}

{When a vessel is turned off from her port of destination in consequence

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of its being blockaded, and proceeds to another port not originally contemplated in the articles under which the seamen shipped, that shall be considered as a delivery port, if the cargo or any part of it is there delivered. And if the vessel, after leaving that port, is lost, the mariners are entitled to wages to the time of arrival at that port, and for half the time of stay there.

2 Pet. 391, *Cranmer v. Gernon*.

Where a cargo or part thereof is purchased at neighbouring ports or places, and the vessel goes to one or more of them for all or part; the last port of lading and departure is that to which wages shall be paid.

2 Pet. 391, *Cranmer v. Gernon*;}

If a ship be seized upon for debt, or otherwise become forfeited, the mariners must receive their wages, unless in some cases, where their wages are forfeited as well as the ship; or, if they have letters of marque, and instead of that they commit piracy, by reason of which there becomes a forfeiture of all. But (a) lading prohibited goods aboard a ship, as wool and the like, though it subjects the vessel to a forfeiture, yet it does not deprive the mariner of his wages, for the mariners having honestly performed their parts, the ship is tacitly obliged for their wages.

Consolato del Mare, Moll. b. 2, c. 3, § 7. β Where a voyage is broken up by seizure for the debts of the owners, extra wages will be allowed to the sailors according to circumstances; but damages for loss of time and expenses on shore, are seldom given. The Oder, 2 Adm. Decis. 261. But where a voyage is broken up for the interest of the owner, an additional allowance is usually given, of from one to three months' pay. *Hindman v. Shaw*, 2 Adm. Decis. 264.γ (a) For this Molloy cites 1 Roll. Abr. 530; but nothing to this effect appears in that page of the book. β Seamen's wages on an illegal voyage are not a lien on the ship. *The Langdon Cheves*, 2 Mason's C. C. R. 58.δ ||As to the loss and forfeiture of wages, see Abbott, part 4, ch. 3.]

{So if a ship is captured and condemned, and the freight lost, in consequence of the fraud and wrongful act of the master, the seamen do not lose their wages. Thus a seaman was hired for a voyage from New York to Bombay, and from thence to Canton, and back to New York. The ship was laden with articles contraband of war, and while in the course of the voyage to Bombay, the master, under a pretence of want of water, which was not true, deviated in order to put into the Isle of France, and while proceeding in the rout to that island, and out of the track of the ostensible voyage, was captured by a British frigate, and condemned. The seaman was put on board of the frigate, and afterwards shipped to London, from whence he sailed to Wilmington, N. C., and from thence to New York. And he recovered wages from the time he shipped on board until his arrival in New York, deducting such wages as he had earned and received during his absence.

3 Johns. Rep. 518, *Hoyt v. Wildfire*. See 5 Esp. Rep. 6, *Eaken v. Thom*.}

A B libelled in the Admiralty Court, as administratrix to her husband, for his wages due as mariner on board the *Prince Frederick*. Minett and Heys moved for a prohibition, upon a suggestion that this ship was seized for importing wines from Holland, not being Rhenish or Hungarian wines, and therefore forfeited by stat. 12 Car. 2; that claim being put in by Bowen the master, an information was filed by the seizer, and Bowen pleaded the general issue, but before trial submitted, and compounded according to the course of the court; and upon payment of 136*l.* to the informer, there was judgment *quod vas deliberetur*, &c. It was likewise suggested, that the libel was for wages due before the seizure. Upon this

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motion it was insisted, that the act of parliament had so altered the property of the ship, that by the seizure, submission to a fine, and judgment *quod deliberetur*, upon it, all precedent encumbrances were discharged. But the court discharged the rule, though they admitted, if there had been a condemnation that would have been a good ground for a prohibition, and a discharge of all precedent encumbrances. But the reporter adds a *quære*, for the fine implies a condemnation, although not actually given but prevented by the submission.

Minett v. Robinson, Bunb. 121. β Where a voyage is broken up abroad by a seizure for violating the revenue laws of a foreign country, the seamen are only entitled to wages to the time of seizure. Oxnard v. Dean, 10 Mass. R. 143.g

By 2 G. 2, c. 36, made perpetual by 2 G. 3, c. 31, no masters of ships shall proceed on any voyage without first coming to an agreement (a) with the mariners for their wages, which agreement shall be made in writing, declaring what wages each seaman or mariner is to have respectively during the whole voyage, or for so long time as he shall ship himself for, and shall also express the voyage for which such seaman was shipped, upon pain of forfeiting 5*l.* to the use of Greenwich Hospital.(b)

[(a) See the agreement usually signed, Abbott, appen. No. V. (b) By the 31 Geo. 3, c. 39, § 1, 2, & 10, a similar agreement in writing (which need not be stamped) is required to be signed by the master and mariners of vessels, of the burden of one hundred tons or upwards, employed in the *coasting trade*, from any port or place in Great Britain, to any other port or place in Great Britain, and going to open sea; and by the terms of the statute, the contract is to specify for *what time*, or for *what voyage or voyages* the mariner shall contract.] β The shipping articles must declare, explicitly, the ports at which the voyage is to commence and terminate. Magee v. The Moss, Gilp. R. 220. It is not unusual for seamen to be shipped by the owner of a vessel, before the master is appointed, and the seamen sign the shipping paper, with a blank left for the name of the master; and it must be understood that the seamen thus signing consent to go the voyage with any master the owner shall appoint, and that the blank be filled with the name of such master when appointed. Mayo v. Harding, 6 Mass. R. 300.g

§ 2. This agreement every seaman shall sign within three days after he shall have entered himself; and, so signed, it shall be conclusive to all parties for the time contracted for.

[[This section does not apply to a British seaman entering on board a *foreign* ship in a British port. Dickman v. Benson, 3 Camp. 290.] β If a seaman ships without signing articles, he must be paid at the highest rate of wages given at the port of shipment, within three months next precedent; and be subject to all the forfeitures imposed, and rules fixed, by the maritime law pre-existent to the act of Congress, and not altered by the statute. The Regulus, 1 Adm. Decis. 212.g

§ 3. And any seaman deserting before or during the voyage, or refusing to proceed on the voyage, after he has signed such agreement, shall forfeit his wages; (c) and further, § 4, upon complaint to any justice of the peace by the master or other person having charge of the ship, may be committed to the house of correction for any time not exceeding thirty days, nor less than fourteen.

[(c) See 11 & 12 W. 3, c. 7, § 17; 2 Geo. 2, c. 36, § 3. But a seaman who quits his ship after her arrival in port, but before she is moored, does not thereby subject himself to the forfeiture of his whole wages, under § 3, of this latter statute. Frontine v. Frost, 3 Bos. & Pul. 302. β Desertion during the voyage, is, by the maritime law, a forfeiture of all wages antecedently due. But a desertion, to work this effect, must be not merely an absence without leave, or in disobedience of orders, but *animo non revertendi*, an intention to abandon the ship, and the service. Cloutman v. Tumison, 1 Sumner's R. 373. By the act of Congress 1790, ch. 56, a statute desertion and forfeiture of wages are created by forty-eight hours' absence, without leave, if a proper

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entry be made on the day of the absence, in the log-book. 1 Sumner's R. 373. But the proper entry must be made, on the day on which the seaman absented himself. The *Phœbe*, 1 Wash. C. C. R. 48; *Knagg v. Goldsmith*, Gilpin's R. 212. The forfeiture provided in the second section of the act of the United States, "for the government and regulation of seamen in the merchant service," is incurred by the absence or desertion of a seaman previously to the commencement of the voyage, but not after; and the forfeiture, provided in the fifth section of the same act, is incurred by his absence or desertion after the commencement and during the continuance of the voyage, but not previously to the commencement of the voyage. *Cotel v. Hilliard*, 4 Mass. R. 664. If the owners defend a suit for wages, in the Admiralty, on the ground of desertion, they are bound to show the articles, that the stipulated service may appear. 1 Hagg. A. R. 168; and see 5 Rob. A. R. 234; *Neave v. Pratt*, 2 New R. 408. Absence occasioned by the power of a foreign country, in which the ship happens to be, without any fault of the seaman, does not work any forfeiture. *Beale v. Thompson*, 4 East, 546; and see *ante*, p. 601, 602.] § Seamen absent from a ship without any fault of their own, are nevertheless entitled to full wages. The *Fair American*, Bee's D. C. R. 134.

§ Where articles had been signed, as required by 5 & 6 Will. 4, c. 19, and the seaman had quitted the vessel after the voyage and return into port, but before the cargo had been discharged; held, that he did not thereby forfeit his whole wages within sect. 9, but of a month only under sect. 7.

McDonald v. Jopling, 4 Mees. & W. (Ex.) 285.

The rule by which the court is guided as to forfeiture of wages by misconduct, held to be, not in cases of discharge, for mere misconduct alone, but where the misconduct has been such as to render the discharge of the seaman imperatively necessary for the safety of the ship, and the due preservation of discipline; and as the penalty cannot be mitigated, and the whole wages are forfeited or none at all; the facts which call for such a penalty must be of a strong description, and be clearly established by the evidence; and there is a great distinction between acts of disobedience in port and when at sea.

Blake, 1 Rob. A. R. 73.

§ 5. If any seaman absent himself from the ship without the leave of the master or other chief officer having charge of the ship, he shall forfeit for every day's absence two days' pay to the use of Greenwich Hospital.

§ 6. If any seaman, not entering into the king's service, leave the vessel before he shall have a discharge in writing from the master or other person having the charge of the ship, he shall forfeit one month's pay.

§ 7. On the arrival of any vessel in Great Britain, the master shall pay the seamen their wages, if demanded, in thirty days after the vessel's being entered at the custom-house (except when a covenant shall be entered into to the contrary,) or at the time the seamen shall be discharged, which shall first happen, deducting out of the wages the penalties by this act imposed, under penalty of paying to such seamen that shall be unpaid 20s. over and above the wages, to be recovered as the wages may be recovered; and such payment shall be good in law, notwithstanding any action, bill of sale, attachment, or encumbrance whatsoever.

[The 31 G. 3, c. 39, § 5, makes a similar enactment with regard to the masters of ships employed in the *coasting trade*, except that *five* instead of *thirty* days is the period mentioned within which the wages, if demanded, are to be paid.]

§ 8. No seaman, by signing such contract, shall be deprived of using any means for the recovery of wages which he may now lawfully use; and where it shall be requisite that the contract in writing shall be produced in court, no obligation shall be upon any seaman to produce it, but on the master or

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owner of the ship; and no seaman shall fail in any action or process for the recovery of wages for want of such contract being produced.(a)

||(a) See *Bowman v. Mangelman*, 2 Camp. 315.||

§ 9. The masters or owners of ships shall have power to deduct out of the wages of any seaman all penalties incurred by this act, and to enter them in a book, and to make oath, if required, to the truth thereof; which book shall be signed by the master and two principal officers, belonging to such ship, setting forth, that the penalties contained in such book are the whole penalties stopped from any seaman during the voyage; which penalties (except the forfeiture of wages to the owners, on the desertion of any seaman, or on refusing to proceed on the voyage,) shall go to the use of Greenwich Hospital, to be paid and accounted for by the masters of ships coming from beyond the seas, to the officer at any port who collects the 6*d.* per month deducted out of seamen's wages, for the use of the said hospital, which officer is empowered to administer an oath to the master touching the truth of such penalties.

§ 10. Any master or owner deducting the penalties as above, and not paying them to the officer collecting the 6*d.* per month in the port where the deduction shall be made, within three months after the deduction, shall forfeit treble the value to the use of the hospital; which, together with the money deducted, shall be recovered by the same means as the penalties for not duly paying the 6*d.* per month.

||The 13th section of this statute provides, that a seaman belonging to any merchant ship who enters into the service of his majesty, on board any of his majesty's ships, shall not for such entry forfeit the wages due to him during the term of his service in the merchant ship, nor shall such entry be deemed a desertion. And pursuant to the spirit of this statute it has been decided, that a seaman belonging to a privateer, who was to have a certain share of prizes in lieu of wages, and who had engaged to serve full six months, on pain of forfeiting such share, did not lose his share of a prize taken while he was in the privateer by being afterwards impressed, and then accepting the bounty, and entering on board one of his majesty's ships before the expiration of the six months.(b)

(b) *Paul v. Eden*, *Abbott on Shipping*, 444, S. P.; *Chandler v. Grieves*, 2 H. Bl. 606, n.

But entering or being impressed into the king's service does not give the mariner an *absolute* right to his wages up to the time, nor place him in a better situation as to such wages than he would be if he had remained on board the ship; and therefore if the ship be afterwards captured he loses his wages in common with those whom he leaves behind.

Anon. 2 Camp. 320, note; *Clements v. Mayborn*, C. B. Trin. T. 24 G. 3; *Wiggins v. Ingleton*, *Ld. Raym.* 1211; *Dunkley v. Bulwer*, 7 Esp. 56.

In the absence of an express decision on the subject, the legislature appears to have considered that some wages might be owing to seamen who died in the course of a voyage;(c) and in one or two cases it seems to have been admitted, that the representatives of a seaman are entitled to a proportion of wages to the time of his death.(d)

(c) 37 G. 3, c. 73, § 7; and 6 G. 4, c. 107, § 15. (d) *Cutter v. Powell*, 6 Term Rep. 320; *Armstrong v. Smith*, 1 New R. 299; *Abbott on Shipping*, 445.|| β A seaman shipped for the whole voyage, dies before its termination, his representatives are entitled to full wages. That another seaman was hired in lieu of the one dead, makes no difference. *Walton, Adm'r, &c. v. The Neptune*, 1 Adm. Decis. 142. *Scru*, if the death of the seaman is owing to vicious or unjustifiable conduct. 1 Adm. Decis. 142. And see also *Luscomb's Adm'r v. Prince et al.*, 12 Mass. 576.g

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By 8 G. 1, c. 24, § 7, (made perpetual by 2 G. 2, c. 28, § 7,) and also by 12 G. 2, c. 30, § 12, no master or owner of any merchant ship shall pay to any seaman beyond the seas any money or effects on account of wages, exceeding one *moiety* of the wages due at the time of such payment, till such ship shall return to Great Britain, Ireland, or the Plantations, or to some other of his majesty's dominions, whereto she belongs, on forfeiture of double the money so paid, to be recovered in the high court of Admiralty by any person who shall first inform for the same.

||See Abbott on Shipping, 453.||

The cargo of a ship was lost by the capture of a Swedish privateer, who carried her into Gottenburgh: the master staid there three months to refit the ship, and take in new lading; and to prevent the seamen from going away, he agreed to pay them so much per month whilst they staid there. In an action for this, the master would have discharged himself, on the rule that freight is the mother of wages, and that none are ever paid whilst the ship is lading and unlading; which the chief justice agreed to be the general doctrine; but he held it not sufficient to control a special agreement, as there was in this case, and where too there was so long a stay at Gottenburgh.

Champion v. Nicholas, 1 Stra. 405, at N. P. in Middlesex.]

{The master is liable for the wages of the mariners, though they have been in fact employed by the owners, if he admits them to serve on board.

1 Dall. 392, Farrell v. M'Clea.}

The mariners may sue in the Admiralty Court for their wages, although the hiring was by the master on land; and this is allowed of in favour of navigation, for here they may all join in the same libel: also, by the law of the Admiralty, they have remedy against the ship and owners, as well as against the master; and it would be a great discouragement to seafaring men to oblige them to bring separate actions, and those against a master who may happen to be insolvent.

Winch. 8; 4 Inst. 141; Vent. 146, 343; 3 Mod. 244; Salk. 33, pl. 4, and vide 4 & 5 Ann. c. 16. {Under what circumstances the seamen of *foreign* ships may sue for wages in our courts, see 2 H. Black. 603, Gienar v. Meyer; 1 Pet. 104, Thompson v. Ship Catharina; Ibid. 197, Willendson v. The Försöket; 2 Pet. 428, Weiberg v. The St. Oloff.}

||With regard to ships trading to the West Indies, it is by the 37 G. 3, c. 73, § 1, enacted, that after the first day of July, 1797, every seaman who shall desert at any time during the voyage, either out or home, from any British merchant ship trading to or from his majesty's colonies and plantations in the West Indies, shall, over and above all punishments, forfeitures, and penalties, to which he is now by law subject, forfeit all the wages he may have agreed for, or be entitled to during the voyage, from the master or owner of the ship, on board of which he should enter immediately after such desertion.

And by § 2 of the same statute it is enacted, "That all and every master or commander of *any* British merchant ship, who shall from and after the 1st day of July, 1797, hire or engage to serve on board his ship or vessel any seaman, mariner, or other person who shall, to the knowledge of such master, have deserted from any other ship or vessel, shall forfeit and pay the sum of 100*l*."(a)

(a) From the general terms in which this clause is expressed, it seems not to be con-

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fined to the masters of ships engaged in the West India trade. See Abbott on Shipping, 436.

By § 3 of the same statute it is also enacted, "That no master or commander of any merchant ship or vessel, which shall from and after the 1st day of July, 1797, sail or proceed from any port or place in Great Britain, shall hire or engage, or cause or procure to be hired or engaged, any seaman, mariner, or other person, at any port or place within his majesty's colonies or plantations in the West Indies, to serve on board any such merchant ship or vessel, at or for greater or *more wages or hire* for such service than according to the rate of *double monthly wages* contracted for with the seamen, mariners, and other persons hired or engaged to serve on board such ship or vessel at the time of her then last departure from Great Britain, being in the same degree and station in which such seaman, mariner, or other person shall be so hired or engaged at any such part or place as aforesaid; unless the governor, chief magistrate, collector, or comptroller of such port or place in the said colonies or plantations, shall think that greater or more wages or hire than double the monthly wages aforesaid should or ought to be given to such seaman, mariner, or other person as aforesaid, and do and shall accordingly authorize or direct the same to be given by writing under his hand; that then and in such case the master or commander of such ship or vessel shall and may be at liberty to pay, and the seaman, mariner, or other person on board such ship or vessel to receive, *such* greater or higher wages as such governor, chief magistrate, collector, or comptroller, shall *direct* as aforesaid;" and all contracts and securities entered into or given, contrary to the intent and meaning of this act, are made null and void, to all intents and purposes; and the master or other person who shall enter into or give, or procure to be made, entered into, or given, any such contract or security, or who shall hire or cause to be hired any seaman or other person to enter on board, contrary to the intent and meaning of this act, or who shall pay or cause to be paid any greater hire, wages, or other gratuity or advantage whatsoever than is allowed or directed by this act, shall for every such offence forfeit 100*l.*(a)

(a) The penalties imposed by this act are to be distributed one-third to Greenwich Hospital, one-third to the seamen's hospital or fund at the ship's port, and one-third to the informer; and may be recovered by action in the courts at Westminster; or such as do not exceed 20*l.*, before a justice of the peace.

It is provided, nevertheless, "That nothing in this act shall extend or be construed to extend to any contract or agreement which shall or may be made with any seaman, mariner, or other person hired or engaged to serve on board any merchant ship or vessel, at any port or place within his majesty's colonies or plantations in the West Indies, who shall, at the time of such hiring or engagement, produce and deliver to the master and commander of such ship or vessel a certificate under the hand of the master or commander of the ship or vessel on board of which such seaman, mariner, or other person had then last served, signed in the presence of one or more witness or witnesses, stating their usual place or places of abode, thereby declaring or certifying that such seaman, mariner, or other person had been duly discharged from the ship or vessel on board of which he had so last served, and which certificate the said master or commander shall grant within three days next after application made to him by such seaman, mariner, or other person, before a witness, or in default thereof shall forfeit and pay the sum of *twenty pounds*, to be levied, recovered, and applied in manner hereinbe-

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fore directed ; nor to any contract or agreement to be made with any seaman, mariner, or other person hired or engaged to serve on board any merchant ship or vessel which, through necessity, or on account of very hazardous service or extraordinary duty, require such contract or agreement to be made, or more wages or hire given, and of which necessity, service, or extraordinary duty proof shall be made on oath before the chief magistrate or principal officer of any port or place, or before any justice or justices of the peace of the said colonies or plantations ; and provided, also, that such seaman, mariner, or other person so hired or engaged to serve on board any ship or vessel so requiring such service, shall not have deserted from the ship or vessel on board of which he had then last served ; and provided, also, that no greater wages or hire shall be given by any master or commander, or taken or received by any seaman, mariner, or other person as aforesaid, except in cases of such necessity, very hazardous service, extraordinary duty as aforesaid, than after the rate of double the monthly wages, or the wages to be settled or directed by any governor, chief magistrate, collector, or comptroller, as hereinbefore directed to be paid or received as aforesaid.”(a)

(a) See the observations on this long and confused proviso in Abbott on Shipping, 439.

It has been decided upon this statute, that a license given by a magistrate in the West Indies to the master of a ship, “*to procure men on such terms as he could to navigate the ship home,*” is not a compliance with its prescribed regulation.(b)

(b) Rodgers v. Lacy, 2 Bos. & Pul. 57.]

The mariners may sue in the Admiralty Court for their wages, although the hiring was by the master on land ; and this is allowed of in favour of navigation, for here they may all join in the same libel : also, by the law of the Admiralty, they have remedy against the ship and owners, as well as against the master ;(c) and it would be a great discouragement to seafaring men to oblige them to bring separate actions, and those against a master who may happen to be insolvent.

Winch. 8 ; 4 Inst. 141 ; Vent. 146, 343 ; 3 Mod. 244 ; Salk. 33, pl. 4, and vide 4 & 5 Ann. c. 16. § The mate is permitted to sue in the Admiralty, as a mariner, and all general rules in cases of mariners apply to him. Atkyns v. Burrows, 1 Peters’s Adm. Decis. 246. So the cook and steward may sue in the Admiralty as mariners, and part of the crew. The Louisiana, 2 Peters’s Adm. Decis. 268. § ¶ § 17, 18, & 19, limiting the period within which the suit must be commenced to six years. On a suggestion that the contract is special and under seal, and made on land, supported by proper affidavits, the courts of common law will prohibit the Admiralty from proceeding, provided the suggestion be made before sentence, for the construction of a special contract is proper for the courts of common law. See Abbott, 480, *et seq.* and the cases there. § No rule has ever been adopted by the maritime laws, either of England or this country, prescribing the time within which mariners should proceed to enforce their lien for wages. The Mary, Paine’s C. C. R. 180. § (c) And their claim for wages is preferred before all other charges. The Favourite, De Jersey, 2 Rob. A. R. 232. § But the charterers, and not the general owners of a vessel are liable for seamen’s wages on the voyage for which she is chartered. Goodrich v. Lord, 10 Mass. R. 483. So where there was a sale and delivery of a ship in a foreign port by the master, and a contract that the purchasers should victual and man her ; it was held, upon these facts being made part of a case, that the former owners were not liable for seamen’s wages after this transaction. Aspinwall v. Bartlett, 8 Mass. R. 483. §

§ Where the claim arises upon a special agreement, the court will not exercise jurisdiction, and subject itself to a prohibition.

Mona, 1 Rob. A. R. 137.

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A contract for wages on a voyage between ports of adjoining states, and on the tide-water of a river or bay, is within the jurisdiction of the District Court, and may be enforced by a suit *in rem* in the Admiralty.

Smith v. The Pekin, Gilp. R. 203; Wilson v. The steamboat Ohio, Gilp. R. 505.g

¶ In suits at common law, if the articles or contract be under seal, and delivered as a deed, an action of debt or covenant must be brought; if it be not under seal, or not so delivered, an action of debt or *assumpsit*. And in order to enable the plaintiff to frame his declaration correctly, a judge will order the defendant to show the articles to the attorney for the plaintiff, and if necessary to give him a copy. The plaintiff is not bound to show that the ship earned freight; the defendant must prove the negative, if such proof will permit a defence.

Abbott, 485; and as to the proper action where the seaman is wrongfully dismissed during the voyage, see 2 East, 145; Brown v. Milner, 7 Taunt. 319. The earning of freight is not in all cases necessary to entitle seamen to their wages; as suppose a ship goes out in search of a cargo, and, not being able to procure one, returns empty, will the seamen be entitled to their wages, unless there be an agreement to the contrary? Judgment of Lord Stowell, 1 Hagg. A. R. 227.¶ β To entitle a seaman to recover wages, he must prove not merely that he signed the shipping articles, but prove that he performed the voyage, or a legal excuse for not having done so. Wilcock v. Palmer, 3 Wash. C. C. R. 248.g

So, of the other officers under the master, as the mate, purser, boatswain, &c.; for though they contract with the master, yet it is on the credit of the ship.

Raym. 2; Salk. 33, pl. 5; Ld. Raym. 397, 632; 2 Stra. 858; {2 Rob. Adm. Rep. 192.}

¶ And the Court of Admiralty has decided the fact of the mariner being a woman to be no ground for resisting the payment of wages to her.

Jane and Matilda, 1 Hagg. A. R. 187.¶

So, a shipwright may sue in the Admiralty for (a) making a ship.

Roll. Abr. 533. [So, a carpenter, 2 Stra. 707.] (a) So, for mending a ship; Cro. Car. 296.

And if a contract be with seamen to go on a voyage, and they, in order thereunto, work in a harbour, and after the voyage be intercepted through the owner's fault, as, if the ship be arrested for his debt, &c., the seamen shall sue for their wages for the work done in the harbour, in pursuance of the contract to go on a voyage, in the Admiralty, as much as if they had gone the voyage: *secus*, if the retainer of them had been only to do the work in the harbour.

6 Mod. 238; 2 Ld. Raym. 1044, S. C.; [2 Wils. 265, S. C. cited, and approved of by the court.] β If a voyage be interrupted without the fault of the crew, they shall receive wages during the time they work on board the vessel in port. The Atalanta, Bee's Rep. 48.g

¶ In regard to foreign seamen, the Court of Admiralty has been in the habit of entertaining proceedings against ships in the ports of this country, at *their* suit for wages, as due by the general maritime law, with the consent of the accredited agent of the government of their country.

Madonna D'Ibra, Papaghica, 1 Dodson, A. R. 37; Wilhelm Frederick, Noormaw, 1 Hagg. A. R. 138; Maria Theresa, Phillips, 1 Dod. A. R. 303. See Abbott on Shipping, 477.¶ β When the voyage of a foreign ship ends in the United States, or is broken up here, and no treaty or compact designates the mode of proceeding, suits may be prosecuted here. In such cases, the determination should be according to the laws of the country to which the ship belongs. Thompson v. The Ship Catharine, 1 Adm. Decis. 106.g

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¶ Where foreigners were hired at a foreign port, under a stipulation by the master that they should continue on board, or that he would procure them a passage back with wages; held that the ship was liable for wages and costs; and the circumstance of her having changed owners did not vary the liability.

Margaret, 3 Hagg. A. R. 238.γ

[But a pilot, though a mariner, who is sent for from Gravesend, and goes from thence on board a ship lying in Sea-Reach, and pilots her thence to her moorings at Deptford, cannot sue in the Admiralty for the pilotage; for both the contract and the work are within the body of a county.

Ross v. Walker, 2 Wils. 264.]

So, if there be any special agreement, by which the mariners are to receive their wages in any other manner than is usual, or if the agreement be under seal the mariners cannot sue in the Admiralty.

Salk. 31, Opy v. Addison; [2 Stra. 968, Day v. Searle, S. P.; 2 Barnard. K. B. 419, S. C.; Howe v. Napier, 4 Burr. 1944, S. P. But see Bennis v. Parre, 2 Ld. Raym. 1206, and Roberts v. Cadd, Bunb. 247; Buggin v. Bennett, 4 Burr. 2035; Menestone v. Gibbons, 3 Term Rep. 267.] ¶ See the cases cited in 2 Dod. A. R. p. 12, in support of the doctrine, that the Court of Admiralty has no jurisdiction in special contracts; and Abbott on Shipping, 480, 5th ed.]

Nor can the master sue in the Admiralty Court; for his contract is on the credit of the owners,(a) and not like that of the mariners, which is on the credit of the ship.

4 Inst. 141; Raym. 3; Salk. 33, pl. 4; Carth. 518, S. P., although the owner was beyond sea, and the ship lay here; and vide 2 Salk. 548, pl. 3; [1 Pet. 228, 230, Gardner v. Ship New Jersey; 2 Rob. Adm. Rep. (Am. ed.) 196, The Favourite; 9 East, 431.] [(a) Hence, the master has no lien on the ship for wages, stores, or repairs done in England. Wilkins v. Carmichael, Dougl. 101.] {Or abroad, 9 East, 426, Hussey v. Christie.} ¶ But the master of a ship may maintain a suit *in personam*, in the Admiralty, against the owner, for his wages, but not *in rem*, against the ship, for he has no lien. Willard et ux. v. Dorr, 3 Mason's R. 91. Actions by seamen for wages consolidated, and the master held entitled to sue for wages as mate. 3 Hagg. A. R. 153. See The steamboat New Orleans v. Phœbus, 12 Pet. 175.γ

[Therefore, where a man went out mate, and, upon the death of the master during the voyage, succeeded to the command of the ship; and upon his return sued in the Admiralty for his wages as mate, and for a further allowance after he became master; the court granted a prohibition *quoad* the time he was master, and refused it *quoad* the time he was mate.

Reed v. Chapman, 2 Stra. 937;] ¶ The Favourite, De Jersey, 2 Rob. A. R. 239.] ¶ The mate becoming master as *hæres necessarium*, must sue in the Admiralty for his wages as mate; and at common law, for compensation as master. Atkins v. Burrows, 1 Adm. Decis. 244.γ

{A mate, becoming master by the capture of the former master, may, however, sue in the Admiralty for wages *as mate* for the whole time, and must apply to the common law courts for the reward of the additional services performed as master.

2 Rob. Adm. Rep. (Am. ed.) 192, The Favourite; 1 Pet. 247, n.}

¶ By the 59 Geo. 3, c. 58, § 1, authority is given to justices of the peace, on the complaint of persons who have served on board any vessel trading from any place in England to parts beyond the seas, or to any other place in Great Britain, and where the sum in question does not exceed 20*l.*, to summon the master or owner, &c., and to order payment, and cause the amount to be levied by distress and sale of the goods of the party, or of the

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vessel, or its tackle or furniture. The act gives a power of appeal to the Court of Admiralty under the restrictions therein mentioned, § 2, and appears to provide that seamen shall not deprive themselves of its benefit by any clause in their contract; and casts the burden of producing the written contract on the master or owners, § 3, and reserves all pre-existing remedies, § 4. It does not extend to Scotland, § 5. Its continuance was limited to seven years from the 2d July, 1819, § 7, but it has by the 7 Geo. 4, c. 59, been continued for a further period of seven years.||

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WHENEVER a ship is in stress of weather, or in danger, or just fear of (a) enemies, and the master, to save part of the cargo, throws overboard some of the goods { } in the ship, those which are saved shall contribute in proportion; and this common calamity shall be equally borne by all the parties interested. This is called general or gross average, and is allowed by the civil law, the customs of merchants, and our law, (b) ||having been adopted into the Roman law from the ancient law of Rhodes, "*Lege Rhodiâ cavetur, ut si levandæ navis gratiâ jactus mercium factus sit, omnium contributione sarciatur, quod pro omnibus datum est.*"||

Molloy, 246, &c.; 2 Bulst. 290. (a) So likewise, goods coming from infected towns or places may be cast overboard. Molloy, 246. { } There shall be no contribution for goods shipped on deck, and ejected. 1 Cain. 43, Smith & Stanley v. Wright. ||(b) Dobson v. Wilson, 3 Campb. 480; and see Abbott on Shipping, 342, chap. "On General Average."|| β There can be no claim for average or contribution for property, the loss of which did not in fact contribute to the safety of the vessel or cargo. Scudder v. Bradford, 14 Pick. R. 13; Nickerson v. Tyson, 8 Mass. R. 467; Ferguson v. Fitt, 1 Hayw. 339.γ

[There is another species of average, called small or petty averages. Petty average consists in such charges and disbursements as, according to occurrences, and the custom of every place, the master necessarily furnishes for the benefit of the ship and cargo, either at the place of loading or unloading, or on the voyage. These charges are lodemanage, or the hire of a pilot for conducting the vessel from one place to another; towage, pilotage, lightmoney, beaconage, anchorage, bridge-toll, quarantine, river charges, signals, instructions, passage-money by castles, expenses for digging a ship out of ice when frozen up, that it may be brought into a proper harbour; and at London, by custom, the fee paid at Dover pier.

A third species of average is that we are accustomed to meet with in bills of lading, "paying so much freight for the said goods, with primage or average accustomed." In this sense it signifies a small duty, which merchants, who send goods in the ships of other men, pay to the master, over and above the freight, for his care and attention to the goods so intrusted to him.]

||This third species of average appears to include the charges mentioned in the last paragraph as forming a distinct species; for in Abbott on Shipping, p. 272, the word average in the bill of lading is said to "include several petty charges, as the expense of towing, beaconage," &c. And the learned author of that treatise, in his chapter on general average, so calls it to distinguish it from special or particular average, "a very incorrect expression, used to denote every kind of partial loss happening either to the ship or cargo from any cause whatever."||

In this contribution in general average, not only the master, owners, and freighters of the ship shall bear a proportionable share of the loss, but also passengers for such wares as they have in the ship. And passengers who have no wares or goods in the ship, yet, as they are a burden to the ship,

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estimate is to be made of their apparel, rings, and jewels, towards a contribution of the loss; (a) and in general it is said, that every thing shall contribute, except the provisions of the ship, and the men who are necessary to work the ship.

Molloy, 250. ¶ Ship's stores necessarily thrown overboard whilst the vessel was in the hands of an enemy are the subject of a general average. Price v. Noble, 4 Taunt. 123. (a) But this is expressly denied in Abbott on Shipping, p. 356, 5th edit., where it is said that wearing apparel, jewels, &c., belonging to the persons of the passengers and crew, and taken on board for their private use, and not for traffic, do not contribute. ¶ The general doctrine is, that mariners do not contribute to general average. The only admitted exception is in case of ransom; and perhaps by parity of reasoning, of recapture. The *Saratoga*, 2 Gallis. R. 164. The same rule as to contribution applies as well between the assurer and assured, as the owners of ship and cargo. *Per Van Ness, J., Strong v. Fireman Ins. Co.*, 11 Johns. R. 323.g

The master ought to be careful that only those things of the least value and greatest weight be flung overboard: also, he and the crew (or most of them) must swear that the goods were cast overboard for no other cause but purely for the safety of the ship and lading.

Molloy, 247. ¶ It may, however, often happen, as was expressed by Lord Kenyon, C. J., in *Birkley v. Presgrave*, 1 East, 228, that the danger is too urgent to admit of any deliberation as to the expediency of the sacrifice, or the object of it. Indeed, too close a compliance with forms at a period of supposed danger has often justly excited a suspicion of fraud. *Emerigon*, t. 1, p. 605; *Abbott*, 345.¶

If, to avoid the danger of a storm, the master cuts down the masts and sails, and they, falling into the sea, are lost, this damage is to be made good by ship and lading, *pro rata*: otherwise if the case happens by storm or other casualties.

Molloy, 249. ¶ And a loss incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger for the benefit of the whole concern, is the subject of general average. *Birkley v. Presgrave*, 1 East, 220.¶ So also where the vessel was sacrificed, for the safety of the crew and preservation of the cargo. Held, that the insurers of the cargo were liable for a general average. *The Columbian Ins. Co. of Alexandria v. Ashly & Stribling*, 13 Peters's R. 331.g

Also, if through the rifling of the ship, casting overboard, and lightening the ship, any of the remaining goods are spoiled, either with wet or otherwise, those which are preserved must contribute towards the loss of the goods impaired, as well as to those which were entirely lost.

Molloy, 248; *Maggrath v. Church*, 1 Cain. 196;g {1 Cain. 196, *Maggrath and Higgins v. Church*; *Abbott*, p. 3, c. 8, s. 4, p. 278; 1 East, 228.}

[Where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average.

Da Costa v. Newenham, 2 Term Rep. 407.] {If the ship-owner covenants by a charter-party to keep the ship in repair during the whole time, for which he is to receive freight on her return, the expenses of repairs under the circumstances here stated must be borne entirely by him. 8 Term, 509, *Jackson v. Charnock*;} {1 East, 220; *Plummer v. Wildman*, 3 Maul. & S. 482; and see the *Copenhagen*, 1 Rob. A. R. 289; the *Gratitudine*, 2 Rob. A. R. 257. Qu. as to the wages and provisions of the crew during the repairs. *Abbott*, 350, and 8 Term Rep. 209.} ¶ But see *Ross v. The ship Active*, 2 Wash. C. C. R. 226; *contra*, where expenses arise from ordinary decay.g

¶ It is a settled rule of the marine law, that if goods be put into boats or lighters to float the ship when aground, and the boat be lost, it shall be regarded as a jettison, and the remaining property shall contribute to the loss, because the lightening of the ship was a voluntary and deliberate act, and

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done for the benefit of the whole. And if the total and entire loss of the goods in the lighter entitles the owner to contribution, his claim to recompense, for the damage they sustain in that exposed condition, must have an equal title to respect.

Lewis v. Williams, 1 Hall's R. 430.*g*

{So, if she is obliged to bear away to a port to refit, in consequence of springing a leak at sea, the wages and provisions from the time of bearing away to the period of sailing on her original voyage, and the expense of unloading and loading the cargo, and all others occasioned by the necessity, become general average.

2 Cain. 263, *Walden v. Le Roy*; *Ibid.* 274, *Henshaw v. Marine Ins. Co.*

So do the wages and provisions of the crew during the detention of a vessel captured {} and carried in for adjudication, or during her detention by an {} embargo.

{1} 1 Cain. 573, *Leavenworth v. Delafield*. See 4 Dall. 274, *Kingston v. Girard*; {2} 2 Bin. 547, *Ins. Co. of N. America v. Jones and Clark*; 7 East, 34. But 3 Cain. 155, *Penny v. New York Ins. Co.*, and the opinion of the Supreme Court of Pennsylvania, in 4 Dall. 246, *Jones et al. v. Ins. Co. of N. America*, and in 4 Dall. 274, *Kingston v. Girard*, are *contra*.

Also, when the tackle belonging to a ship is sacrificed for an unusual purpose, on an extraordinary occasion of danger, for the benefit of the whole concern, the loss is a general average.

1 East 220, *Birkley v. Presgrave*.

If a ship, in order to escape from a privateer by which she has been captured, carry an unusual press of sail, and succeed in getting away, but sustain damage in so doing, this is not a general average. It is only a common sea risk, not a loss in consequence of an extraordinary sacrifice or expense incurred for the preservation of the ship and cargo.

5 Bos. & Pull. 378, *Covington v. Roberts*.*

||The rule as to average is not confined to goods, but extends to the ship and furniture. Where the master of a French vessel being pursued by privateers, by way of stratagem, at night hoisted his boat, with a mast and sail and a lantern at the masthead, into the sea, and then changed his course and escaped, the value of the boat abandoned was made good by general contribution. And where stores were thrown overboard during a storm, the shippers were held liable to contribution.

Emerigon, tom. 1, p. 622; *Price v. Noble*, 4 Taunt. 123; the necessity of the jettison was proved by the mate.

And if the master, from necessity, cut his cable from the anchor to use it as a hawser; or if he cut away and abandon his masts, sails, or cables, to lighten and preserve the ship, they must be made good by contribution.

Abbott, 349, and authorities there cited.

¶ And the freight of a vessel totally lost, by being run on shore for her preservation and that of the crew and cargo, ought to be allowed to the owner of the vessel as the subject of general average, the cargo of the vessel having been saved by the stranding.

The *Columbian Ins. Co. of Alexandria v. Ashby et al.*, 13 Peters's R. 331; but see *Bradhurst v. Columbian Ins. Co.*, 9 Johns. R. 9.*g*

But it is otherwise as to a mainmast broken in a heavy gale by carrying an unusual press of sail, in order to escape an enemy to whom the ship had

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struck; and as to masts and sails broken by carrying press of sail to avoid being driven on shore and stranded.

Covington v. Roberts, 2 New Rep. 378.

And the expenses of a ship (wages and provisions) in a port, in which she has taken refuge to repair the damage of a storm, must fall on the ship alone.

Power v. Whitmore, 4 Maul. & S. 141; Ibid., and see 3 Maul. & S. 489. β Wages and provisions during the detention of a vessel captured and carried in for adjudication are subjects of general average. Leavenworth v. Delafield, 1 Cain. R. 573; so where the vessel puts into port to refit. Walden v. Le Roy, 2 Cain. R. 263; Henshaw v. Marine Ins. Co., 2 Cain. R. 274; but see Spafford v. Dodge, 14 Mass. 66. γ

And it would rather seem that such is the case as to the wages and provisions of the crew during a detention by embargo of a foreign power, for this case does not appear within the principle of the Rhodian law, because the delay is not for the general benefit, though on this point writers have differed.

Abbott, 351, and the authorities there cited, and 2 Term Rep. 407.

Whether the additional expense of wages and maintenance of the crew, incurred while the ship is waiting in port for convoy, is a subject of average contribution, has been agitated in three cases stated by Bynkershoek. (a) Where the delay of convoy is accidental, and the ship merely remains in port to avoid the ordinary dangers of a state of warfare, that learned writer, and the learned author of the treatise on shipping, consider the claim of contribution contrary to legal principles: an opinion supported by the judgment of the Dutch senate in last appeal in one of the cases stated by Bynkershoek, a member of the court; but where the master sailing with convoy was driven by an attack of privateers, who had captured other vessels in company, to put into Lisbon, where he waited six months before he could procure convoy for Cadiz, his port of destination, the four courts of Holland successively decreed (b) in favour of the claim; a decision approved by both Bynkershoek and Lord Tenterden, since the expense incurred by this imminent peril was analogous to cases of jettison, and fell within the principle of the Rhodian law.

(a) *Questiones Juris Privati*, lib. 4, c. 25; Abbott, 352. (b) For the sake of those who complain of delay in the administration of justice in England, it may be proper to mention, that in one of these foreign cases nearly seven years elapsed between the first and last sentence; in another, a period of nearly ten years; and in the third of almost sixteen years.

In England it has been decided, that neither the damage to the ship, nor the ammunition expended, nor the expense of healing sailors wounded in an action with the enemy, is an item of general average. The latter item, however, is made so by the French *Code de Commerce*.

Taylor v. Curtis, 2 Marsh. R. 309; 6 Taunt. 608; Code de Comm. art. 400, No. 6.

β A seaman, whose feet were frozen in the course of the ship's voyage, and who was severely injured while in this service, is entitled to be cured at the expense of the ship; but the expenses of the same are not to be deemed a general average on all who are concerned in the voyage.

1 Sumner's R. 203. γ

A loss by general average is to be calculated between the owner of the ship and the owner of the goods, according to the law of the port of discharge.

Simonds v. Loder, 2 Barn. & C. 805. $\parallel$ β But where the voyage is broken up, and the vessel returns home, the value of the goods at the port of departure is to be taken as the basis in computing the average. Tudor v. Maccomber, 14 Pick. R. 34. γ

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The goods saved and lost are to be estimated according as the goods saved were sold for, freight and other necessary charges being first deducted, and in such proportion the goods saved are to contribute.

Molloy, 250, 251. {As to the rule of estimating the value of ship, freight, and cargo in a general average, see 1 Cain. 196, Maggrath and Higgins v. Church; Ibid. 573, Leavenworth v. Delafield; 2 Johns. Rep. 98, Bell v. Smith.}

[This rule is agreeable to the marine laws of Wisbuy, which declare, that the goods thrown overboard shall be brought into a gross average, and shall be rated at the same price for which other merchandise of the same sort, preserved from the sea or enemy, was sold. This custom mentioned by Molloy was certainly new in England at the time he wrote; for it appears by Malyne, that in 1622, the distinction was observed of estimating the goods at prime cost, if the jettison happened before half the voyage was performed; and if after, at the price the rest of the goods sold for at the place of discharge. However, the authority of Molloy is confirmed by Magens, who says, that the prevailing mode of settling averages now adopted in England is conformable to that rule, which has abolished the distinction.

Leg. Wish. Art. Maly. Lex Merc. 1st part, c. 26. [As to the mode of contribution, see Lord Tenterden's treatise on the Law of Merchant Ships, p. 357, 5th edit., where the subject is discussed with great learning and perspicuity.]

§ Where a vessel, by the perils of the sea, becomes so much injured as to render it necessary to sell her in a foreign port, the amount of her value, on which the general average is to be calculated, is the amount she actually and *bond fide* sold for, and not the four-fifths of her original value, as in case of capture.

Bell v. Smith, 2 Johns. R. 98.

[In the case of freight it has been held, that it should contribute in respect of a loss occurring on an outward voyage, in a case where a ship was chartered out and home, and the freight was payable according to the quantity of the homeward cargo, and upon the ship's safe arrival.

Williams v. London Insurance Company, Maul. & S. 318; and see Abbott on Shipping, 357.] § The contributory value of freight to a general average is ascertained by a deduction of one-third of the gross freight. Humphry v. Union Ins. Co., 3 Mason's R. 499. But see Leavenworth v. Delafield, 1 Cain. R. 573; Maggrath v. Church, 1 Cain. R. 196.

In England, money and jewels fall into the general average at their full price.

Molloy, tit. *Average*, § 4; 1 Mag. 62; Peters v. Milligan, Sitings at Guildhall, 1787, *coram* Buller, J.

A special action on the case was brought, by the owners of a packet hired by government, against defendants, who were the shippers of bullion from the West Indies to this country, for their proportion of general average arising from a loss by cutting away a mast. A bill of lading was given by the captain at the time he received the bullion. It appeared that merchant ships take less for the conveyance of this article than packets, and these than men-of-war. Packets are allowed by government to receive bullion on board, but captains of men-of-war are prohibited. Packets, however, are considered as king's ships; they are under martial law. It appeared, also, that bullion on board merchant ships always contributes to general average. But no particular instances were in proof of such an accident having happened to a packet with bullion on board, on which the general question

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could arise. But several witnesses declared that they never heard of such demand, and they were likely to have known if it ever had been made.—Bearcroft, for plaintiff, in his reply contended, that this being a new question in a court, it was as much in his favour as against him; for perhaps the demand was never before resisted. Wherever a bill of lading is given, it must be for *cargo*, and cargo is always subject to general average. This must be considered as cargo, and though packets are not allowed to carry cargo in general, yet *quoad* bullion they are. Buller, J.—There is a point arising in this cause, and it is the only one which I can leave to the jury, which is new in a court of justice; therefore it is necessary to state it precisely: the only question then is, Whether any usage in the particular case of packets has made an exception out of the general law with regard to general average? for as to the general law there can be no doubt but that bullion is subject to average like any other cargo paying freight. Before I come to the evidence on this subject, I shall lay two circumstances out of the case. 1st, That though a captain of a man-of-war takes bullion on board, yet he does not receive any freight for it as such, and if he does receive a reward for doing so, it is against positive orders. 2d, The difference of the premiums of insurance between packets and merchantmen with bullion on board, because the motive of the underwriter, in requiring less in the one than in the other case, is, because the former is more secure and better manned than the latter. There can be no doubt but that specie is liable to general average. The law upon this subject has been diligently and ably collected by a gentleman who has lately written on the subject of insurance. Every thing which pays freight must be liable to general average. A packet does carry bullion for freight; the captain gives bills of lading; government receives one-third of the freight; the owner another third, and the captain the third share. The cargo of every vessel carrying for freight must equally be liable to general average, whether employed by government or a subject: there can be no difference. Then the question arises, whether there is any usage in this case to vary the general law. This is the material consideration. It has been said by the witnesses, that they never heard of any instance similar to the present, in which such a demand has been made. Whether negative usage ought to weigh or not, depends very much upon the subject to which it is applied. In cases of this sort, where accidents must frequently have happened, negative usage of non-claim is very strong. Captain Bull, of one of the packets, has said, that very many instances have happened of packets cutting away their masts. Now it must frequently have happened that bullion was on board in such cases. There are now thirty packets employed every year by government, and many have been so at least from the time of Queen Anne, but I cannot now say at what time they were set up. Captain Braithwayte says, that they have larger freight for carrying bullion in the packets from Lisbon than the merchantmen have, because the packets are a safer mode of conveyance; but the reason given by Captain Bull for the difference is, because there is no general average allowed in that case. Then Mr. Etherage, who is clerk of the bullion office in the Bank, says, that he never knew of a demand of this sort in the case of a packet, and he thinks he must have known it if there had; but he has always known it done in the case of merchantmen. Verdict for defendant by a special jury.

Peters v. Milligan and others, at Guildhall, *coram* Buller, J., Dec. 19th, 1787, Mr. now Mr. Justice Park.]

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If a master of a ship lets out his ship to freight, and then receives his complement, and afterwards takes in goods without leave of the freighters, and a storm arises at sea, and part of the freighters' goods are cast overboard, the remaining goods are not subject to the average, but the master must make good the loss out of his own purse.

Molloy, 250.

¶ And in accordance with the French ordinance, (a) goods stowed upon the deck of the ship are excluded from the benefit of general average, for in most cases goods so stowed obstruct the management of the vessel.

(a) Liv. 3, tit. 8 *du Jet*, art. 13. (b) Myer v. Vander Deyl, Guildhall Sittings, before Lord Ellenborough, C. J., Dec. 1803; Backhouse v. Ripley, cited in Abbott on Shipping, 355, 5th edit. ¶ Lenox v. United Ins. Co., 3 Johns. C. 178; Smith v. Wright, 1 Cain. R. 43. But where a custom was found for ships engaged in the timber trade to carry timber on deck, held, that such having been thrown overboard for the preservation of the ship and cargo, the owner was entitled to contribution against the ship-owner. Gould v. Oliver, 4 Bing. N. S. (C. P.) 134. g

¶ In adjusting a contribution between the insurers of a stranded ship, who had succeeded in getting her off, and the owners of cargo, all of the cargo that was on board at the time the efforts of the underwriters commenced shall contribute; but such part of the cargo as was previously saved by the owners is exempt from contribution.

Bedford Commercial Ins. Co. v. Parker, 2 Pick. R. 1. g

Also, average is not due unless the goods are lost in such a manner that thereby the residue in the ship are saved; as, if goods are thrown overboard to lighten the ship, or, by composition, part is given to a pirate to save the rest; but, if a pirate takes part by violence, average shall not be paid for them.

Moor, 297. ¶ And a party may by his agreement forfeit all right to call for contribution; see Jackson v. Charnock, 8 Term Rep. 509. ¶

So where A, being one of the owners of a ship, loaded on board her 210 tons of oil, and B loaded on board her 80 bales of silk upon a freight, by contract, both to be delivered at London; the ship was pursued by enemies and forced into an harbour, &c., and the master ordered the silk on shore, being the most valuable commodity, though they lay under the oils, and took up a great deal of time to get at them; the ship and oils were afterwards taken, and the owner of the oils brought his bill in equity to have contribution from the owner of the silk; in this case, as the loss of the oils did not save the silks, nor the saving the silks lose the oils, the bill was dismissed.

Show. Par. Cases, 18, 19, and affirmed in parliament.

¶ The schooner Julia on her voyage from France to Philadelphia, being chased by a British frigate, and her capture being deemed inevitable by the captain, he, by the advice of the officers and crew, ran her on shore at Long-beach, New Jersey, and before the enemy could board her, a large part of the cargo was saved, and the vessel was burned. The master claimed to retain for freight, salvage, and general average. The court said, the Rhodian law *de jactu* is the parent of maritime contributions. The principle to be deduced from the Rhodian law, and the maritime law of nations, is, that if the cargo or ship, or any part of either, be voluntarily sacrificed or exposed to danger, for the common safety, the part saved shall contribute to repair the loss sustained; provided the object for which the sacrifice was made be obtained.

Caze et al. v. Reilly, 3 Wash. C. C. R. 298. g

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||And where a ship, being unable to escape from a privateer, resisted the attack, beat off the privateer, reached her port, and delivered her cargo in safety, the Court of Common Pleas decided that the expense of repairing the ship, of curing the wounds of the sailors, and the expenditure of ammunition, were not the subject of general average; on the ground, that though the measure of resisting the privateer was for the general benefit, it was still a part of the adventure, and that no particular part of the property was voluntarily sacrificed for the protection of the rest.

Taylor v. Curtis, 6 Taunt. 608; S. C. 2 Marsh, 309.||

If a ship happens to be taken, and the master, to redeem the ship and lading out of the enemy's or pirate's hands, promises a certain sum of money, for performance whereof he himself becomes a pledge or captive in the custody of the captor; in this case he is to be redeemed at the costs and charges of the ship and lading, and all are to be contributory for his (a) ransom according to each man's interest.

Molloy, 249; Hard. 183. (a) And as he may ransom the ship and goods, so may he retain the goods for his satisfaction, in the same manner as he may detain the goods for freight: but if he once suffers them out of his possession, he cannot afterwards retake them. 6 Mod. 19, 13. ||Even the mariners contribute in respect of their wages for the ransom of the ship; but it is the only instance in which they are so called upon. Abbott on Shipping, 357.||

So, where a pirate takes part of the goods to spare the rest, contribution must be paid; but if a pirate takes by violence part of the goods, the rest are not subject to average, unless the merchant hath made an express agreement to pay it after the ship is robbed.

Moor, 297; Molloy, 249.

||But ransom in the case of capture by an enemy can hardly become the subject of general average in this country, for by the 22 G. 3, c. 25, the ransom of any ship, or merchandise on board the same, belonging to any subject of this country, and taken by "the subjects of any state at war with his majesty, or by any persons committing hostilities against his majesty's subjects," was absolutely prohibited; and by a statute made at the commencement of the late war (b) such ransom was prohibited, "unless in the case of extreme necessity, to be allowed by the Court of Admiralty;" and all contracts for ransom contrary to those statutes are made void, and the person entering into such contract is subjected to a penalty of five hundred pounds.(c)

In the case of *The Friends*, Ball, 4 Rob. A. R. 143, Sir William Scott considered the payment of salvage upon a recapture as analogous to the payment of ransom. (b) 43 G. 3, c. 160, § 34, 35, 36; 45 G. 3, c. 72, § 16, 17, 18. (c) In consequence of this illegality, if the master ransom his ship, and bring her to England, the owner may take her from him without paying the price. *Parsons v. Scott*, 2 Taunt. 363. And if the master, to enable himself to pay the ransom, borrow money of a person acting with him in the transaction, he cannot be compelled to repay it. *Webb v. Brooke*, 3 Taunt. 6.]

If A and several others take their passage in a ferry-boat, and being upon the water, a tempest arises, so that they are in danger of being drowned; upon which, to preserve their lives, several of the goods are cast overboard, among which a pack of goods of A's of great value is thrown over; in this case there shall be no average, but the ferryman must answer for the goods, because, for his hire, he runs the venture of the voyage.

Allen, 93; 2 Buls. 280; 12 Co. 62.

(G) Of Hypothecation.

{An action of *assumpsit* will lie for the owner of the property sacrificed, to recover a proportion of the loss from the party liable to contribute.

1 East, 220, *Birkley v. Presgrave*; 2 Cain. 263, *Walden v. Le Roy*.}

¶In case of dispute, the average contribution is to be recovered, either by a suit in equity,^(a) or by an action at law,^(b) instituted by each individual entitled to recover, against each party that ought to pay, for the amount of his share. But a court of equity will not at the instance of the sufferer restrain the master from parting with the goods of the other merchants, if he thinks fit to do so;^(c) and in case of a general ship, where there are many consignees, it is usual for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average when the same shall be adjusted.

(a) *Shepherd v. Wright*, Show. P. C. 18. (b) *Marsham v. Dutrey*, Abbott, 362; *Birkley v. Presgrave*, 1 East, 220; *Dobson v. Willson*, 3 Camp. 480. (c) *Hallett v. Bousfield*, 18 Ves. 187.¶

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¶See (K) Of *Bottomry and Respondentia*.¶

If a ship be at sea, and spring a leak, or be otherwise in danger of being lost, or the voyage be defeated for want of provisions or other necessaries; in these cases of extremity, the master may pledge or hypothecate the ship and goods, or^(d) either of them, for such necessaries as are wanting, which power is implicitly given him in^(e) constituting him master, and which he may exercise, rather than that the ship should be lost, or the voyage defeated.

Roll. Abr. 53; Hob. 11; Moor, 918. That it is so by the laws of Oleron, of which our law takes notice; Molloy, 213. (d) The master may hypothecate either ship or goods, for the master is intrusted with both, and represents the traders as well as owners of the ship; Salk. 34, pl. 7; 2 Ld. Raym. 805. {This subject was fully considered by Sir William Scott in the case of *The Gratitude*, 3 Rob. Adm. Rep. (Am. ed.) 196, and the power of the master, in a case of great necessity, to hypothecate the whole of his cargo on freight, or to sell a part of it, in a foreign port, for the necessary repairs of the ship, was recognised by him. See also 1 Pet. 37.} ¶*The Gratitude*, Mazzola, 3 Rob. A. R. 240; Abbott on Shipping, p. 129.¶ βBy the general maritime laws, every contract of the master for repairs imports an hypothecation. *The Jerusalem*, 2 Gallis. R. 349.γ (e) That he who is deputed master may do the same. Noy, 95. βAn hypothecation of a ship by the master is invalid, unless it is shown by the creditor that the advances were necessary to effectuate the objects of the voyage, or the safety of the ship; and that the supplies thus necessary could not be procured upon the owner's credit, or with his funds at the place. *The Aurora*, 1 Wheat. 96; *Murray v. Lazarus*, Paine's R. 572; *The ship Lavinia v. Barclay*, 1 Wash. C. C. R. 49; *Phillips v. Sedley*, 1 Wash. C. C. R. 226; *Ross v. Ship Active*, 2 Ibid. 226; *Selden v. Hendrickson et al.*, 1 Brockenb. R. 396; and in the District Court of Pennsylvania, it was held that to make an hypothecation by the master a valid contract, it is essential, 1. That it should be absolutely necessary for the safety of the ship, and to enable her to proceed on her voyage, and not for any other debt or demand, either pre-existent or co-existent, for other purposes or on other accounts, or even for similar supplies on other voyages. 2. It must be made in a strange port, and not in the port where the owners reside, and its reasonableness and necessity should be shown. 3. It must be where none of the owners are present, and where the master has no goods, or not a sufficiency, either belonging to his owners or himself; for he may pledge the goods and freight, as well as the ship, or he may sell a part of the cargo to repair the ship. 4. It is essential that no other means of procuring funds at the place required, should exist. Of course, if the owners have agents or consignees, who have either funds or property to furnish, or are bound to afford means on the personal credit of the owners, this power in the captain is excluded. 5. The sum loaned must be at risk, and there must not be a personal responsibility; that is, the money must be advanced on the faith of the ship, and at the sole risk of her loss or safety. *Kucher et al. v. Conyngham*, 2 Adm. Decis. 295.γ

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{To authorize the master to hypothecate, it is requisite, 1. That the hypothecation be absolutely necessary for the safety of the ship, and to enable her to proceed on her voyage, and not for any other debt or demand, either precedent or co-existing, for other purposes or on other accounts, or even for similar supplies on other voyages. 2. That it be made in a {¹} strange port, and not in the port where the owners reside; and evidence of its reasonableness and necessity should be obtained and produced. 3. That it also be made where none of the owners is present, and where the master has no goods (or if any, insufficient) belonging either to his owners or {²} himself. 4. That no other means of procuring funds {³} exist at the place where they are required, of course, if the owners have agents or consignees who have either funds or property to furnish, or are bound to afford means on the personal credit of the owners, this power in the captain is excluded. 5. The sum loaned must be at risk, and there must not be a personal responsibility; that is, the money must be advanced originally on the faith of the ship, and at the sole risk of her loss or safety.

2 Pet. 295, *Rucher & Co. v. Conyngham*; *Hopkinson's Rep.* 5; *Liebart et al. v. Ship Emperor*, *Ibid.* 23; *Forbes v. Brig Hannah*, *Ibid.* 35; *De Canizares v. Brigantine Santissima Trinidad*. {¹} 4 Rob. Adm. Rep. 1, *The Barbara*; *Hopkinson's Rep.* 17, *Tumbull & others v. Ship Enterprise*. {²} 2 Dall. 194, *Cupisino v. Perez*. {³} In case of necessity, the master may *bona fide* hypothecate the ship at the port of destination, as well as at any other foreign port. 3 Johns. Rep. 352, *Reade v. Commercial Ins. Co.*

The master cannot hypothecate the ship or goods for any debt of his own, nor in any case but for the preservation of the ship and completing of the voyage.

Molloy, 213; [Abbott on Shipping, p. 127, 5th ed.]

Also, the master cannot (a) sell the ship and broken tackle, though there is no probability of its being saved, partly in respect of the tempest, and partly in respect of the barbarity of the inhabitants, who took away every thing that was cast on the shore.

Sid. 453, *per Hale*. (a) But if he cannot hypothecate, he may sell so much of the lading as is necessary, &c. Molloy, 214.

If the vessel happens to be wrecked or cast away, and the mariners, by their great pains and care, recover some of the ruins and lading, the master in that case may pledge the same, and distribute the money among the mariners, or so much as shall be necessary to the defraying of their expenses to their own country: but if the mariners no way contributed to the salvage, then their reward is sunk and lost with the vessel; and if there be any considerable part of the lading preserved, he ought not to dismiss his mariners till advice from the laders or freighters.

Molloy, 214. [And in the case of capture and recapture the master may hypothecate the ship, for the purpose of paying the salvage to the recaptors. *Parmeter v. Todhunter*, 1 Camp. 541.] 2 The master of an American vessel in an enemy's country, may hypothecate the vessel for money advanced to return to the United States as a cartel, though the original voyage was broken up by the capture, and the compulsory sale of the cargo. *Crawford v. The William Penn*, 3 Wash. C. C. R. 484.]

But although hypothecation of ships be absolutely necessary for navigation, without which masters could not get credit abroad, yet a master cannot make the owner (b) personally liable by any contract of his; but (c) the ship and cargo shall be liable where he hypothecates for necessaries, although such necessaries were not actually employed or laid out in the service of the

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ship or voyage, and the owners and freighters must take their remedy against the master.

(b) 6 Mod. 79; 2 Sid. 161; Salk. 35, pl. 9, *contra*. [However, what is said by Lord Hardwicke in the case of *Buxton v. Ince*, 1 Ves. 156; and the decision of the master of the *Rolls* in *Samsun v. Braginton*, 1 Ves. 443, support the doctrine in the text.] {The cases referred to by Mr. Gwyllim support the principle that the master *may* make his owners personally responsible for articles necessarily provided for the use of the ship abroad; which is also established by the following cases: 1 Bro. P. C. 284, (vol. 5, p. 325, in 2d ed.) *Cary v. White*; 15 Vin. 348, case 4, S. C.; 2 Eq. Abr. 722, case 1, S. C.; 2 Cain. 77, *Milward v. Hallet*; 1 Johns. Rep. 106, *United Ins. Co. v. Scott & Seaman*; 4 Dall. 225, *Wainright v. Crawford*.} (c) Noy. 25; {*Hopkinson's Rep.* 49, 50.}

The master can only hypothecate where the calamity of want of necessaries happened after the ship had put to sea; and therefore the Admiralty Court is allowed to have jurisdiction herein, so far as to subject the ship, but cannot proceed against the person otherwise than as it is necessary to make him party towards the condemnation of the ship.

Molloy, 214; 6 Mod. 70; [2 P. Wms. 367; 2 Str. 695; 1 Atk. 234;] and *vide* 2 Vern. 643.

And therefore where A contracted with B for a cable, which he delivered at Ratcliff-upon-Thames, and B sued in the Admiralty, a prohibition was granted; though it was insisted, that the want of the cable was occasioned by the stress of the weather and sea; for here the contract was at land, and a remedy for the breach at common law; but had the hypothecation been at Rotterdam, or any other foreign port, the remedy had been proper in the Admiralty Court. [For that court has cognisance of an hypothecation bond given in the course of a voyage, though it be executed upon land, and under seal.]

Salk. 34, pl. 7; 3 Mod. 244; 6 Mod. 12, 25, 79; [*Menetone v. Gibbons*, 3 Term Rep. 267.]

{The master himself has no lien on the ship for money expended or debts incurred by him, for repairs done to her on the voyage.

9 East, 426, *Hussey v. Christie*. See 1 Pet. 226, 227, *Gardner v. The New Jersey*.}

||It is obvious that a loan of money upon bottomry, while it relieves the owner from many of the perils of a maritime adventure, deprives him also of a great part of the profits of a successful voyage; and therefore, in the place of the owners' residence where they may exercise their own judgment upon the propriety of borrowing money in this manner, the master of the ship is by the maritime law of all states precluded from doing it, so as to bind the interest of his owners without their consent. The meaning of the words "place of residence" (*la demeure des propriétaires*) has given occasion to some questions in France. With us the whole of England is considered for this purpose as the residence (*a*) of an Englishman, at least before the commencement of the voyage.

Abbott, 123, and authorities there cited. (a) Ireland has been held to be a foreign country in the case of an English ship, hypothecated by the master there in the course of a voyage; see *Monetone v. Gibbons*, *supr.*; but it may be doubted whether the incorporation of Ireland with this country, by the Act of Union, may not have the effect of altering the rule. See the judgment in the *Rhadamanthe*, Major, 1 Dodson, A. R. 201; and Abbott on Shipping, 123, 5th ed.; and the *Barbara*, 4 Rob. A. R. 1. Lord Stowell, under the peculiar circumstances of the country, held a bond given by the master of a Spanish ship, bound from Alicante to London, at Corunna, valid. *La Ysa-bel*, 1 Dodson, 273. β To constitute a valid maritime hypothecation by the master, there must be a case of plain necessity, and it must be given in a place where the owner has no personal credit, nor any goods of his own, nor of the master. *Forbes v. The*

(H) Of Charter-parties.

Hannah, Hopkinson's Adm. Cases, 176; *Onizares v. The Santissima Trinidad*, Hop. Adm. Cases, 185; and it must be given by the master appointed by the owners, or his legal successor, and not by one appointed by the obligee who had chartered the ship from the former master. *Walden v. Chamberlain*, 3 W. C. C. R. 290.*g*

There is no settled form of contract in use on these occasions; sometimes a bond, at other times a bill of sale, and other forms are used.

2 Ld. Raym. 892; 3 Term Rep. 267; Abbott, Appendix.

But bills of exchange drawn by the master on the owner as security for money advanced to the master, though accompanied with a verbal engagement that the ship shall be liable, cannot be considered as an instrument of hypothecation.

3 Ves. & B. 135; 19 Ves. 474; 2 Rose Ca. 194, 229.

The last hypothecation bond in point of date is entitled to priority of payment, on the ground that the last loan furnished the means of preserving the ship, and that without it the former lenders would entirely have lost their security.

Abbott on Shipping, 128, (5th ed.); Bynk. Quest. Jur. Pub. lib. 1, c. 19.]]

(H) Of Charter-parties.(a)

A CHARTER-PARTY is an agreement by indenture, whereby the owners, master, and freighters of a ship covenant with each other, that such a ship shall be fit and ready to sail, take in such and such lading, carry and transport the same to such place or places, in consideration whereof the freighters or merchants are to pay so much, &c.; and such charter-party, being only a covenant or agreement, shall be construed according to the intention of the parties, and the usual customs of merchants.(b)

[(a) See this subject fully and learnedly discussed in Abbott on Shipping, part iii. chap. 1, tit. "Of the Contract of Affreightment by Charter-party."] (b) Molloy, 237, &c.; 2 Vent. 196; Style, 133; 2 Show. 384; Palm. 399; 2 Roll. Abr. 248, pl. 10; Poph. 161. ¶ But though the terms of a charter-party may be explained by usage, they cannot be altered, nor can any terms be introduced so as to vary the nature of the original contract. *Gibbon v. Young*, 2 B. Moo. 224; *Anderson v. Pitcher*, 2 Bos. & Pull. 164. ¶ When the owners of a vessel have no agent in a foreign port, the master of the vessel has power to make a charter-party. *Huny v. The Assignees of Huny*, 2 Wash. C. C. R. 145. Parties are not bound to any fixed and precise stipulations to be embraced in a charter-party. They can insert any covenant they please to answer their ends, and effect the object in view. *Ruggles v. Buckner*, 1 Paine's R. 358.*g*

An indenture of charter-party was made between Scudamore and others, owners of the good ship called B, whereof Robert Pitman was master of the one part, and Vandestene of the other part; in which indenture the plaintiff covenanted with the said Vandestene and Robert Pitman; and also Vandestene covenanted with the plaintiff and Robert Pitman, and bound themselves to the plaintiff and Robert Pitman for the performance of covenants in 600*l.*; and the conclusion of the said indenture was, *In witness whereof the parties aforesaid to these present indentures have put their seals*; and the said Robert Pitman to the said indenture put his hand and seal; and delivered the same: the defendant, in bar of the said action, pleaded the release of Pitman, &c., whereupon the plaintiff demurred; and it was adjudged, that the release of Pitman did not bar the plaintiff, because he was no (c) party to the indenture; and the diversity was taken and agreed between an indenture reciprocal between parties on one side, and parties on the other side, as this was; for there no bond, covenant, or grant can be made to, or with any that is not party to the deed: but where the deed in-

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dented is not reciprocal, but is without a *between*, &c., as *omnibus Christi fidelibus*, &c., there a bond, covenant, or grant may be made to divers several persons.

Abbott on Shipping, 163; 2 Inst. 673; 2 Lev. 74; S. C. cited, and admitted to be law. ¶ And see Salter v. Kidgley, Carthew, p. 76; Lord Ellenborough's judgment in Storer v. Gordon, 3 Maul. & S. 322, and Barclay v. Hardy, East. T. 7 G. 4. ¶ (c) Lev. 235.

So, where an action was brought on a charter-party, which was in this manner: *This indented charter-party witnesseth, that Binley, master, and part owner of the ship, with consent of Cooker, the other part-owner, hath let (a) the ship to Child for such a voyage, and Child covenants with Binley, necnon with Cooker to pay 300l.* Cooker brings the action, and the defendant Child pleads, that only he and Binley were the parties to and sealed the indenture; whereupon the plaintiff demurred; *et per totam curiam*, though the deed be indented, yet, not being *inter partes*, there may be a covenant with a stranger, as if it were a deed poll, or in the first person, *Know ye that I*, &c.: otherwise, where the deed is between parties; then no one, that is a stranger, can take advantage thereof by way of action.

2 Lev. 74; 3 Keb. 94, 115; Cooker v. Child, 3 Lev. 139; Gilby v. Copley, S. C. cited. ¶ (a) Unless, as in this case, the charter-party contains express words of demise, the freighter does not thereby become the owner for the voyage; but the possession continues in the owner, who has consequently a lien on the cargo for his freight. See Saville v. Campion, 2 Barn. & A. 503; and see Christie v. Lewis, 2 Bro. & B. 410; S. C. 5 Moore, 211; Hutton v. Bragg, 2 Marsh. 339; Trinity House v. Clark, 4 Maul. & S. 288; Burley v. Gladstone, 3 Maul. & S. 205; 2 Meriv. 401. See Colvin v. Newberry, 8 Barn. & C. 166; ¶ BClarkson v. Edes, 4 Cow. R. 470. g

¶ But whether a charter-party be under seal or not, an action at law grounded upon it must be brought in the name of the party to it, and not in the name of another to whom he may have assigned his interest. (b)

(b) Splidt v. Bowles, 10 East, 279; Morrison v. Parsons, 2 Taunt. 407; Moores v. Hopper, 2 New Rep. 411.

If a charter-party under seal is made for the delivery of goods at a stipulated freight, and the goods are carried and delivered under it, the action for freight must be on the charter-party, although the goods are delivered to the firm who are consignees in the bill of lading; and the person entering into the charter-party is one partner in such firm.

Shack v. Anthony, 1 Maul. & S. 573; but see Leslie v. Wilson, 3 Bro. & B. 171. ¶

In an action on a charter-party a breach must be assigned, which the party may do in the very words of the agreement; and, if there be any thing to be done by the plaintiff, which in the nature of the thing is *necessary to enable the defendant to perform his part* of the agreement, if the plaintiff hath not done his part, this will excuse the defendant's omission.

Vide tit. *Covenant*, letter (I) and 2 Jon. 216.

¶ An action cannot be maintained to recover freight due under a charter-party, unless performance of the service is averred in the declaration and proved on trial.

Loirent v. Potts, 1 Car. Law Rep. 474. g

[In covenant on a charter-party, whereby it was agreed to employ a ship of which the plaintiff was captor, as soon as sentence of condemnation should have passed, the sentence must be taken to mean a legal sentence, and the party who sues for the freight must aver, that the ship was condemned by a court having competent jurisdiction.

Unwin v. Wolseley, 1 Term Rep. 674.]

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If, in an action of covenant, the plaintiff declares upon a charter-party, by which the plaintiff, being master of a ship, was to pay two parts of the port charges, and the factor of the defendant the other part; and the plaintiff shows, that he sailed from L to C and there paid all the port charges, viz: two parts for himself, and the other part for the defendant; and that the defendant had not repaid him; this breach is well assigned; for when the plaintiff says he paid the third part, it shall not be intended the defendant did, but that the plaintiff was necessitated to pay it, otherwise his ship would be stayed in the port.

2 Jon. 186, *Bellamy v. Russell*.

[If there be a covenant in the charter-party, that no claim shall be admitted or allowance made for short tonnage, unless such short tonnage be found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights to be indifferently chosen by both parties; this is not a condition precedent to the plaintiff's right of recovering for short tonnage, but is a matter of defence to be taken advantage of by the defendant; (a) and, consequently, the not averring performance can be no ground for arresting the judgment.

Hotham v. East India Company, 1 Term Rep. 638.] [(a) But where by the charter-party a ship is described to be of a certain burden, and the freighter covenants to load a full and complete cargo; the loading of goods equal in number of tons to the tonnage described in the charter-party, is not a performance of the covenant; but the freighter is bound to put on board as much goods as the ship is capable of carrying with safety. *Hunter v. Fry*, 2 Barn. & A. 421. And where there is a custom in the country to compress cotton wool by machinery, to improve the stowage, "a full cargo" means a cargo so stowed. *Benson v. Schneider*, 7 Taunt. 272.]

||So, where a ship was, by charter-party, let to freight at a certain sum per month, to be paid on her final discharge at the end of the voyage, and she was lost in the middle of the voyage, it was held that no action could be maintained for the freight, since the arrival and discharge were conditions precedent to the right to freight; and if the covenant be to pay for "goods delivered at A," freight cannot be recovered on *this covenant*, if the vessel be wrecked at B, before her arrival at A, notwithstanding the defendant accepted his goods at B. (b) But if the plaintiff declare on the *assumpsit* implied from the receipt of the goods, it seems he may recover.

Smith v. Wilson, 8 East, 437; and see *Gibbon v. Mendez*, 2 Barn. & A. 17; *Cook v. Jennings*, 7 Term Rep. 381; *Liddard v. Lopez*, 10 East, 526; *Hunter v. Princep*, 10 East, 376; *Christy v. Row*, 1 Taunt. 300; *Burrill v. Cleeman*, 17 Johns. R. 73; *Penoyer v. Hallett*, 15 Johns. R. 332, and see *Brown v. Delano et al.*, 12 Mass. R. 370. (b) If the covenant in a charter-party by deed be, that the goods shall be delivered at London, and the freighters direct them by parol to be delivered at Liverpool, which is accordingly done, the master cannot recover on the charter-party freight for such delivery, since the contract by deed cannot be altered by parol. *Thomson v. Brown*, 1 B. Moo. 358; and see *Leslie v. De la Torre*, cited *Ibid.* p. 371; *Heard v. Wadham*, 1 East, 619; *Gibbon v. Young*, 8 Taunt. 254. But if the subsequent agreement is not inconsistent with the prior deed, it may be sued on in *assumpsit*. *White v. Parkin*, 12 East, 578; and see *Fletcher v. Gillespie*, 3 Bing. 635.

But where a ship employed by charter-party on both an outward and homeward voyage, at so much per month, was lost in the homeward voyage, she was held to have earned the freight due for the outward voyage.

Mackrell v. Simmond, 2 Chitt. R. 666; *S. C. Abbott on Shipping*, p. 333; and see *Ritchie v. Atkinson*, 10 East, 295; *Coffin v. Storer*, 5 Mass. 252; *Locke v. Swan*, 13 Mass. 76. *g*

g Where a charter-party was entered into, whereby A let a schooner to B

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and C for transporting stone, for the term of six months, the affreighters engaging to pay for the vessel at the rate of \$300 per month, for six months, or in the same proportion for whatever time she might be employed, and at the expiration of four months an end was put to the contract by a stipulation between the owner of the vessel and one of the affreighters; held, that such act of one of the affreighters was obligatory upon both; that a *pro rata* compensation was recoverable by the owner of the vessel, under a special count upon the contract, alleging the employment of the vessel from the time stipulated in the contract until the day when it was by mutual consent dissolved, or that the compensation might be claimed under a general count of *indebitatus assumpsit*.

Wheeler v. Curtis, 11 Wend. 653.g

A covenant by an owner *forthwith* to make the ship tight and strong, and for a twelvemonth's voyage, is not a condition precedent to the recovery of freight after the freighter has actually taken the ship into his service and use her. But, if the neglect *immediately* to repair her had prevented the freighter making *any use* of her, that would have barred the action for freight.

Havelock v. Geddes, 10 East, 555; and see Hall v. Cazenove, 4 East, 477; Puller v. Staniforth, 11 East, 232.

So, a covenant by the master in a charter-party to sail with the *first convoy* was held not a condition precedent, and the master having performed the voyage and delivered the cargo, though not having sailed with the first convoy, was held entitled to freight.

Davidson v. Gwynne, 12 East, 381.

And the same is held as to a covenant to sail with the *first wind*.

Constable v. Cloberie, Palmer, 397.

And so as to a covenant to sail *direct for the port* of destination.

Bornmann v. Tooke, 1 Camp. 376.

And if the owner covenant to take on board and deliver an outward-bound cargo at N, and having so done, to receive a homeward cargo, and the freighter agree to supply a full return cargo at N, and to pay 1750*l.* outward freight, on delivery of the outward cargo; the delivery of the outward cargo is not a condition precedent on the part of the owner to his right to sue the freighter for not providing a homeward cargo—the covenants are independent; but the delivery of the outward cargo is a condition precedent to the payment of the 1750*l.*

Storer v. Gordon, 3 Maul. & S. 308; and see Fothergill v. Walton, 8 Taunt. 576; 2 Moo. 630. See further, as to conditions precedent, 1 Saunders' R. 320 b, c, d, *notis.* *¶* Penoyer v. Hallett, 15 Johns. R. 332; Barker v. Cheriot, 2 Johns. R. 352; Post v. Robertson, 1 Johns. R. 24.g

If the freighter agree to find a full cargo for the ship, provided she be at J before the 25th June, unless the ship arrive before that day, the freighter is discharged from his agreement.

Shadforth v. Higgin, 3 Camp. 383; and see Soames v. Loneragan, 2 Barn. & C. 564; Abbott, p. 195; and Deffell v. Brocklebank, 4 Price, 36.

¶ Where, by the terms of the charter-party, the ship was to proceed to T, and take in a cargo for, &c., the ship to sale from England for T, on or before a stated day; held to be a condition precedent to entitle the plaintiff to recover for refusing to load, &c.

Glaholm v. Hays, 2 Man. & Gr. (C. P.) 257.

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The charterer of a ship, who agrees to send a cargo alongside at a foreign port, is not excused from sending it alongside, although, in consequence of an infectious disorder at the port, all public intercourse is prohibited by law there, and though he cannot communicate without danger of contracting and communicating the disorder.

Barker v. Hodgson, 3 Maul. & S. 267. See *Abbott*, part iii. ch. 11.

Nor is he excused by an embargo in the port, which prevents his loading the ship according to his contract.

Sjoerds v. Luscombe, 16 East, 201.

If the charterer of a ship agree to provide her a cargo at Jamaica, at 10s. 6d. per cwt. freight, and then tender a cargo, insisting on the captain signing bills of lading to deliver at 10s. per cwt., this is no tender at all, and the charterer is liable for dead freight.

Hyde v. Willis, 3 Camp. 202.¶

§ So when the whole of a vessel is chartered to take a cargo, at certain specified rates per ton, square foot, &c., if the shipper does not furnish a full cargo, the owner of the vessel is entitled to freight not only for the cargo actually put on board, but also for what the vessel could have carried, had a full cargo been furnished.

Duffie v. Hayes, 15 Johns. R. 327.¶

If A covenants to pay 3*l.* per ton for goods imported, and for performance thereof binds himself in a penalty, and in an action thereupon the plaintiff assigns for breach the nonpayment for so many tons, and a hogshead, which came to so much; this is naught, (a) for the covenant is only to pay by the ton; though it was said *per cur.* to be otherwise, if the covenant had been to pay, *secundum ratam*, 3*l.* per ton.

Rea v. Burnis, 2 Lev. 124; *Allen*, 9, S. P. (a) If goods are sent abroad generally, the freight must be according to freight for the like accustomed voyage. *Molloy*, 232. — And if a ship be freighted for 200 tons or thereabouts, the addition of *thereabouts* is commonly reduced to be within five tons, more or less, as the moiety of the number *ten*, whereof the whole number is compounded. *Molloy*, 232. ¶ The owner is not bound to deliver the goods of the freighter without being satisfied as to the entire freight, payable according to the rates mentioned in the charter-party. *Tate v. Meek*, 2 B. Moo. 278; S. C. 8 Taunt. 280.¶

(b) If a charter be so worded, that there can be no remedy thereon at law, yet the party having a just demand may be relieved in equity; as, where by the agreement there was no freight to be paid for the outward-bound cargo, and when the ship arrived beyond sea, the factor had no goods at all to load the ship with; the court decreed payment of the freight.

2 Vern. 210, 212. [(b) But Lord Mansfield, speaking of this very instrument, says, "In construing agreements, I know of no difference between a court of equity and a court of law. A court of equity cannot make an agreement for the parties; it can only explain what their true meaning was, and that is also the duty of a court of law." *Doughl.* 277.]

So, where the East India Company took bonds from the mariners and officers of a ship not to demand their wages, unless the ship returned to the port in London; and the ship arrived at a delivering port, and was afterwards taken by the French; it was held by my Lord Chief Justice Holt, in an action tried by him, and likewise in Chancery, that the seamen and officers should have their wages, to the time of the arrival of the ship at the delivering port.

2 Vern. 727.

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§ So, if a neutral vessel be captured on her outward voyage, carrying a hostile cargo, which is condemned, and if by the charter-party, the outward cargo is to be carried free of freight, but the homeward cargo to pay at a certain rate, to be ascertained by the nature of the cargo; the court will decree freight *pro rata itineris* of the outward cargo, to be assessed upon the principle of a *quantum meruit*.

The Soci  , 9 Cranch, 209.

¶ By a charter-party on a voyage from Liverpool to the West Indies, and from thence to London or Liverpool, it was agreed, that a brig "should be made, and during the voyage kept tight, stanch, &c., at the owners' expense, and that the freighter should pay freight at the rate of 200*l.* per month, for any time (beyond six months) that she might be employed; the pay to commence from the day of sailing, until her arrival into dock at the homeward port of discharge." The vessel was obliged to remain twenty-eight days at St. Domingo, for the purpose of repair; the repairs being done at the expense of the owner: it was held by Lord C. J. Abbott, and confirmed by the Court of King's Bench, that during those twenty-eight days the vessel was employed by the freighter, within the terms of this charter-party.

Ripley v. Scaife, 5 Barn. & C. 167; S. C. 7 Dow. & Ry. 818.

If by the terms of the charter-party an abatement in the freight is to be made, in case of the inability of the ship to proceed on the service in which she is employed, an inability arising from the want of hands, though without the master's default, is within the provision.

Beatson v. Schank, 3 East, 233.

The plaintiff, a merchant in London, hired the defendant's ship to freight for a voyage to Bourdeaux, at 3*l.* 10*s.* a ton: it happened that an embargo was laid on all merchant ships for six weeks: the ship afterwards proceeded on her voyage to Bourdeaux; and the defendant not discovering what agreement he had made with the plaintiff in England, the plaintiff's factors and correspondents there agreed to allow the defendant 6*l.* 10*s.* per ton, upon which latter agreement the defendant recovered at law. A bill being exhibited for relief against this second and underhand agreement, obtained, as was alleged, by fraud, was dismissed, for the defendant was at liberty to make a new agreement, by reason that the performance of the first was obstructed by the embargo after laid on all merchant ships.

2 Vern. 242, Draddy v. Deacon. {In Hadley v. Clarke, 8 Term, 266, Lord Kenyon says of this case, "It furnishes us with no principle of decision; the report of it is very unsatisfactory; and no trace of it is to be found in the register's book." And in the same case, the facts were, that the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn, and on the arrival of the vessel at Falmouth in the course of her outward voyage, an embargo was laid on her "until the further order of council," which was not taken off for more than two years; and it was determined that the defendants were answerable then, if they did not perform their contract; because the embargo only suspended, and did not dissolve it. See 3 Bos. & Pul. 291; Touteng v. Hubbard, 3 Cain. 158.}

{A blockade of the port of destination dissolves the charter-party. Should the vessel, therefore, sail for such port, and be turned off by the blockading force, and return home, with the original cargo on board, the freight (which was in this case an entire sum for the whole voyage) is not recoverable. Nor can a *pro rata* freight be recovered, because the right to it results {} from an implied contract, raised by the acceptance of the cargo at an intermediate port, and a supposed benefit received by the owner from a partial

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transportation of his goods. But when they are brought back to the port of lading, no benefit is received by him, nor any act done from which an implied contract to pay any freight can be raised.

2 Johns. Rep. 336, *Scott v. Libby*. {} 2 Burr. 882, *Luke, v. Lyde*; 7 Term. 381; *Cook v. Jennings*; 3 East, 316, *Mulloy v. Backer*; 2 Cain. 13, 21, *Williams v. Smith*; 1 Johns. Rep. 24, *Post v. Robertson*; 2 Johns. Rep. 325; *Robinsons v. Marine Ins. Co.*; 1 Wash. 211, 212, *Hoe & Harrison v. Mason*; 1 Day, 193, *Pinto v. Atwater*.

So where a ship was chartered for a voyage from Liverpool to Halifax, from thence to one or more of the West India islands, and back to Liverpool, at a freight of 210*l.* per month, 500*l.* thereof to be paid on delivery at Halifax, and the remainder on the delivery of the return cargo at Liverpool, and the ship was captured before her arrival at Halifax, and was recaptured and brought back to Plymouth, Sir William Scott considered it the same thing as if she had been brought back to her own port, and was of opinion that no part of the freight was due.

3 Rob. Adm. Rep. (Am. ed.) 149, *The Hiram*.

A vessel was chartered for a voyage from New York to Martinique and back to New York, for the entire sum of \$4,500, which was to be paid in sixty days after the delivery of the return cargo at New York. The vessel delivered the outward cargo at Martinique; and while on her voyage home with a return cargo on board, was captured by a British cruiser and carried into Antigua, where the cargo was libelled in the Admiralty, and the judge ordered it to be retained for further proof, subject to a lien for freight according to the charter-party. The vessel returned to New York without the goods, except a few articles left on board. The goods were appraised by order of the Admiralty, and afterwards, on producing further proof, were ordered to be restored to the claimants; but neither the goods nor the proceeds ever came to the hands of the owners. In an action by the ship-owners for the freight, it was held that as the vessel was captured on her return, and did not deliver her return cargo, no freight was due, though the defendant had the benefit of the outward voyage; because by the agreement the voyage was entire, and the freight depended on the complete performance of it. The master ought to have waited at Antigua for the removal of the detention, especially as he would have been entitled, on an eventual condemnation, to his freight from the captor; as his lien for the freight had been admitted by the court.

2 Johns. Rep. 352, *Barker v. Cheriot*. See 4 Bos. & Pul. 236, *Atty v. Linds*.

Where the goods were carried to the place of destination, and accepted by the consignee, but the government of the country not permitting them to be landed, they were brought back again, it was held that the freight was earned. Obtaining permission to land the cargo is the business of the consignee.

4 Dall. 455, *Morgan v. Ins. Co. of N. America.* }

A master of a ship, without the owner, treated with the plaintiff, a merchant, for the freight of the ship at eighty tons, and accordingly entered into a charter-party with him to sail from London to Falmouth, and thence to Barcelona, without altering the voyage, and there to unlade at a certain rate per ton; and for performance, the master binds the ship, tackle, &c., valued at 300*l.*; the master deviates, and commits barratry, by which the merchant in effect loseth his voyage and goods. The merchant had a sentence against the master and ship in Barcelona, which was confirmed in a higher court in

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Spain; and the owner having brought trover for the ship, the merchant exhibited his bill to be relieved against this action, and likewise another action brought for freight; it was held by my Lord Chancellor, that the charter-party having valued the ship at a certain rate, the owner is not liable further, and the master is liable for deviation and barratry; for should it be otherwise, masters would be owners of all men's ships and estates.

2 Chan. Ca. 238. ¶ But though these are the usual stipulations in a charter-party, other special conditions, equally binding on the master and owner, may be added. See *Beatson v. Schank*, 3 East, 233.]

If a charter-party be made in England, to do certain things in several places on the sea, though no act is to be done in England, but all upon the sea, yet no suit can be in the Admiralty Court for the nonperformance of the agreement, for the contract is the original, without which no cause of suit can be; and this contract is out of their jurisdiction; for where a part is triable by the common law, and part by the admiral law, the common law shall be preferred.

Roll. Abr. 532; Roll. Rep. 486; S. C. 4 Inst. 135, 139, 142; Hob. 212; Moor, 450, like point.

[Freighters of ships under charter-parties with the East India Company are not answerable for *damage* or *loss* occasioned by the act of God. The expression *ship-damage*, (a) in those charter-parties, means damage from negligence, insufficiency, or bad stowage in the ship.

Hotham v. E. I. Company, Dougl. 272;] [¶ *Tod v. The E. I. Company*, Abbott on Shipping, 204. (a) In the printed form of a charter-party, used for the ship *Anna*, dated November, 1809, instead of the words, "ship-damage," the following words are used, viz., "received after shipping the goods." See Abbott on Shipping, p. 204, note (t), where also, at p. 201, *et seq.*, see the clauses usually introduced into the charter-parties of the East India Company.]

{If it be provided in a charter-party that, in case of the *inability* of the ship to proceed on the service, certain persons shall have power to make such an abatement out of the freight as they shall think reasonable; an inability of the ship to proceed to sea for want of hands is within the proviso, although that want was caused by the death of some of the crew by an infectious disease, the desertion of others from fear of the distemper, and the impossibility of procuring others in their room.

3 East, 233, *Beatson v. Schank*.

The owner of the ship is not only bound to see that she is in a suitable condition to transport her cargo in safety at the outset of the voyage, but must keep her in that condition, unless prevented by the perils of the sea or unavoidable accident; and he is answerable to the freighter for damages arising from want of repairs, whether the defect in the ship be known or unknown to him.

Abbott, 178, (146;) 3 Mass. T. Rep. 481, *Putnam v. Wood*.

Where goods are carried to the place of destination, though spoiled so as to be of no value, the owner cannot abandon the goods for the freight, but the full freight may be recovered.

3 Johns. Rep. 321, *Griswold v. New York Ins. Co.*; 1 Johns. Rep. 214, S. P., *per Livingston, J.*

But where 190 hogsheads of sugar had been shipped at Surinam to be delivered at New York, and during the voyage the ship leaked, owing to tempestuous weather, fifty hogsheads of sugar were washed out, so that the casks were empty, and some of them had fallen to pieces; on the arrival

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of the vessel at New York, where 140 hogsheads were received by the consignee, who refused to pay for the residue; it was held that no freight was due for the empty hogsheads, the sugar being considered as lost by the perils of the sea.

2 Johns. Rep. 327, *Frith v. Barker*.)

[[Under the common printed form of their charter-parties, the East India Company may send any chartered ship on a warlike expedition, conjointly with his majesty's government, under command of a king's officer placed on board; and the charter-party is not avoided by alterations being made in her upper works to increase the number of her guns, &c., and though a king's officer assume the command of her, and hoist the king's broad pendant.(a)]

(a) *Dobree v. The E. I. Company*, 13 East, 290.

The words in a charter-party, "it is hereby covenanted and agreed by and between the said parties, that forty days shall be allowed for unloading and loading again," &c., raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading beyond the forty days.

Randall v. Lynch, 12 East, 179. § A covenant in a charter-party to pay for demurrage, applies only to a voluntary detention, and not to a detention by capture. *Douglass v. Moody*, 9 Mass. 548.g

If a ship is detained beyond the days of demurrage allowed by the charter-party, the stipulated demurrage is *prima facie* the rate of compensation for the further time: but it is competent to the owner or freighter to show that this is more or less than a fair compensation.

Moorsom v. Bell, 2 Camp. 616.||

§ A chartered the whole tonnage of his vessel to B, for a certain voyage, and he covenanted by the charter-party to deliver the cargo at the port of destination, the dangers of the seas excepted; and that the return cargo should be delivered to B, at Alexandria. By provisional articles, it was afterwards covenanted between the parties, that the captain should be instructed by his owner to touch at Falmouth, there to lie off and on twenty-four hours, or longer if desired, in day-light, during which time there will come off orders from the consignees; on receiving these orders the captain must proceed to such one of certain designated ports, as the orders should specify. If the vessel be detained at Falmouth over twenty-four hours, demurrage is to be paid for the time, at the rate stipulated in the charter-party. The vessel proceeded to Falmouth road, and no orders being ready, the captain, by the instruction of one of the consignees, brought the vessel into port, where she was seized and detained by the revenue officer. In an action of covenant for demurrage during the period of this detention, it was held: That A remained owner for the voyage, that he was answerable for the misconduct of the captain, and the covenant to lie on and off at Falmouth was his covenant. 2d. The instructions of the consignee not being in conformity with the articles, did not authorize the captain to bring the vessel into Falmouth, and the freighters are not bound to pay demurrage. 3d. The orders of the consignee might excuse A from any action brought by B for loss sustained by him in consequence of the vessel going into Falmouth, which was a breach of the covenant of A; but these orders being beyond the scope of the authority of the consignee, cannot entitle A to an action against B.

Hoe v. Groveman, 1 Cranch, 214; and see *Robertson v. Bethune*, 3 Johns. R. 349.

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Where a steamboat chartered for six months to ply between New York and New Brunswick, was arrested in New Jersey by process of attachment sued out by a creditor of the owner, who, on receiving notice of the seizure of the boat, refused to procure her liberation, by giving bonds or otherwise; it was held, that by such refusal the hirer was discharged from the contract, and from all liability for the hire of the boat for the residue of the term.

The Stamford Steamboat Co. v. Gibbons, 9 Wend. R. 327. But a contract of affreightment is not dissolved by a hostile blockade of the port of departure; the performance of it is merely suspended. Palmer v. Lorillard, 16 Johns. R. 348; Ogden v. Barker, 18 Johns. R. 87, (*contra* 15 Johns. R. 14.) *Aliter*, if the port of delivery is blockaded. Scott v. Libby, 2 Johns. R. 336.*g*

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1. Of Marine Insurances.]

[See Park on Insurance, (7th edit. ;) Marshall, (3d edit.)]

[ASSURANCE or insurance signifies a contract or agreement, whereby one or more persons, called insurers or assurers, oblige themselves to answer for the loss of a ship, house, goods, &c., specified in an instrument subscribed by them, in consideration of a premium of a stipulated sum *per cent.*, paid by the proprietors of the things insured.

2 Saund. 200.

The instrument by which this contract of indemnity is effected is called a policy. It is signed only by the insurer, who, on that account, is denominated an underwriter. Notwithstanding this, there are certain conditions to be performed as well by the person not subscribing, as by the underwriter, else the policy will be void.

Park, 1, 7th ed. ; [Marshall on Insurance, i, 3d edit.]

Of policies there seem to be two sorts, *valued* and *open* policies ; and the only difference between them is, that in the former, goods or property insured are valued at prime cost, at the time of effecting the policy ; in the latter the value is not mentioned : that in the case of an open policy the real value must be proved ; in a valued policy it is agreed, and is just as if the parties had admitted it at the trial.

Lewis v. Rucker, 2 Burr. 1171. *β* Marine Ins. Co. of Alexandria v. Hodgson, 6 Cranch, 206 ; Watson et al. v. The Ins. Co. of North America, 2 Wash. C. C. R. 152. The foundation of an open policy is the real value of the thing insured ; and in estimating the real value of merchandise, the invoice price is a proper criterion : where the real value cannot be proved in any better manner, the prime cost of the articles may furnish the rule. Snell v. The Delaware Ins. Co., 1 Wash. C. C. R. 509. But see Carson et al. v. The Marine Ins. Co., 2 Wash. C. C. R. 468. If a party insures property expected to be on board a ship to a large amount, upon a valued policy, and much less is in fact shipped ; he is entitled to recover, in case of a loss, a proportion *pro rata* only, notwithstanding the valuation. Alsop v. The Commercial Ins. Co., 1 Sumner's R. 451. See Murray v. Columbia Ins. Co., 11 Johns. 302 ; Post et al. v. Phenix Ins. Co., 10 Johns. 72.*g*

Although policies of insurance are not to be ranked with specialty contracts, not being under seal, yet they have always been holden as sacred agreements. The courts, therefore, will very reluctantly admit of any alteration in them. They may indeed be altered by the consent of the parties (*a*) after they are signed ; but the courts will never vary or depart from the written words, but upon the strongest and most satisfactory evidence that the meaning of the parties has been mistaken. (*b*)

Park, 1 ; Skin. 54. (*a*) Bates v. Graham, 2 Salk. 444. (*b*) Henkle v. Royal Ex-

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change Assurance Company, 1 Ves. 317; *Motteux v. Governor and Company of the London Assurance*, 1 Atk. 545; {3 Cran. 419, *Graves v. Barnewall v. Boston Marine Ins. Co.*}

||Alterations, if not material, may, however, be made in a policy after it is underwritten, without the necessity of any assent on the part of the underwriters; as where in a policy on goods, to be thereafter declared by ship or ships, the brokers by mistake declared by a wrong ship, the blunder was allowed to be rectified.(a) So, where in a policy, "at and from Cadix and Seville," the broker added the words, "both or either," their insertion was held not to affect the legal operation of the instrument;(b) and the same principle has been acted upon in several other cases. It follows from what has been said, that since no *material* alteration can be made in the policy after it is signed, unless by the consent of the parties, or the authority of a court of justice, that any *material* alteration of it without the assent of the underwriters will avoid it.(c)

(a) *Robinson v. Touray*, 3 Camp. 158. (b) *Clapham v. Cologan*, 3 Camp. 399; and see *Sanderson v. Symonds*, 1 Brod. & B. 436; S. C. 4 Moore, 42; *Sanderson v. McCullom*, 4 Moore, 5. (c) *Langhorne v. Cologan*, 4 Taunt. 330; *Forshaw v. Chabert*, 3 Brod. & B. 158; S. C. 6 Moo. 369; *Fairlie v. Christie*, 7 Taunt. 412; S. C. 1 Moo. 114; *Campbell v. Christie*, 2 Stark. 64. ||

§ A policy of insurance on a ship "lost or not lost," executed, after the ship is known by all parties to be lost, in pursuance of a previous agreement to insure, is valid.

Mead v. Davison, 4 Nev. & M. 701; 3 Adol. & Ellis, 303; 1 Harr. & Woll. 156.

||PARTNERSHIPS PROHIBITED TO INSURE.||—By the common law and usage of merchants, any person might be an insurer. But the statute of 6 G. 1, c. 18, (by which the crown was authorized to create two distinct corporations for the purpose of insuring, which corporations are since known by the names of the Royal Exchange Assurance Office, and the London Assurance Office,) has somewhat restrained this common law right; for by § 12 of that statute it is enacted, "That from and after the granting or making the said charters or indentures for making the two corporations above mentioned, and passing the same under the great seal, for and during the continuance of the said corporations respectively, or either of them, all other corporations or bodies politic, before this time erected or established, or hereafter to be erected or established, whether such corporations or bodies politic, or any of them, be sole or aggregate, and all such societies and partnerships as now are, or hereafter shall or may be, entered into by any person or persons, for assuring ships or merchandises at sea, or for lending money on bottomry, shall, by force and virtue of this act, be restrained from granting, signing, or underwriting any policy of assurance, or making any contracts for assurance of or upon any ship or ships, goods or merchandises, at sea, or going to sea, and for lending any moneys by way of bottomry, as aforesaid; and if any corporation or body politic, or persons acting in such society or partnership, (other than the two corporations intended to be established by this act, or one of them,) shall presume to grant, sign, or underwrite, after the 24th day of June, 1720, any such policy or policies, or make any such contract or contracts for assurance of or upon any ship or ships, goods or merchandises, at sea, or going to sea, or take or agree to take any premium or other reward for such policy or policies, every such policy or policies of assurance, of or upon any such ship or ships, goods or merchandises, shall be *ipso facto* void; and all and every such sum or sums so signed and underwritten in such policy or policies shall

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be forfeited, and shall and may be recovered, one half to the use of his majesty, the other to that of the informer, by action; and if any corporation or bodies politic, or persons acting in such society or partnership, other than the two corporations intended to be erected by this act, or one of them, shall presume to lend, or agree to lend, or advance, by themselves or any others on their behalf, after the said 24th day of June, 1720, any money by way of bottomry, contrary to this act, the bond or other security for the same shall be *ipso facto* void, and such agreement shall be adjudged to be an usurious contract, and the offenders therein shall suffer as in cases of usury; nevertheless, it is intended and hereby declared, that any private or particular person or persons shall be at liberty to write or underwrite any policies, or engage himself or herself in any assurances of, for, or upon any ship or ships, goods or merchandises, at sea or going to sea, or may lend money by way of bottomry, as fully and beneficially as if this act had never been made, so as the same be not on the account or risk of a corporation or body politic, or upon the account or risk of persons acting in a society or partnership for that purpose as aforesaid."

The projectors of these companies had been very industrious to bespeak the countenance of the House of Commons, for which they had caused two letters to be printed and given to the members. But these and all other solicitations having proved ineffectual, they had recourse to other expedients; and, understanding that the civil list was considerably in arrear, (for which no provision had been or could be conveniently made by the parliament, because the grand committee of supply had been inadvertently dismissed,) they offered to the ministry 600,000*l.* towards the discharge of that debt, in case they might obtain the king's charter, with the parliamentary sanction, for the establishment of these companies. This offer the ministry, who were at a loss for means to pay the civil-list debt, readily embraced; and Mr. Craggs having prepared the leading members of the House of Commons, Mr. Aislabie on the 4th of May, 1720, presented a message from the king, recommending the establishment of these companies; in pursuance of which this act was passed.

Upon this clause of the statute a question lately arose at Guildhall. It was an action brought to recover a sum of money received by the defendant from one Bristow to the plaintiff's use. The plaintiff was an underwriter, and the defendant was a broker, and a loss having happened upon a policy underwritten by the plaintiff, he had been obliged to pay it: but Bristow, having agreed to take half the plaintiff's risk, had paid his moiety of the loss into the hands of the defendant, to recover it from whom this action was brought. Lord Kenyon,—I am of opinion that the plaintiff cannot recover, for this is clearly a partnership within the act of Parliament. If a single name appears upon the policy, as in this case, the insurer shall never be allowed, if a loss happen, to defeat a *bond fide* insurance by saying to an innocent man, there was a secret partnership between another and myself, and therefore the policy is void. But here the plaintiff is himself the underwriter, who comes to enforce the contract: it is a partnership *pro hac vice*; and this party cannot apply to a court of justice to enforce a contract founded on a breach of the law.

Sullivan v. Greaves, Sittings after Easter, 1780, Park, 8; [1 Marsh. on Insur. 46, 3d edit.] No motion was ever made to set aside the nonsuit; but two or three days after Lord Kenyon mentioned to the bar, that he had stated the case to the other judges of the Court of King's Bench, who were unanimously of the same opinion with him. And this opinion has been since farther confirmed by a decision of the Court of Common Pleas in the case of Mitchel v. Cockburn, 2 H. Bl. 379; and of the Court of King's Bench in Booth v. Hodgson, 6 Term Rep. 405; [Aubert v. Maze, 2 Bos. & Pul. 371; Lees v. Smith, 7 Term Rep. 338; Branton v. Taddy, 1 Taunt. 6; *Ex parte* Bell, 1 Maul. & S. 751; but it must be observed, that Sullivan v. Greaves is distinguishable from all

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these last-cited cases, since in all these the plaintiff was compelled to go into the illegal transaction, in order to make out his case: whereas, in *Sullivan v. Greaves*, the plaintiff need only show the money paid to the defendant's hands for his use; and in *Tenant v. Elliot*, 1 Bos. & Pul. 3; *Farmer v. Russell*, *Ibid.* 296; it was decided that money paid by A to B, for the use of C, might be recovered by C, although paid on an illegal consideration.]

||It appears from the following case that insurances may be legally made upon a joint capital, provided each subscriber to it be only liable to the amount of his subscription, and not each for the whole. The plaintiff and defendant were members of the "Whitby Association," consisting of a number of owners of ships, each of whom, in proportion to his shipping, paid a certain sum, which formed the stock of the society. The policies were signed by all the members. They all became insurers for each other, according to the respective values of their ships; and when any loss happened, the treasurer paid it out of the joint stock. The defendant's share of the present loss was 14*l*. Each individual was only liable for the sum he had undertaken. Lord Kenyon, before whom the cause was tried, held the policies to be legal. He said, "This does not infringe on the act of Parliament, as the members of the association have only underwritten in their individual characters: but they cannot underwrite for themselves and partners. If all of them were liable to the extent of their whole stock it would be illegal. At present the members of this association can only stand as individual underwriters for small sums.(a)

(a) *Harrison v. Millar*, 7 Term Rep. 340, n.; *Dowell v. Moon*, 4 Camp. 166; and see Lord Kenyon's observations on *Harrison v. Millar* in *Lees v. Smith*, 7 Term Rep. 338.]

||THE SUBJECT-MATTER OF THE INSURANCE.||—*With respect to the subjects of the policy*, the most frequent are ships, goods, merchandises, the freight or hire of ships; also, houses, warehouses, and the goods laid up in them from danger by fire, and insurance upon lives. Bottomry and *respondentia* may also be the subject of insurance. But then it must be particularly expressed in the policy to be *respondentia* interest; for under a general insurance (b) on *goods and merchandises*, the party insured cannot recover money lent upon bottomry. Not (c) but that money expended by the captain for the use of the ship, and for which *respondentia* interest is charged, may be recovered under an insurance upon *goods, specie, and effects*, provided the usage of the trade, which in matters of insurance is always of great weight, sanctions it.

Park, 12, 7th edit.; Marshall on Insurance, 323.] β The charterer of a ship has no interest in the freight as such, and he cannot therefore insure it *eo nomine*. *Robbins v. New York Ins. Co.*, 1 Hall's R. 325.γ (b) *Glover v. Black*, 3 Burr. 1394; 1 Bl. Rep. 405, S. C.; {*Robertson v. United Ins. Co.*, cited 2 Cain. 19; 1 Johns. Rep. 394; 2 Johns. Rep. 351; } β *Jennings v. Ins. Co. Pennsylvania*, 4 Binn. R. 251, 253; *Wells v. Philadelphia Ins. Co.*, 9 Serg. & R. 103.γ (c) *Gregory v. Christie*, B. R. Tr. 24 G. 3, Park, 14, 7th edit.

||Profits expected to arise upon a cargo of goods may also be insured;(d) but the insured must show that he would have made profit, if the loss had not happened;(e) if, however, it appear that profit would have arisen, the insured, on the principle that *in certum est quod certum reddi potest*, may recover on an open policy as well as on a valued one.(g)

(d) *Grant v. Parkinson*, Marshall on Insurance, 95; *Barclay v. Cousins*, 2 East, 544; and generally as to what will be considered a sufficient insurable interest, see *Routh v. Thompson*, 13 East, 274; *Craufurd v. Hunter*, 8 Term R. 13; *Hagedorn v. Oliverson*, 2 Maul. & S. 485; *Lucena v. Craufurd*, 3 Bos. & Pul. 75; *Hill v. Secretan*, 1 Bos. & Pul. 315; β *Columbian Ins. Co. v. Laurence*, 2 Pet. 46; *Russell v. The Union Ins.*

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Co., 4 Dall. 431; Buck & Hedrick v. The Chesapeake Ins. Co., 1 Pet. 163; *Seamans v. Lovings et al.*, 1 Mason, 127; *Calbraith v. Gracie*, 1 Wash. C. C. R. 98; 2 Adm. Decis. 276; *Fosdick v. Norwich Marine Ins. Co.*, 3 Day, 108. Where goods are insured in one policy, and the profits in a separate policy, and the insured recovers for an average loss on the goods, he can only recover an average loss, in the like proportion on the profits. *Loomis v. Shaw*, 2 Johns. C. 36; *Abbott v. Sebor*, 3 Johns. C. 39. A loss on a policy on profits will be a total or partial loss, according as the loss on the subject-matter of the profits is total or partial. *Abbott v. Sebor*, 3 Johns. C. 39. (e) *Hodgson v. Glover*, 6 East, 316. (g) *Eyre v. Glover*, 3 Camp. 276.]]

Although insurances upon the wages of mariners are in general, for very wise reasons, forbidden, yet this regulation does not mean to prevent them from insuring those wages which they are entitled to receive abroad, or goods which they have purchased with those wages in order to bring home; for in such a case they are to be considered in the same light with other men.

1 Mag. 19; ||Marshall on Insurance, 89, 3d edit.]]

In an action upon a policy of insurance upon Fort Marlborough, otherwise Bencoolen, in the East Indies, for twelve calendar months, from the first of October, 1759, to the first of October, 1760, against any European enemy, for the benefit of the governor, it was doubted by Lord Mansfield, who tried that cause, whether a policy against the loss of Fort Marlborough for the benefit of the governor was good, upon the principle which does not allow a sailor to insure his wages. But afterwards, when he came to deliver the opinion of the court upon all the points in that cause, after mentioning this doubt, which had occurred to his mind, he went on thus: "But, considering that this place, though called a fort, was really but a factory or settlement for trade; and that he, though called a governor, was really but a merchant; considering, too, that the law allows a captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part-owner; and the captain of a privateer, if he be a part-owner, to insure his share; considering, too, that the objection could not, upon any ground of justice, be made by the insurer, who knew him to be the governor, at the time he took the premium; and as with regard to principles of public convenience, the case so seldom happens, (I never knew one before,) any danger from the example is little to be apprehended, I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially, too, as the objection did not come from the bar. Though this point was mentioned, it was not insisted upon at the last trial; nor has it been seriously argued, upon this motion, as sufficient alone to vacate the policy: and if it had, we are all of opinion, that we are not warranted to say that it is void upon that account."

Carter v. Boehm, 3 Burr. 1905; and 1 Bl. Rep. 593.

{The captain of a ship may insure his wages, commissions, and privileges.

Bos. & Pul. 206, *King v. Glover*.}

||Money lent to the captain, payable out of the freight, is not an insurable interest; and the policy being illegal on the face of it, the insured is not entitled to a return of premium.

Per Lord Ellenborough in *Wilson v. Roy*, Ex. Ass. 2 Camp. 626; and see *Siffken v. Allnutt*, 1 Maul. & S. 39.]]

¶And where the owner of the cargo, without request from the owner of the vessel, repaired her on the voyage and effected an insurance in his own name on his expenditure for repairs; held, that he had not an insurable

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interest; that the repairs being voluntarily bestowed, belonged to the vessel, and the property of them vested in the owner.

Buchanan v. The Ocean Ins. Co., 6 Cow. 318. As to insurable interest see generally, *Kenny v. Clarkson*, 1 Johns. R. 386; *Williams v. Smith*, 2 Cain. R. 13; *Smith v. Williams*, 2 Cain. C. E. 110.¶

{The husband of a ship has no right to insure for any part-owner without his particular direction; nor for all the owners in general without their general direction, or something equivalent to it.

5 Burr. 2727, *French v. Backhouse*. Vide 2 Cran. 436, 437, 439.

A policy on a ship, in the name of *one* joint-owner, as "property may appear," (without the clause {} stating the insurance to be for the benefit of all concerned,) does not cover the interest of another joint-owner.

2 Cran. 419, *Graves & Barnewall v. Boston Marine Ins. Co.* {} See 2 Cain. 203, *Lawrence v. Sebor*.

A, in expectation of goods to be shipped on his account and risk, on board a certain vessel, effects an insurance. No such goods are shipped; but certain other goods are consigned to him in the same vessel on account and risk of the shippers, whose creditor and general agent A is. A partial loss happens. A cannot recover against the underwriter for such loss, but shall have his premium returned.

2 Mass. T. Rep. 365, *Toppan v. Atkinson*.

The plaintiff was in advance to A for money lent, goods sold, and commissions and premiums of insurance on goods of A, who sailed with them for the Havanna. By agreement, the plaintiff was to have insurance effected for A to the amount of his debt, and to retain the policy, as a security for his advances in case of loss. The property was captured, but afterwards restored to A the owner, who did not pay the plaintiff the amount of his advances. The plaintiff abandoned, stating that he had received orders from A to do so. It was held that as he effected insurance merely as agent for A, at whose instance also he had abandoned, and the property was restored to A, the owner, he could not recover, as for a loss in the nonpayment of his advances.

4 Dall. 463, *Donath v. Ins. Co. of N. America*.

A mistake in the name of the vessel will not vitiate a policy, containing the words "or by whatever other name the same ship should be called," if the identity of the vessel is proved, and there is no fraud.

6 East, 382, *Le Mesurier v. Vaughan*; *Ibid.* 385, *Hall v. Molineaux*, cited by *Lawrence, J.* }

An insurance generally "*upon any ship or ships*" expected from a particular place is valid; and the insured has a right to cover any ship he may think proper that falls within the terms of it.

Kewley v. Ryan, 2 H. Bl. 343; *Henchman v. Offley*, *Ibid.* 345, note; [1 *Marshall on Ins.* 168.]

Nor do the owners of goods insured preclude themselves by shifting the goods from one ship to another from recovering an average loss arising from the capture of the second ship, if they acted from necessity, and for the benefit of all concerned.

Plantamour v. Staples, 1 Term Rep. 611, note; [1 *Milles v. Fletcher*, Doug. 231; *Marsh.* 161.]

An action was brought upon a policy of insurance of the captain's goods for six months certain. The loss proved was chiefly for goods lashed on

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deck, and the captain's clothes, and the ship's provisions. It was proved by an underwriter and a broker that none of those things are within a general policy on goods; for the risk was greater as to goods lashed on deck than other goods: and a policy on goods means only such goods as are merchantable, and a part of the cargo. They also swore, that when goods like the present are meant to be insured, they are always insured by name; and the premium is greater.

Ross v. Thwaite, *Sittings after Hil.* 16 G. 3, at Guildhall, Park. 26, (7th edit.)
 ¶ Goods laden on deck are not covered by a policy on goods or cargo, unless expressly mentioned. *Lennox v. United Ins. Co.*, 3 Johns. C. 178; *Mayor et al. v. Ripley et al.*, 11 La. R. 144.g

Lord Mansfield said, he thought it consistent with reason; and understood the usage to be so: therefore he advised the plaintiff to withdraw a juror, the premium having been paid into court, to which he consented.

¶ But where the insurance was on forty carboys of vitriol, which were carefully lashed on the deck, (as it was proved was frequently done, though they would have been safer below,) and some of the vitriol having caught fire, it was necessary to throw the whole over-board; Lord Ellenborough held, that the underwriters were bound to know this usage, and therefore were liable.

Da Costa v. Edmunds, 4 Camp. 142. ¶ But see *Milward v. Hibbert*, 2 Gale & D. (2 B.) 142.g

When a man insures one species of property, he cannot recover damage, occasioned by the loss of a species of property different from that named in the policy. Thus, under a policy upon the ship, or upon the goods, the insured cannot recover *extraordinary wages* paid to the seamen, or *provisions* expended, during a detention to repair, or a detention by an embargo.

Fletcher v. Poole, *Sittings after Easter*, 1769, before Lord Mansfield at Guildhall, Park, 53; *Robertson v. Ewer*, 1 Term Rep. 127; ¶ and see *Hunter v. Prinsep*, Marsh. on Insur. 323.¶

¶ So where insurance was effected upon goods from New York to Batavia, and upon the proceeds thereof home; the goods valued at the sum insured out, "to be open on the proceeds home." The identical goods shipped to Batavia were returned to New York in the same vessel, and damaged upon their return voyage; held, that they were not protected by the policy during the voyage homeward.

Dow v. The Hope Ins. Co. 1 Hall's R. 166; and see *Murray v. Columbian Ins. Co.*, 11 Johns. R. 302.g

Nor is the underwriter on goods liable for the freight paid by the owner of the goods to the proprietors of the ship, where the goods are partially lost.

Baillie v. Modigliani, B. R. Hil. 25 G. 3.

Neither is an underwriter upon ship and goods liable for the charge of demurrage.

Eden v. Poole, *Sitt. after Hil.* 1785.

¶ Nor is he on a policy upon goods liable, where the ship is disabled from pursuing her voyage by perils of the sea, and obliged to put in port to repair, and the master, having no other means of raising money to defray the expenses of such repairs, sells part of the goods, and applies the proceeds in payment of these expenses.

Powell v. Gudgeon, 5 Maul. & S. 431; *Sarqay v. Hobson*, 2 Barn. & C. 7; S. C. 3 Dow. & Ry. 192; 4 Bing. 131.¶

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Nor in an insurance upon a Greenland ship, is the underwriter in a policy *on the ship, tackle, and furniture, &c.*, liable for the *lines and tackle* employed in the fishery in those seas.

Hoskins v. Pickersgill, B. R. East. 23 Geo. 3; and see *Gale v. Laurie*, 3 Barn. & C. 159.]

¶ And if on a common policy on ship and goods there be a written memorandum, that it is *on goods*, the effect is the same as if goods only had been mentioned.

Houghton v. Ewbank, 4 Camp. 89.

A policy on ship and *outfit*, on a voyage to the Southern Whale Fishery, cannot be altered to ship and *goods*, after the risk attaches, without a fresh stamp; for outfit is very different in such a voyage from goods.

Hill v. Patten, 8 East, 373.]

But provisions sent out in a ship for the use of the crew, are protected by a policy on *the ship and furniture*.

Brough v. Whitmore, 4 Term Rep. 206.

§ The cases establish the doctrine that where the insurance is on the proceeds or returns of an outward cargo, it is not necessary that the return cargo should be procured by an actual sale of the outward cargo, and an appropriation of the money arising from such sale. It is sufficient if the homeward cargo be a substitute for the outward; and should spring, though indirectly, from the deposit of the latter, either by sale or deposit; or that it should be procured on the credit, or in consequence of the outward cargo.

Dow v. The Hope Ins. Co., 1 Hall's R. 166; *Whitney v. The American Ins. Co.*, 3 Cow. R. 210.]

¶ THE INTEREST OF THE INSURED. ¶—It is enacted by stat. 28 G. 3, c. 56, "That it shall not be lawful for any person or persons to make or effect, or cause to be made or effected, any policy of assurance on any ship or vessel, or upon any goods, merchandises, effects, or other property whatsoever, without first inserting or causing to be inserted in such policy the name or names, or the usual style and firm of dealing of one or more of the persons interested in such assurance, or without instead thereof first inserting the name or names, or the usual style and firm of dealing of the consignor, or consignors, consignee or consignees, of the goods or property so to be inserted, or the name or names, or the usual style and firm of dealing of the person or persons residing in Great Britain who shall receive the order for and effect such policy, or of the person or persons who shall give the order or direction, the agent or agents immediately employed to negotiate or effect such policy." The statute further declares, "that every policy made or underwritten contrary to the true intent and meaning of this act shall be null and void, to all intents and purposes."

{See 1 Bos. & Pul. 316, *Wolff v. Horncastle*.}

¶ If the name of the broker effecting the policy be inserted in it, it is a sufficient compliance with this statute; and though the agent named in the policy be not the general agent, but only for that particular purpose, his name may be inserted.

De Vignier v. Swanson, 1 Bos. & Pul. 346, n.; *Bell v. Gilson*, 1 Bos. & Pul. 345.

The insured may be described "the trustees of A B," they being so.

Hibbert v. Martin, 1 Camp. 538.

A foreign letter (post-marked) to A B here, directing a policy, is proof that he received the order, and effected the policy.

Arcangelo v. Thompson, 2 Camp. 620; and see *Wolff v. Horncastle*, 1 Bos. & Pul.

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316; *Mellish v. Bell*, 15 East, 416; *Bell v. Janson*, 1 Maul. & S. 301; *Dickson v. Lodge*, 1 Stark. Ca. 226.¶

β A consignee with the power of sale has an insurable interest. If he has but a naked right to take possession, he has no insurable interest, though he may insure for his principal. Yet to give validity to the contract, he must state the interest to be in the assignor.

De Forest v. The Fulton Fire Ins. Co., 1 Hall's R. 84. A consignee insuring goods, "by him held in trust," covers only his interest in them. *Parks v. General Interest Assurance Co.*, 5 Pick. R. 34.

Different parties, having different interests in the same subject-matter, may severally procure insurance of their several interests.

Higginson v. Dall, 13 Mass. 96; *Locke v. North American Ins. Co.*, 13 Mass. R. 61.

One may insure his equitable interest in property, the legal title to which is in another.

Oliver v. Greene, 3 Mass. R. 133; *Locke v. North American Ins. Co.*, 13 Mass. R. 61; *Bartlet v. Walter*, 13 Mass. 267; *Jackson v. Mass. Ins. Co.*, 23 Pick. 418.

One who is part-owner and the ship's husband, though he may protect his own interest by insurance, cannot procure insurance for the whole amount at risk, without authority from the other owners.

Finney v. Warren Ins. Co., 1 Met. R. 16; *Reed v. Pacific Ins. Co.*, 1 Met. R. 166.¶

¶[STAMP ON INSURANCES.]—By 35 Geo. 3, c. 63, which repeals all former duties upon policies of insurance, it is enacted, "That for every skin or piece of vellum or parchment, or sheet of paper, on which any insurance upon any ship or ships, goods or merchandise, or upon any other property or interest whereon insurances may lawfully be made, shall be engrossed, written, or stamped, the stamp duties following upoh the sums insured; that is to say, where the sum to be insured shall amount to 100*l.*, a stamp duty of 2*s.* 6*d.*, and so progressively for every sum of 100*l.* insured; and where the sum to be insured shall not amount to 100*l.*, a like stamp duty of 2*s.* 6*d.*; and where the sum to be insured shall exceed 100*l.*, or any progressive sums of 100*l.* each, by any fractional part of 100*l.*, a like stamp duty of 2*s.* 6*d.* for each fractional part of 100*l.*; and that upon all and every insurances or insurance, where the premium, or consideration in the nature of a premium, actually and *bond fide* paid, given, or contracted for, shall not exceed the rate of 10*s.*, there shall be paid the following duties; that is to say, where the sum so to be insured shall amount to 100*l.*, a stamp duty of 1*s.* 3*d.*, and so progressively for every sum of 100*l.* so insured; and where the sum so to be insured shall not amount to 100*l.*, a like stamp duty of 1*s.* 3*d.*; and where the sum so to be insured shall exceed 100*l.*, or any progressive sums of 100*l.* each, by any fractional part of 100*l.*, a like stamp duty of 1*s.* 3*d.* for such fractional part of 100*l.*, which several sums shall be payable and paid by the assured in such insurances respectively."

By § 2, the duty imposed by this act is not to extend to insurances on lives, or insurances from losses by fire.

§ 4. "Provided, that upon every such insurance, where the premium, or consideration in the nature of a premium, actually and *bond fide* paid, given, or contracted for, shall not exceed the rate of 10*s.* *per centum* on the sum insured, it shall be lawful, where the sum insured shall amount to 200*l.* or upwards, to use stamps of 2*s.* 6*d.* for every 200*l.* of the sum insured, instead of stamps of 1*s.* 3*d.* for every 100*l.* of the like sum insured."

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§ 11. "Every contract or agreement which shall be made or entered into for any insurance, in respect whereof any duty is by this act made payable, shall be engrossed, printed, or written, and shall be deemed and called a *policy of insurance*; and the premium, or consideration in the nature of a premium, paid, given, or contracted for, upon such insurance, and the particular risk or adventure insured against, together with the names of the subscribers and underwriters, and sums insured, shall be respectively expressed or specified in or upon such policy, and in default thereof every such insurance shall be null and void, to all intents and purposes whatever."

§ 12. "And no policy of insurance upon any ship, or upon any share or interest therein, shall be made for any certain term longer than twelve calendar months; and every policy which shall be made for any longer term shall be null and void to all intents and purposes."

The 10th section provides for an allowance to be made under certain circumstances by the commissioners, where the sums insured on homeward voyages shall exceed the interest of the assured.

The 13th section provides, that nothing contained in the act shall prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of insurance, duly stamped as aforesaid, after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration, so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for shall exceed the rate of 10s. *per cent.* on the sum insured, and so that the thing insured shall remain the property of the same person or persons, and so that such alteration shall not prolong the term insured beyond the period allowed by § 12 of this act, and so that no additional or further sum shall be insured by reason or means of such alteration.

§ 15, 16, 17. A penalty of 500*l.* is imposed both upon the persons procuring and the brokers effecting insurances on policies not duly stamped; and the latter can neither demand their brokerage, nor the money expended for premiums; and every underwriter subscribing such illegal policy is liable to a like penalty of 500*l.*

{A policy of insurance originally underwritten on ship *and outfit* was, after the ship sailed, declared, by consent of all parties, to be on ship *and goods*, by a memorandum written on a blank space in the body of the policy, but without any new stamp: and it having been before decided {¹} that for want of the stamp the plaintiff could not recover as upon a policy on *ship and goods*, it was in this case held that he could not recover on the policy in its original state, as an insurance on ship and outfit, by reason of the alteration apparent upon the face of the instrument itself, and which was made by parties interested.

9 East 351, French v. Patton. {¹} 8 East, 373, Hill v. Patton.

If an insurance be *at and from* a place, the risk commences from the time of subscribing the policy, if the ship is at home; if abroad, from the first moment of her arrival {²} at the place specified. If such insurance is on freight, the risk commences at the time the goods are first on board.

2 Cain. Er. 158, 172, Smith v. Steinbach. {²} In Garrigues v. Cox, *at nisi prius*, C. J. Tilghman stated that the insurance on a vessel *at and from* a foreign port commenced as soon as she had been safely moored 24 hours in port on her outward voyage. 1 Bin. 594.

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When a vessel has been long in port previous to an insurance, the risk, on a policy *at and from*, does not commence till some act be done towards equipping her for the voyage, or on the day on which she is stated to have been in safety in the port from which she was to sail.

1 Cain. 75, *Kemble v. Browne*;

|| COMMENCEMENT AND DURATION OF THE RISK. ||—Where the owner of the goods insured brought down his own lighter, received the goods out of the ship, and before they reached land an accident happened, whereby the goods were damaged, a special jury of merchants, under the express direction of Lord Chief Justice Lee, found that the insurer was discharged, although the insurance was upon goods to London, and *till the same should be safely landed there*.

Sparrow v. Carruthers, 2 Stra. 1236. The case turned upon the goods not being sent by the ship's boat, which is considered as part of the ship and voyage.

{But it is otherwise if the goods are put into a public lighter, employed by the owner, according to the usage of the trade. The underwriters are then liable for a loss happening before the goods are safely landed from the lighter.

3 Esp. Rep. 289; *Harry v. Royal Exchange Ass. Co.*; 2 Bos. & Pul. 430, S. C.; *Ibid.* 432, n., *Rucker v. London Ass. Co.*

So goods put into launches, for the purpose of being run on shore in a contraband trade with the Spanish Main, are protected by the policy while on board the launches; such being the usual method of carrying on that trade.

3 Bos. & Pul. 23, *Matthie & others v. Potts*.

If, however, when goods are put on board a public lighter, the owner takes them into his own care and possession before they are landed, the underwriters are discharged; as where the lighter came to the insured's wharf in the evening, but the goods were not landed on account of the rough weather, and the insured told the lighterman he need not stay, and undertook to see to the landing himself, and in the night the lighter was sunk and the goods lost.

4 Bos. & Pul. 16, *Strong v. Natally*.

A policy on goods until 24 hours after they are landed continues until 24 hours after all the goods are landed.

1 John. Ca. 141, *Gardiner v. Smith*;

||But if the goods had been put into a *public* lighter for the purpose of being landed, the risk would have continued, "for public lighters have a stamp of authority: they are entered at Watermen's Hall; and lightermen appointed by the Watermen's Company are *public officers*, and have a public credit."

Per Buller, J., in *Rucker v. London Assur.*, *Marshall on Ins.* 253, (3d ed.); and see *Hurry v. Roy. Ex. Assur.*, 2 Bos. & Pul. 430; 3 Esp. Ca. 289; *Matthie v. Potts*, 3 Bos. & Pul. 23.

If, however, while the goods are in a public lighter, the insured take charge of them himself, he discharges the underwriters.(a) And if they be once landed in the usual course of business the risk is at an end, even though the goods have never been in the possession of the consignees.(b)

(a) *Strong v. Natally*, 1 New R. 16. (b) *Brown v. Carstairs*, 3 Camp. 161.

§ An underwriter is bound to know the general course of trade in relation to the voyage and the property which he insures. Where, therefore, it appeared that it is the usual custom in the port of New York, when a vessel

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laden with hides was detained at quarantine, to send the cargo by lighters to a depot at Brooklyn, and in such transshipment to lade the hides on deck as well as in the hold of the lighter, it was held, that the underwriter could not for that cause object to a recovery.

Wadsworth v. Pacific Ins. Co., 4 Wend. R. 33; and see Coggeshall v. American Ins. Co., 3 Wend. R. 283; Osacar v. Louisiana State Ins. Co., 5 La. R. N. S. 387.

Where a policy is at and from a port, the construction of it, as to the time the policy attaches, depends on circumstances. If the vessel be in a foreign port, in the course of a voyage, it attaches upon her first arrival there; if in a domestic port, then from the date of the policy. If the vessel has been long lying in port without reference to any particular voyage, it attaches from the time preparations are begun to be made for the voyage insured. If the assured becomes owner while the vessel is lying in port, the policy does not attach until after his ownership commences.

Seamans v. Loring et al., 1 Mason's R. 197.g

Sometimes the risk on goods is made to commence from the loading thereof at a particular place; in which case the policy will attach only upon such goods as are there put on board, and not upon goods shipped elsewhere, though they were the very goods meant to be insured, and were on board at the place specified.

Thus, goods were insured, at and from Gottenburgh to the ship's port of discharge in the Baltic, beginning the adventure on the goods from "the loading thereof on board the said ship," without saying where. The ship received at London the goods insured, sailed to Gottenburgh, from whence, without landing any part of the cargo, she proceeded to Pilau Roads, where she was captured. The defendant knew that the goods insured were the same which had been shipped at London, having himself insured them from thence to Gottenburgh. The court, after considerable discussion, determined that it must be intended, from the words of the policy, that the goods were loaded at Gottenburgh; for if that were not the true interpretation, and the adventure were to commence from the loading, a risk would be incurred which was not in the policy, namely, from London to Gottenburgh.(a)

Spitta v. Woodman, 2 Taunt. 416; S. C. 16 East, 188, n.; Horneyer v. Lushington, 15 East, 46; and see Robertson v. French, 4 East, 130; Langhorn v. Hardy, 4 Taunt. 628; Constable v. Noble, 2 Taunt. 403; β Graves et al. v. Mar. Ins. Co., 2 Caines's R. 399; Richards v. Mar. Ins. Co., 3 Johns. R. 307; Murray v. Col. Ins. Co., 4 Johns. R. 443; Silva v. Low, 1 Johns. C. 197.g (a) But if the adventure had been to commence "from the loading thereof on board the said ship, wheresoever," &c., *semble* that the policy would have attached, Gladstone v. Clay, 1 Maul. & S. 418. So the risk may be properly commenced, though under circumstances unforeseen at the time of the contract. See Driscoll v. Passmore, 1 Bos. & Pul. 200. If an insurance on freight be from several places of departure, the risk will not commence till the ship sails for her port of destination. Sellar v. M'Vicar, 1 New R. 23. β Whether a vessel, by dropping down a river on the route of the voyage insured has commenced the voyage or not, will depend on the *quo animo* or *bona fide* intent of the party. Dennis v. Ludlow, 2 Cain. R. 111; Bowen v. Hope Ins. Co., 20 Pick. 275.g

But if the policy be declared to be in continuation of other policies from the real port of loading, the objection is removed; (b) or if part of the cargo be landed, and reloaded at the specified port, so as to enable the whole to be inspected, this will satisfy the policy.(c) And a policy on goods from the ship's port of loading in Amelia Island, in the river St. Mary's, in Spanish America, in which there is no port, has been held to cover a loading at a port higher up in the same river, the ship having cleared out at the

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island, this being the usage of trade; (d) for every underwriter is bound by the usage of the trade which he insures. (e)

(b) *Per Lord Ellenborough* in *Bell v. Hobson*, 5 Camp. 272. (c) *Nonnen v. Reid*, *Nonnen v. Kettlewell*, 16 East, 176. (d) *Moxon v. Atkins*, 3 Camp. 200; and see *Ouglir v. Jennings*, *cor. Lord Eldon*, C. J., *Vallance v. Dewar*, *cor. Lord Ellenborough*, 1 Camp. 503. β The term *port* is to be taken in reference to the subject-matter to which it is applied, and although it generally means a harbour of shelter to vessels from storms, yet when applied to places on a coast where there are no harbours, it may mean only a road or anchorage place, for the purpose of unloading and loading cargoes. *De Longuemere v. New York Fire Ins. Co.*, 10 Johns. R. 120, 126. Under an insurance from the port of loading, a loading at one single place only is authorized. *Brown v. Tayleur*, 5 Nev. & M. 472; 1 Har. & Woll. 578. γ (e) *Kingston v. Knibbs*, 1 Camp. 508, n. ||

β A vessel was insured "for and during the term of twelve calendar months, ending on the 10th of November, 1838, with liberty of the globe; and if at sea at the expiration of the said twelve months, the risk to continue at the same rate of premium until her arrival at her port of destination in the United States." Beginning the adventure upon the said vessel, &c., "for twelve months from November 10, 1837, as aforesaid, and so shall continue and endure until the said vessel shall be safely arrived at November 10, 1838, at noon, with liberty of the globe, as aforesaid, and until she shall be moored twenty-four hours in safety," &c. The order for insurance was in the words of the first clause above stated. The vessel sailed from Philadelphia in November, 1837, for South America, for the purpose of freighting, and took on board a cargo entirely on freight, and sailed on the 9th of October, 1838, for the island of Jersey, in the British Channel, for orders. On the 10th of November, 1838, she was at sea on the voyage to Jersey; and while still at sea, in December, 1838, encountered a gale, which did her great damage. *Held*, that on the true construction of the contract, the underwriters were not liable after the expiration of the year, unless the vessel should be on her voyage to her port of destination in the United States; and therefore, that they were not answerable for the loss suffered in the gale of December, 1838.

Eyre v. Maine Ins. Co., 6 Whart. R. 247. γ

A policy of insurance shall be construed to run until the ship shall have ended, and be discharged of her voyage; for arrival at the port, to which she was bound, is not a discharge till she is unloaded: and it was so adjudged by the whole court, upon a demurrer.

Anon. Skin. 243. β A policy on goods, to be safely landed at Leghorn, is discharged by landing them at the Lazaretto, that being the usage of trade. *Gracie v. Marine Ins. Co. of Baltimore*, 8 Cranch, 75. γ

But although this construction may be perfectly right, where the policy is general from A to B, yet if it contain the words usually inserted, "and till the ship shall have moored at anchor twenty-four hours in good safety," the underwriter is not liable for any loss, arising from seizure after she has been twenty-four hours in port; though such seizure was in consequence of an act of barratry of the master during the voyage; for, if it were extended beyond the time limited in the policy, it would be impossible to lay down any fixed rule, and all would be uncertainty and confusion.

Locker v. Offley, 1 Term Rep. 252; || *Angerstein v. Bell*, Park, 55, (7th edit.) || β And see *Dickey v. United Ins. Co.*, 11 Johns. R. 358; *Mariatiqui, Knight, & Co. v. La. Ins. Co.*, 8 La. R. 68. Insurance until twenty-four hours after the goods are landed, means twenty-four hours after all the goods are landed. *Gardiner v. Smith*, 1 Johns. C. 141. The termination of the voyage as to the ship, does not necessarily terminate the risk on the goods; that may continue, when the voyage on the ship is ended. Its termination

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depends on the intention of the parties, and this intention must be found in their contract. *Gracie v. The Marine Ins. Co. of Baltimore*, 8 Cranch, 75.g

Where the policy contains a clause, that the insurers take no risk in port, but sea risk, the term *port* is not to be confined to the port of departure or discharge, but is used in contradistinction to the high seas, and refers to any port into which the vessel may of necessity enter during the voyage insured.

Patrick v. Com. Ins. Co., 11 Johns. R. 9.g

{A policy was on an English ship bound to a French port, until she was moored twenty-four hours in safety there. Previous to her arrival at her port of destination, an embargo was laid on all English vessels; and she on entering it was also detained, and her crew made prisoners of war; but no guard was put on board till some days after. Lord Kenyon held the insured entitled to recover, as the ship was never moored in safety, but was to all intents captured by the French as soon as she entered the port.

Peake, N. P. 211, Minett & others v. Anderson.}

In an action upon a policy of insurance by the defendant at London, insuring a ship from thence to the East Indies, warranted to depart with convoy, the declaration showed, that the ship went from London to the Downs, and from thence with convoy, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration, and it was objected, that there was a departure without convoy. But by the court, the clause "warranted to depart with convoy," must be construed according to the usage among merchants, that is, from such place where convoys are to be had, as the Downs.

Lethulier's case, 2 Salk. 443; ||*Gordon v. Morley*, Stra. 1265; *Warwick v. Scott*, 4 Camp. 62.||

Case upon a policy of insurance, which was to insure the William galley in a voyage from Bremen to the port of London, warranted to depart with convoy. The case was, the galley set sail from Bremen, under convoy of a Dutch man-of-war, to the Elbe, where they were joined by two other Dutch men-of-war, and several Dutch and English merchant ships, whence they sailed to the Texel, where they found a squadron of English men-of-war and an admiral. After a stay of nine weeks, they set sail from the Texel; the galley was separated in a storm, taken by a French privateer, and retaken by a Dutch privateer, and paid eighty pounds salvage. It was ruled by Holt, Chief Justice, that the voyage ought to be according to *usage*, and that their going to the Elbe, though out of the way, was no deviation; for till after the year 1703, (prior to which time this policy was made,) there was no convoy for ships directly from Bremen to London. Verdict for the plaintiff.

Bond v. Gonsales, 2 Salk. 445; ||and see *Bond v. Nutt*, Cowp. 601; *Audley v. Duff*, 2 Bos. & Pul. 111.||

The ship *Success* was insured "*at and from Leghorn to the port of London, and till there moored twenty-four hours in good safety.*" She arrived the 8th of July at Fresh Wharf and moored, but was the same day served with an order to go back to the Hope to perform a fourteen days' quarantine. The men upon this deserted her, and on the 12th of the month the captain applied to be excused going back, which petition was adjourned to the 28th, when the regency ordered her back; and on the 30th she went back, performed the quarantine, and then sent up for orders to air the goods; but before she returned, the ship was burnt on the 23d of August. The question was, therefore, whether the insurer was liable? Lord Chief Justice Lee ruled, that though the ship was so long at her moorings, yet she could not

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be said to be there in *good safety*, which must mean the opportunity of unloading and discharging; whereas here she was arrested within the twenty-four hours, and the hands having deserted, and the regency taken time to consider the petition, there was no default in the master or owners: and it was proved that till the fourteen days were expired, no application could be made to air the goods; whereupon the jury found for the plaintiff.

Waples v. Eames, 2 Stra. 1243; [and see *Parkinson v. Collier*, Park, 470, (7th ed.); *Minnett v. Anderson*, Peake, 211; *Horney v. Lushington*, 15 East, 46; *Mackenzie v. Shedden*, 2 Camp. 431.]

In an insurance upon *freight*, if an accident happens to the ship before any goods are put on board, which prevents her from sailing, the insured upon the policy cannot recover the freight which he would have earned, if she had sailed. The circumstances of the case were these:—

The plaintiff insured *on ship and freight*, at and from Jamaica to Bristol. A cargo was ready to put on board; but the ship being careening, in order for the voyage, a sudden tempest arose, and she and many others were lost. The rigging and parts of her were recovered and sold, and the defendant paid into court as much as, upon an average, he was liable to for the loss of the ship: but the plaintiff insisted to be allowed six hundred pounds for the freight the ship *would have earned* in the voyage, if the accident had not happened. But as the goods were not *actually* on board, so as to make the plaintiff's right to freight commence; Lord Chief Justice Lee held, he could not be allowed it, and he was nonsuited.

Tonge v. Watts, 2 Stra. 1251.

But if the policy be a valued policy, and part of the cargo on board when such accident happens, the rest *being ready to be shipped*, the insured may recover to the whole amount. This was so decided in an action brought by the assured on a policy on freight valued at 1500*l*. In fact only 500*l*. worth of freight was on board when the ship was driven from her moorings and lost; but goods to the amount of the rest of the freight *were ready* to be shipped, and were lying on the quay for that purpose at the time. Lord Kenyon, before whom the cause was tried, told the jury, that the question for their consideration was, whether this was a mere colourable insurance and a gaming policy, or whether it was a *bond fide* transaction; if the latter, the insured was entitled to recover for the whole value in the policy. The jury found the whole sum. The defendant's counsel obtained a rule for a new trial, which he afterwards abandoned, the court being strongly of opinion against him.

Montgomery v. Eginton, 3 Term Rep. 362. [This decision has been much shaken, if not overruled, by *Forbes v. Cowie*, 1 Camp. 520, and *Forbes v. Aspinall*, 13 East, 323; the result of which cases is, that the insured can only recover, whether on an open or a valued policy, for the freight of goods actually put on board, or of which the shipment has been contracted for; and see *Patrick v. Eames*, 3 Camp. 441; *sed vide Truscott v. Christie*, 2 Bro. & B. 320; and *Palmer v. Blackburn*, 1 Bing. 61.] And *Hart et al. v. The Delaware Ins. Co.*, 2 Wash. C. C. R. 344; *De Longuemere v. New York Fire Ins. Co.*, 10 Johns. R. 201.]

So also, in an *open* policy on freight, *at and from London and Teneriffe to any of the West Indian isles*, (Jamaica excepted,) the underwriters were held liable to pay the insurance, though the ship sailed from London in ballast, and was captured before her arrival at Teneriffe, where the cargo was to be put on board. But as the ship was under a charter-party to *depart out of the river Thames, and proceed to Teneriffe, and there to load and receive on board from the freighters 500 pipes of wine, to deliver in the West Indies, for the freight of which 500 pipes, the freighters covenanted to*

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pay 35s. per pipe; the court held, that the instant the ship departed from the Thames the contract for freight had its inception, and the plaintiff was entitled to recover.

Thompson v. Taylor, 6 Term Rep. 478; *Horncastle and others v. Stuart*, 7 East, 400; *Davidson v. Willasey*, 1 Maul. & S. 313; *sed vide Everth v. Smith*, 2 Maul. & S. 278.]

{ Where a ship was chartered on a voyage from London to Dominica and back to London, at a certain rate of freight on the outward cargo; and after delivering her outward cargo at Dominica, the charterers were to provide her a full cargo homeward at the current freight from Dominica to London; it was held that an insurance by the owner of the ship on the freight, *at and from Dominica to London*, attached while the ship lay at Dominica delivering her outward cargo, and before any part of the homeward cargo was shipped, during which time she was captured by an enemy; the contract of affreightment by the charter-party being entire, and the voyage insured by the policy having commenced.

7 East, 400, *Horncastle v. Stuart*.

A policy was underwritten on freight, valued at 500*l.*, on a voyage at and from Demarara, Berbice, and the Windward and Leeward Islands to London. The ship being at Demarara, an agreement was entered into by the master with a house there, for a freight from Berbice to London, the cargo to be put on board at Berbice, and the ship to take a cargo of bricks and planks from Demarara to Berbice, and deliver them there. While proceeding from Demarara to Berbice, with the bricks and planks on board, she met with an accident, and in consequence never earned her freight. The Court of Common Pleas held that it was not a loss within the policy. For the voyage insured was from Demarara to London, or from Berbice to London, or from any of the Windward or Leeward Islands, according to the place from which the ship might happen to sail on her voyage to London; and in this case such voyage never commenced.

4 Bos. & Pul. 23, *Sellar v. M'Vicar*.

A policy was on the freight of the ship *Stranger*, at and from London to Jamaica, with liberty to touch at Madeira, and discharge and take goods on board there. The insured had agreed by charter-party that the ship should take in goods at London, and proceed to Madeira, and there deliver such part of the goods shipped at London as their agent should direct, and receive on board wine, and proceed to Jamaica and there deliver; and the freighter agreed to pay 135*l.* in full for freight during the whole voyage from London to Madeira, and from thence to Jamaica; such freight to be paid in Madeira, on delivery of the goods shipped at London for that place, by Madeira wine at 40*l.* per pipe, to be carried in the same ship to Jamaica free of freight. The ship arrived at Madeira, and delivered all her London cargo, except 33 casks of coals, which the captain kept on board to stiffen his ship. Having received part of his cargo for Jamaica, but not the wine to be paid for freight, the captain was obliged, by a gale of wind, to cut his cables and run out to sea, where he was captured. The insured recovered for a total loss of freight; as the contract for freight was entire, the charter-party treated the whole as one voyage, and the accident happened before the condition was performed, on which the freight was payable, viz., the delivery of the goods shipped at London.

4 Bos. & Pul. 236, *Atty v. Lindo*.

By a valued policy on freight *at and from* one port to another, and *at*

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and from thence back to the original port, for which a premium is paid, double to that which would be demanded for the outward voyage, the freight to the full amount of the valuation is covered on each voyage; and the insured, on a capture on the return voyage, is entitled to recover the full amount of his policy, without making any deduction for the freight received on the outward risk.

3 Cain. 16, Davy v. Hallett.

¶ A policy of insurance on freight from the port of loading to the port of discharge, with leave to call at any intermediate ports, covers the freight of goods loaded at such intermediate port. And the risk on freight continues till the goods are safely landed. (a)

Barclay v. Sterling, 5 Maul. & S. 6. (a) Phillips v. Champion, 6 Taunt. 3; 1 Marsh. Rep. 402, S. C.

So freight may be insured for part of a voyage only.

Taylor v. Wilson, 15 East, 234, overruling Murdock v. Potts, 2 Park's Ins. 451.]

On an insurance from London to Gibraltar, warranted to depart with convoy; it appeared there was a convoy appointed for that trade at Spithead, and the ship *Ranger*, having tried for convoy in the Downs, proceeded for Spithead, and was taken in her way thither. The insurers resisted the demand of indemnity, alleging, that as there was a French war, the ship should not have ventured through the Channel, but have waited for occasional convoy. Lord Chief Justice Lee, however, was of opinion, that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words, *warranted to depart with convoy*, Salk. 443, 445; and if the parties meant to vary the insurance from what is *commonly* understood, they should have stated it. Two special juries of merchants found their verdicts agreeably to that direction.

Gordon v. Morley; Campbell v. Bordien, 2 Stra. 1265.

A bill was filed in the Court of Chancery, which stated, that the ship *Eyles*, late in the East India Company's service, was, in the year 1732, at Bengal, at which time the owner employed I H to insure the ship in the London Assurance Office for five hundred pounds. The adventure thereon was to commence *from her arrival at Fort Saint George*, and thence to continue till the said ship should arrive at London, and that it should be lawful for the said ship, in the said voyage, to stay at any ports or places without prejudice, and the ship was and should be rated *at interest or no interest*, without further account; in consideration whereof I H paid fifteen pounds premium. The *Eyles* came to Fort St. George in February, 1733, in her way to England; but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ships, &c., she sailed to Bengal to be refitted, and after being sheathed, in her return upon her homeward-bound voyage, she struck upon the Englee sands and was lost. Evidence was read on the part of the plaintiffs to prove, that Bengal was the most proper place to refit, and that she went thither for that reason; that this was a voyage of necessity, and not a trading voyage, for she took nothing on board but water, provision, and ballast. Lord Chancellor Hardwicke,—As to the question, whether there has been a breach, or, in other terms, a loss, within the meaning of this policy, the general principles laid down by the plaintiff's counsel are right, that stress of weather, and the danger of proceeding on a voyage, when a ship is in a decayed condition,

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are to be considered. In such a case, if she went to the nearest place, I should consider it equally the same as if she had been repaired at the very place from which the voyage was to commence, according to the terms of the policy, and no deviation. It is a very material circumstance, that the governor ordered the lading to be taken out, to show the necessity of the ship's being repaired, but there is not a syllable of proof why she might not have been equally well repaired at Fort Saint George. There is one part of this case which distinguishes it from all others whatever, and that is, as to the certain time the voyage was to commence. The fact is, the ship was lost in July, 1733, three weeks before the time of making this policy, so that clearly the ship was not at Fort Saint George at the time the agreement was made; and therefore it is a material question, whether it comes within the agreement. His lordship directed an issue to try, whether the loss in July, 1733, was a loss during the voyage, and according to the adventure agreed upon; which issue was afterwards found for the plaintiffs, upon a trial in the Common Pleas.

Mottoux and others v. The Gov. and Comp. of Lond. Assur., 1 Atk. 545; [and see *Bird v. Appleton*, 8 Term Rep. 562.]

In an action upon a policy of insurance before Lord Chief Justice Hardwicke, it has been held, that the words "at and from Bengal to England," meant *the first arrival at Bengal*; and it was agreed, that when such words are used in policies, *first arrival* is always implied and understood. (a)

1 Atk. 548. [(a) The ship must, however, have been once at the place in good safety, otherwise the policy does not attach. *Parmeter v. Cousins*, 2 Camp. 235; but the safety intended is *physical*, not *political*. *Bell v. Bell*, 2 Camp. 475.]

It has likewise been held, that when a ship is insured *at and from a place*, and it arrives at that place, as long as the ship is preparing for the voyage upon which it is insured, the insurer is liable: but if all thoughts of the voyage be laid aside, and the ship lie there five, six, or seven years, with the owner's privity, it shall never be said the insurer is liable; for it would be to subject him to the whim and caprice of the owner.

Chitty v. Selwin, 2 Atk. 359; [Cruikshank v. Janson, 2 Taunt. 301.] And see *Earl v. Shaw*, 1 Johns. C. 313.g

§ A vessel, cargo, and freight, being insured "at and from" a foreign port, the vessel sailed thence, was found leaky, put back, was repaired, and sailed again; and it was held, that the insurer was liable while the vessel was in port, after her return to port, and for the subsequent voyage.

Taylor v. Lowell, 3 Mass. R. 331; *Merchants' Ins. Co. v. Clapp*, 11 Pick. R. 56.g

This was an action on a policy of insurance on a ship, at and from Jamaica to London. The ship had also been insured from London to Jamaica generally, and was lost in coasting the island, after she had touched for some days at one port there, but before she had delivered all her outward-bound cargo at the other ports of the island. This was an action on the homeward policy; and in order to show when the homeward-bound risk commenced, it was necessary to show at what time the outward-bound risk determined; and the jury, which was special, after an examination of merchants as to the custom, by their verdict decided, that the outward risk ended when the ship had moored in any port of the island, and did not continue till she came to the last port of delivery.

Camden v. Cowley, 1 Bl. Rep. 417.

In the Trinity term following, a motion was made for a new trial, but it

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was refused ; because it had been thoroughly tried, and no new light could be thrown upon it, although Lord Mansfield said, the inclination of his opinion at the trial was the contrary way. Mr. Justice Wilmot thought the construction put upon the policy by the jury was the right one.

In a similar case, Lord Mansfield laid down the same doctrine to the jury, namely, that the outward risk *upon the ship* ended twenty-four hours after its arrival in the first port of the island, to which it was destined ; but that the outward policy *upon goods* continued till they were landed.

Barrass v. The London Assurance, Sittings after Hilary, 1782, at Guildhall.

The doctrine stated in the two last cases has been confirmed in a late decision. It was an action on a policy of assurance of *the ship* Palliser, and *on goods* on board thereof, on a voyage at and *from* Georgia to Jamaica. The ship arrived at Montego Bay, and moored at anchor, and there also the plaintiff's agent sold and delivered the greatest part of the cargo to Messrs. Adams and Hatton, merchants there. The captain then entered into a charter-party with Adams and Hatton to proceed from thence to Saint Anne's, and there to take in a cargo for London. After unloading the greatest part of the cargo at Montego Bay, and remaining there a month, it was verbally agreed, that the remainder of the cargo, which was lumber, should be carried as ballast to Saint Anne's ; and accordingly the vessel, after taking in some fustic, proceeded towards Saint Anne's, but was wrecked in her passage. For the plaintiff, it was insisted, that in such an assurance the ship might go from port to port ; and that, in all events, the goods were protected by the policy till they were all discharged and safely landed. Lord Kenyon was clearly of opinion, and that opinion was confirmed by a special jury, to whom he particularly referred on this occasion, that the risk on the ship ceased after she had been moored at anchor twenty-four hours in the first port of the island for the purpose of unloading ; and the facts disclosed in this case having manifested that Montego Bay was also the original destination of the cargo, and that its not being wholly delivered there was only prevented by a new agreement, the goods could not be recovered under this policy. A ship insured to Jamaica generally cannot be permitted to go round the whole island, from port to port, for the purpose of unloading her cargo, especially where, as in this case, the owner of the ship and goods is the same person. The plaintiff was nonsuited.

Leigh v. Mather, Sittings at Guildhall, after Mich. 1795 ; || 1 Esp. Rep. 412. As to what shall be considered a ship's port of discharge, see *Brown v. Vigne*, 12 East, 283 ; *Dagleish v. Brooke*, 15 East, 295. ||

{ If the voyage insured be "from New York to Barbadoes *and a market*," the vessel may *bond fide* go from island to island until her whole cargo is disposed of. But the court added, they did not mean to say that the same construction would be given to a policy on any other trade than that to the West Indies.

1 Johns. Rep. 333, *Maxwell v. Robinson & Hartshorne*. }

|| But where the policy was on freight of a ship *at and from* Grenada to London, and it appeared that there was only one custom-house for the whole island of Grenada, and that the vessel arrived safely at Grenada, and discharging part of her outward cargo at three different bays, and was proceeding to a fourth to discharge the residue of her outward cargo and take in part of her homeward cargo, when she was lost by perils of the sea ; it was

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held, that the vessel was proceeding to the fourth bay for a purpose of the voyage, and that the underwriter was liable.

Warre v. Miller, 4 Barn. & C. 538.

Where the insurance is to some port in the West Indies, and a market, the vessel may, *bond fide*, go from island to island to dispose of her cargo, and the risk is not determined until the whole is disposed of.

Maxwell v. Robinson, 1 Johns. R. 333.*g*

But a policy on a specific voyage cannot be extended to another, though undertaken from necessity, and inability to enter the port of destination:—As, where a ship insured to the river Plate was ordered away upon her arrival by the British commander, and wanting repairs, made for the nearest friendly port. This new voyage, though undertaken from necessity, was held not to be protected by the policy.

Parkin v. Tunno, 11 East, 22.¶

In construing policies, the *strictum jus*, or *apex juris*, is not to be the rule, but a liberal construction is to be adopted, and the usage of trade called in to explain any doubts.

Thus, in an assurance of goods from Malaga to Gibraltar, and from thence to England or Holland, the parties having agreed that the goods might be unloaded at Gibraltar, and reshipped in one or more British ship or ships, and it appearing in evidence that there was no British ship at Gibraltar, but the goods had been unloaded and put into a *store-ship*, (which was always considered as a warehouse,) the insurers were held to be liable for the loss of these goods in the store-ship.

Tierney v. Etherington, before Lee, C. J., 5th March, 1743, 1 Burr. 348. ¶See Mat-
thie v. Bell, 3 Bos. & Pul. 23.¶

A ship was insured from London to any place beyond the Cape of Good Hope. The ship arrived in the river Canton in China, where, in order to be heeled and refitted, the sails, &c., were taken out, and lodged in a *bank saul*, on an island in the river, (which was proved to be *usual*, and beneficial to all concerned.) The underwriter was held liable for the loss of the sails by fire while in this *bank saul*; for the insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of doing it. What is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy. If a ship be driven a mile on shore by a hurricane, or be burnt in a dry dock, while repairing, the insurer is liable.

Pelly v. Governor and Company of the Royal Exchange Assurance, 1 Burr. 341; Brough v. Whitmore, 4 Term Rep. 206, S. P.; ¶Fletcher v. Inglis, 3 Barn. & A. 315; but see Phillips v. Barber, 5 Barn. & A. 161.¶

¶And where the vessel fell over by the breaking of a rope, it was held to be a stranding within the meaning of that word in the policy.

Bishop v. Pentland, 7 Barn. & C. 219; and see Hodgson v. Malcolm, 2 New. R. 336.¶

The goods on board the ships, the Hope and the Anne, were insured at and from Dartmouth to Waterford, and from thence to the port or ports of discharge, on the coast of Labrador, with leave to touch at Newfoundland, *till the goods should be safely discharged and landed*. From the time of their arrival, the crew were chiefly employed in fishing, and took out their cargo only at leisure times, (which was fully proved to be the usage,) and the ships were taken by a privateer, before they were unloaded. The court

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held, that the insurers were liable; for that according to the usage there was no delay.

Noble v. Kennoway, Dougl. 510; [Vallance v. Dewar, 1 Camp. 503; Ougier v. Jennings, Ibid. 504; Kingston v. Knibbs, Ibid. 508.]

With respect to East India voyages, the usage of trade has been more notorious than in any other, the question having more frequently occurred.

The charter-parties of the India Company give leave to prolong the ship's stay in India for a year, and it is common, by a new agreement, to detain her a year longer. The words of the policy, too, are very general, without limitation of time or place.

These charter-parties are so notorious, and the course of the trade is so well known, that the underwriter is always liable for any intermediate voyage, upon which the ship may be sent, while in India, though not expressly mentioned in the policy.

Thus, where the insurance was "at and from Bengal to any ports or places whatsoever, in the East Indies, China, Persia, or elsewhere beyond the Cape of Good Hope, forwards and backwards, and during her stay at each place, until her arrival in London, &c.," and the captain, when in Bengal, entered into a new agreement for prolonging the ship's stay, and went several intermediate or country voyages, in the last of which she was lost; the insurers were held liable.

Salvador v. Hopkins, 3 Burr. 1707.

β An insurance on time differs in no essential manner from one upon a particular voyage; except in this, that in the latter case, the insurance is upon a specific voyage, described in the policy, whereas a policy on time insures no specific voyage, but it covers any voyage or voyages whatsoever, undertaken within, and not exceeding in point of duration, the limited period for which the insurance is made. But it does not contain an undertaking that any particular voyage shall be performed within a particular period. It warrants nothing as to any prolongation or retardation of the voyage; but only that the ship shall be capable of performing the voyage undertaken, notwithstanding any loss or injury which may accrue to her during the time for which she is insured; and of repairing it, if interrupted.

Bradlie v. The Maryland Ins. Co.

[But where goods are insured from the loading thereof at the ship's port of departure, the policy, though worded in the most comprehensive terms, will not protect goods shipped at any other place.

See Grant v. Paxton, 1 Marsh. on Ins. 259, (3d ed.); 1 Taunt. 463.

On an India voyage out and home, if the policy contain the words *forwards* and *backwards*, it will apply to all goods put on board in the course of the voyage.

Ibid.; and see Norville v. St. Barbe, 2 New R. 434.]

In an assurance "from London to Madras and China, with liberty to touch, stay, and trade at any ports or places whatsoever," the facts were: that when the ship arrived at Madras, she was too late to go to China that year, upon which she was sent by the council to Bengal to fetch rice, which voyage she performed once, but in the second attempt she was lost. The insurers are answerable on account of the usage.

Gregory v. Christie, B. R. Tr. 24 G. 3; Park, 14, 7th ed.

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In an insurance on a ship "at and from London to Bengal, beginning the risk upon the ship at London, and so to continue till the arrival of the said ship at Madras and Bengal, *with liberty to touch and stay at any port or place in this voyage*;" (a) the underwriters were held to be answerable for a loss, which happened in an intermediate voyage from Madras to Visagapatnam for rice, by order of the council.

Farquharson v. Hunter, B. R. Hil. 25 G. 3, Park, 84, (7th ed.); [and see *Grant v. Dalacour*, 1 Taunt. 465. (a) In *Rucker v. Allnutt*, 15 East, 278, liberty to touch and stay at, was held not to be abridged by a subsequent leave to wait off any ports, &c.]

However, the parties may, by their own agreement, prevent such latitude of construction.

Nor need this be done by express words of exclusion; but if, *from the terms used*, it can be collected that the parties meant so, that construction shall prevail.

Thus, where the general words were restrained by the expressions, "*in the outward or homeward bound voyage*;" and "*in this voyage*;" the court held that the policy only meant places in the usual course of the voyage "to and from the places named."

Lavabre v. Wilson, Dougl. 284.

§ A policy on time simply, where no ports are mentioned, necessarily implies a trading voyage, with liberty to touch and trade at such ports and places on the globe as the insured shall choose, subject to the accustomed and usual mode of transacting business at the several places visited by such vessel; and however often the goods may be changed the policy will attach.

Coggeshall v. American Ins. Co., 3 Wend. R. 283. A vessel being insured on time, it is not necessary that she should be, at the commencement of the risk, where she is stated to be in the policy. *Manley v. United Ins. Co.*, 9 Mass. R. 85; *Martin v. Fishing Ins. Co.*, 20 Pick. R. 389. §

{The same rule of construction which applies to all other instruments applies equally to a policy of insurance, viz.: that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect is, that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words.

Per Lord Ellenborough, 4 East, 135, 136.

Where by a policy of insurance ship and goods were insured "at and from all and every port, &c., on the coast of Brazil, and after the 17th September, to the Cape of Good Hope, beginning the adventure upon the goods from the loading thereof aboard the said ship at all and every port, &c., on the coast of Brazil, and from the 17th September, 1800; and upon the ship

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in same manner," with liberty to sail, &c., any place, backwards or forwards, under the Portuguese government, &c., at a premium of four guineas *per cent.*, to return 3*l.* 10*s.* should the ship have arrived or the risk have otherwise ceased on or before the 17th of September; it was held that the policy only attached on the homeward bound cargo laden on board at the coast of Brazil, and did not cover a cargo originally taken in at the Cape of Good Hope, and which continued on board after the 17th of September, while the ship was on the coast of Brazil, and after she left it on her return to the Cape. Neither did the policy cover the ship itself, which was insured *in the same manner* as the goods.

4 East, 130, Robertson v. French.

Goods were insured on a voyage from Vera Cruz, "beginning the adventure upon the said goods from the loading thereof on board the said vessel at Vera Cruz, &c., until the said goods shall be safely landed at New York," with liberty to touch at New Orleans or Havanna. The vessel had sailed on her outward voyage to Vera Cruz, where she arrived, but was not permitted to discharge her outward lading, or even remain within the port, although in great distress. She, therefore, sailed with her original cargo to New Orleans, where she changed her cargo, and returned to New York. In a suit for return premium, the court held that it ought to be returned, for the policy clearly intended to insure only such goods as were taken on board at Vera Cruz, or in other words the return cargo.

2 Cain. 339, Graves & Scriba v. Marine Ins. Co.; 3 Johns. Rep. 307, Richards v. Marine Ins. Co., S. P.

When a man insures one species of property, he cannot recover damage, occasioned by the loss of a species of property different from that named in the policy. Thus, under a policy *upon the ship* or *upon the goods*, the insured cannot recover *extraordinary wages* paid to the seamen, or *provisions* expended, during a detention to repair, or a detention by an embargo.

Fletcher v. Pool, sittings after Easter, 1769, before Lord Mansfield at Guildhall, Park, 53; Robertson v. Ewer, 1 Term Rep. 127.

Nor can seamen's wages and provisions expended during an embargo be recovered as a partial loss from the underwriter on freight.

2 Bin. 547, Ins. Co. of N. America v. Jones & Clark, reversing the judgment of the Supreme Court, 4 Dall. 246. And see 4 Dall. 274, Kingston v. Girard.

Nor is the underwriter on *goods* liable for *the freight* paid by the owner of the goods to the proprietors of the ship, where the goods were partially lost.

Baillie v. Mondgiliane, B. R. Hil. 25 G. 3; 1 Bin. 405, Gibson v. Philadelphia Ins. Co. *acc.*

Nor for extra freight paid during an embargo; the ship being chartered at so much per month.

3 Cain. 155, Penny v. New York Ins. Co. But where goods insured were captured during the voyage, and the vessel was released, but the goods detained for further proof, and afterwards restored on payment of the full freight, but the owner was obliged to hire another vessel to carry the goods to their place of destination; it was held that the insurer was liable to pay this additional freight, being an expense necessarily incurred in consequence of the capture. 5 Johns. Rep. 262, Mumford v. Commercial Ins. Co.

Neither is an underwriter upon *ship and goods* liable for the charge of demurrage.

Eden v. Poole, Sitt. after Hill. 1785.

Nor in an insurance upon a Greenland ship, is the underwriter in a policy

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on the ship, tackle, and furniture, &c., liable for the lines, and tackle employed in the fishery in those seas.

Hoskins v. Pickersgill, B. R. East., 23 Geo. 3.

But provisions sent out in the ship for the use of the crew, are protected by a policy on the *ship and furniture*.

Brough v. Whitmore, 4 Term Rep. 206.

An insurance "on the cargo or freight of a ship, both or either, to the amount insured; valued at the sum insured," is an insurance of freight or of cargo, if in the event the assured should have only one of those descriptions of property at risk in the voyage insured. And if he should have both, then it is an insurance upon both, proportionably to the interest of the assured in the subjects respectively.

3 Mass. T. Rep. 476, *Faris et al. v. Newburyport Marine Ins. Co.*}

||A policy in the common form upon goods to the East Indies ceases when the ship has delivered the Company's outward cargo at a port in the East Indies, and will not protect the goods to a market in an intermediate voyage made by the ship before her final departure for Europe.

Richardson v. London Assurance Company, 4 Camp. 94.||

THE LOSS.—In the construction of policies, the loss must be a *direct and immediate consequence* of the peril insured, and not a remote one, in order to entitle the insured to recover.

Thus, in an action upon a policy to recover the value of some negroes, who perished by *mutiny*, which was one of the risks insured against; it was held, that the underwriters were liable for all those who were killed in the mutiny, or who died of their wounds: that all those who died of the bruises which they received in the mutiny, though accompanied with other causes, were to be paid for by the underwriters. But they were not liable for those who had swallowed salt-water, and died in consequence thereof, or who leaped into the sea, and hung upon the sides of the ship, without being otherwise bruised, or who died of chagrin; all these having been lost by too remote a consequence.(a)

Jones v. Schmoll, Guildhall, Tr. Vac. 1785, 1 Term Rep. 130, note. ||(a) Since the decision of this case, the African slave trade has been abolished by the statute 47 Geo. 3, c. 36; and (by § 5) all insurances upon any trading in slaves are prohibited and declared unlawful, and a penalty of 100*l.* and treble the premium, imposed upon any of his majesty's subjects who shall subscribe, effect, or make any such unlawful insurances.||

||So, where a ship insured from New York to London was warranted free from American condemnation; and having, for the purpose of eluding the American embargo, slipped away in the night, and been driven on shore by force of the ice, wind, and tide, and thus suffered a *partial* damage, but was seized the next day, and finally condemned by the American government for breach of the embargo; it was held, that as there was ultimately a total loss by a peril excepted out of the policy, the assured could not recover for the total loss, nor for the previous partial loss arising from the stranding, which, in the event, became wholly immaterial.

Livie v. Janson, 12 East, 648. β And see *Coolidge v. New York Firemen's Ins. Co., 14 Johns. R. 308.*g

But where, in case of a policy warranted free of capture and seizure, the ship was stranded on a shoal, and lost, and while in that situation seized by

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the commander of the place, and confiscated, it was held, that there was a complete loss by perils of the seas.

Hahn v. Corbett, 2 Bing. 205.

On a policy on ship insuring against fire, and barratry of the master and mariners, the insurers are liable for loss by fire, though occasioned by the negligence of the master and mariners, which by English law is not barratry; for the fire is the proximate cause of the damage.

Buck v. Royal Exchange Assurance Company, 2 Barn. & A. 73. *β* But a loss by fire, where the fire was directly and immediately caused by the barratry of the master and crew as the efficient agents when the fire was communicated; and occasioned by the direct act and agency of the master and crew, intentionally done from a barratrous purpose, is not a loss within the policy, if barratry is not insured against. *Waters v. The Merchants' Louisville Ins. Co.*, 11 Peters, 213. See *Grim v. Phoenix Ins. Co.*, 13 Johns. 451.*g*

Where a merchant vessel was taken in tow by a ship of war, and was thereby exposed to a tempestuous sea, which injured the goods; this was held a peril of the sea.

Hagedorn v. Whitmore, 1 Stark. Ca. 157.

So also, where a press-gang seized two of the mariners who had been despatched to cast off a rope while the ship was moving from port to port in a harbour, and the vessel in consequence ran ashore.

Hodgson v. Malcolm, 2 New R. 336, Mansfield, C. J., diss.

But where a merchant vessel was fired upon by a ship of war, which mistook her for an enemy, and the goods by this means were sunk, Lord Ellenborough, C. J., held, that the loss was not properly described as a peril of the sea, though it was a loss for which the underwriters were liable, under the words, "all other perils, losses, &c."

Cullen v. Butter, 4 Camp. 289; 1 Stark. 138; 5 Maule & S. 461.||

In the construction of a policy upon time, the same liberality prevails as in other cases; and an attention to the meaning of the contracting parties has always been paid. Hence, in an insurance at and from Liverpool to Antigua, *with liberty to cruise six weeks*, it was held that this meant a connected portion of time, and not a desultory cruising for six weeks at any time.

Syers v. Bridge, Dougl. 527; ||Cockey v. Atkinson, 2 Barn. & A. 460.||

{Upon an insurance on cargo for six months at a premium of 15 *per cent.* "as interest shall appear," the premium is not to be paid on the amount of the first cargo shipped, without regard to any change or diminution in the value of the cargo during the term, but upon the value of the different cargoes for the time that they are respectively on board.

3 Dall. 510, Pollock v. Donaldson.}

With respect to perils of the sea, it is to be observed, that every accident happening by the violence of wind or waves, by thunder and lightning, by driving against rocks, or by the stranding of the ship, may be considered as a peril of the sea; and for such losses the underwriter is answerable.(a)

1 Show. 323; ||Gabey v. Lloyd, 8 Barn. & C. 793; Lawrence v. Aberdeen, 5 Barn. & A. 107; Shaw v. Felton, 2 East, 109. (a) Although the remote reason of the loss were the negligence of the master and mariners. Walker v. Maitland, 5 Barn. & A. 171; and see Smith v. Scott, 4 Taunt. 126; Holt, 149.||

{In moving a ship from one part of a harbour to another, it became necessary to send two of the crew on shore to make fast a new line and cast off the rope by which the ship was made fast. Those two men being im-

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mediately impressed and carried away, and not being allowed by the press-gang to cast off the rope in question, the ship in consequence thereof went ashore and was lost. This was held to be a loss by perils of the sea.

5 Bos. & Pul. 336, *Hodgson v. Malcolm*, by three judges *contra* Sir J. Mansfield, C. J.

A leak occasioned by rats, without the neglect of the captain, is a peril of the sea within the policy.

1 Bin. 592, *Garrigues v. Coxe*.

If a ship is eaten by worms during a voyage, so as to be incapable of proceeding on her voyage, and she is condemned, it is not a loss by perils of the sea.

1 Esp. Rep. 445, *Rohl v. Parr*; 2 Mass. T. Rep. 490, *Martin v. Salem Marine Ins. Co.* Vide 2 Cain. 90.}

§ So, where the policy contained a clause, that the insurers took no risk in port but sea risk; and the vessel, while in port, was driven on shore, and stranded, so that she could not be got off, unless at an expense exceeding half her value, and was taken possession of by an armed force, and burnt; held, that it was a loss by sea risk, and not by burning.

Patrick v. Com. Ins. Co., 11 Johns. R. 9.g

But a ship driven on an enemy's coast by the wind, and there captured, shall be said to be lost by capture, and not by perils of the sea.

Greene v. Elmslie, Peake, 212. ||But see *Hahn v. Corbett*, 2 Bing. 205; S. C. 9 Moore, 390.}

||And if a ship hove down on a beach, within the tide-way, to repair, be thereby bilged and damaged, it is not a loss occasioned by perils of the sea.

Thompson v. Whitmore, 3 Taunt. 227; and see 4 Maul. & S. 88; *Phillips v. Barber*, 5 Barn. & A. 161.}

§ A loss of a ship by worms, in an ocean where worms ordinarily assail and enter the bottoms of vessels, is not a peril of the sea within the policy.

Hazzard v. The New England Marine Ins. Co., 1 Sumn. R. 218.g

An action was brought to recover the value of certain slaves insured by the policy. The facts were, that the captain missed the island for which he was bound, and the water running short, some of the slaves were thrown overboard to preserve the rest; and the declaration stated the loss to have happened by perils of the sea. But it was held, that *the mistake* of the captain could not be called a *peril of the sea*.

Gregon v. Gilbert, B. R. East. 23 G. 3, 1 Park. 103.

||However, it has since been held in a late case, that the underwriters are answerable for a loss arising *immediately* from a peril of the sea, though remotely from the negligence of the master and mariners.

Walker v. Maitland, 5 Barn. & A. 171; and see *Buck v. Royal Exchange Assurance Company*, 2 Barn. & A. 73. § *The Patapsco Ins. Co. v. Coulter*, 3 Peters, 230.g

And where the captain was guilty of gross misconduct, amounting to barratry, in cutting the ship's cable, and allowing her to drift on the rocks, this was held a loss by perils of the seas.

Heyman v. Parish, 2 Camp. 150.} § But if the master or crew should barratrously bore holes in the bottom of a vessel, and she should thereby be filled with water and sink, the loss would probably be deemed a loss by barratry, and not by the perils of the seas, or of rivers, though the water should co-operate in producing the sinking. *Waters v. The Merchants' Louisville Ins. Co.*, 11 Peters, 213.g

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A ship which is never heard of, after her departure, shall be presumed to have perished at sea.

This was held in an action on a policy upon the ship from North Carolina to London, and the loss was stated to be by sinking at sea; the evidence to support this averment was, that after sailing from port she had never been heard of.

Green v. Brown, 2 Str. 1199. [See Koster v. Reed, 6 Barn. & C. 19; S. C. 9 Dow. & Ry. 2.]

The same was held in a case where a ship had been captured and ransomed at sea, but was never afterwards heard of, and never arrived at her port of destination.

Newby v. Read, *sitt. after Mich.* 3 Geo. 3, Park, 10; [and see Koster v. Reed, 6 Barn. & C. 19; S. C. 9 Dow. & Ry. 2.]

β There is no precise time after which a vessel that has not been heard of is to be presumed to be lost, but it must depend on the circumstances of the case.

Gordon v. Bowne, 2 Johns. R. 150; Brown v. Neilson, 1 Cain. R. 525.*g*

In England, no time is fixed within which payment of a loss may be demanded from the underwriter, in case the ship is not heard of. A practice, however, prevails among merchants, that a ship shall be deemed lost if not heard of within six months after her departure for any part of Europe, or within twelve, if for a place at a greater distance.*(a)*

Park, 106. {Each case must depend on its own particular circumstances, having regard to the distance of places and the nature of the voyage. 2 Johns. Rep. 150, Gordon v. Bowne. If a vessel does not arrive within the most usual limits of the voyage she was prosecuting, she ought to be presumed to be lost; it is not reasonable to calculate on the utmost limit of it. 1 Cain. 525, Brown v. Neilson.} [See Cohen v. Hinkley, 2 Camp. 51; S. C. 1 Taunt. 249. *(a)* But *seem* that witnesses should be called from her port of destination, to show that she never arrived there. Twenlow v. Oawin, 2 Camp. 85.] β Where a vessel has never been heard of, and is therefore presumed to have been lost, interest is to be paid by the underwriters from the period of twelve months and thirty days since the vessel was last heard of; that being proved to be the uniform usage in such cases. Hallett v. The Phoenix Ins. Co., 2 Wash. C. C. R. 279.*g*

[Loss by capture or detention.]—As to losses by capture, the rule is, that as between the insurer and the insured, the ship is to be considered as lost by the capture, though she be never condemned at all, nor carried into any port or fleet of the enemy; and the insurer must pay the value. If, after a condemnation, the owner recover or retake her, the insurer can be in no other condition than if she had been retaken or recovered before condemnation. The insurer runs the risk of the insured, and undertakes to indemnify; he must, therefore, bear the *loss* actually sustained, and can be liable to no more. So that if, after condemnation, the owner recovers the ship in her complete condition, but has paid salvage, or been at any expense in getting her back, the insurer must pay the loss so actually sustained. No capture by the enemy can be so total a loss, as to leave no possibility of a recovery.*(b)* If the owner himself should retake at any time, he will be entitled; and by a late act of parliament, if an English ship retake the vessel captured, either before or after condemnation, the owner is entitled to restitution upon stated salvage. This chance does not, however, suspend the demand for a total loss upon the insurer: but justice is done, by putting him in the place of the insured, in case of a recapture.

2 Burr. 694, 1st point in Goss v. Withers; [Pond v. King, 1 Wils. 191; Rotch v.

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Edie, 6 Term Rep. 413; *M'Iver v. Henderson*, 4 Maul. & S. 576; *Cologan v. London Assurance Company*, 5 Maul. & S. 447.¶ (b) 2 Burr. 696; 29 G. 2, c. 34, § 24; 34 G. 3, c. 66, § 42.

It has likewise been held, that where a capture has been made, whether it be legal or not, the insurers are liable for the charges of a compromise made, *bonâ fide*, to prevent the ship from being condemned as prize.

Berens v. Rucker, 1 Bl. Rep. 313; [and see *Arcangelo v. Thompson*, 2 Camp. 630.]

By the marine law of England, as practised in the Court of Admiralty, it was formerly held, that the property was not changed so as to bar the original owner in favour of a vendee or recaptor, till there had been a sentence of condemnation.

Park, 71. ¶ Unless the transaction amount to a ransom, in which case the insurers are not liable. *Havelock v. Rockwood*, 8 Term Rep. 268; *Parsons v. Scott*, 2 Taunt. 263; and see *Wilson v. Forster*, 6 Taunt. 25.¶

But now by statute this right of the original owner, in case of a recapture, is preserved to him for ever, upon payment of stated salvage to the recaptors. 13 G. 2, c. 4; 29 G. 2, c. 34; 33 G. 3, c. 66.

Before the stat. of 19 G. 2, c. 37, several cases were determined upon the question of recapture in the English courts; but the same question can never again arise between an insurer and an insured.

If the ship be recovered before a demand for indemnity is made, the insurer is only liable for the amount of the loss actually sustained at the time of the demand. Or, if the ship be restored at any time subsequent to the payment by the underwriter, he shall then stand in the place of the insured, and receive all the benefits resulting from such restitution.

Park, 777.

The underwriter, by the express terms of his contract, is answerable for all loss or damage arising to the insured "*by the arrests, restraints, and detentions of all kings, princes, and people, of what nation, condition, or quality soever.*"

In a late case, the declaration claimed a loss of corn, occasioned by the *unlawful arrest, restraint, and detention of people to the plaintiffs unknown*. The facts upon this part of the case were, that the ship being forced into Elly harbour, in Ireland, and a great scarcity of corn prevailing there at that time, the people came on board in a tumultuous manner, took the government of the vessel from the captain and crew, weighed her anchor, by which she drove upon a reef of rocks, and would not leave her till they had compelled the captain to sell all the corn considerably below the invoice price. The word *people*, it was contended, at the bar, meant individuals of a nation as opposed to magistrates or rulers. But the court held, that it meant "*the ruling power of the country.*"

Nesbitt v. Lushington, 4 Term Rep. 783.

¶ If underwriters subscribe a policy agreeing to pay a total loss in case the ship should not be allowed by the Russian government to load a cargo at Petersburg, and the Russian government refuse to permit her to unload her outward cargo, this is a refusal to allow her to load a cargo within the meaning of the policy, and a total loss is payable. And it is no answer for the underwriters to say that the seizure and detention are unjustifiable, and that the insured have a remedy against the aggressors.

Puller v. Staniforth, 11 East, 232; *Mullett v. Shedden*, 13 East, 304; 6 Term Rep. 424.

To support an averment that the ship and goods, when at A, were ar-

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rested by the persons exercising the powers of government there, and the goods were then and there by the said persons seized, detained, and confiscated; it is enough to show that the goods were forcibly taken from the ship by the officers of government, without putting in any sentence of condemnation.

Carruthers v. Gray, 3 Camp. 141.]

In case of an arrest or embargo by a prince, though not an enemy, the insured is entitled to recover against the insurer.

2 Burr. 696; [Mellish v. Andrews, 15 East, 13.]

¶ But where a British ship insured from Hull to St. Petersburg, having sailed under convoy to the Sound, was afterwards stopped in her course by a king's ship in the Baltic, from an apprehension of hostilities, for eleven days; and then proceeded to a place of rendezvous for convoy, where she waited seven days longer, and then sailed under convoy, till the king's officer received intelligence that a hostile embargo was laid on British ships at St. Petersburg, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to Hull; it was held that this loss of the voyage was not attributable to the arrest or detainment of kings, &c., but immediately to the fear of the hostile embargo in the port of destination, and therefore not within the policy; though if the ship had not been detained in the first instance by the king's officers, she would have arrived in time at St. Petersburg, to have delivered her cargo before the embargo.

Forster v. Christie, 11 East, 205.]

¶ Insurance on goods from New York to Antwerp. During the voyage the vessel was carried by a British privateer to Portsmouth, England, and after a short detention, released. On arriving at Flushing Roads, an armed force was put on board the vessel and continued until her arrival at Antwerp, on the twenty-first of July, 1807. She was not permitted to land her cargo there, nor to depart with it; an armed force being kept on board by the officer of the customs. On application by the consignee, leave was obtained from the French government, through its ministers, to land the cargo under the directions of the officer of the customs, on condition of its being placed in depot, in the customhouse stores, until the decision of the emperor of France could be obtained. After remaining in the state of sequestration until 1810, the cargo was sold by order of the emperor of France, and the proceeds paid into his *caisse d'amortissement*; held, that there was a total loss of the cargo, by the arrest, restraint, and detriment of the French government.

Gracie v. New York Ins. Co., 13 Johns. R. 161.]

If the ship be detained by a foreign power, which, in time of war, may have seized a neutral ship, in order to search her for enemy's property, the charges consequent thereupon must be borne by the underwriter.

Saloucci v. Johnson, B. R. Hil. 25 G. 3, Park, 125. [See also *Schroeder v. Thompson*, 7 Taunt. 462. And this right of search is allowed by the law of nations. See 8 Term Rep. 234; 1 Rob. A. R. 340.] ¶ So the assured, in a policy upon a ship, who sustains a total loss by seizure, &c., is entitled to recover all expenses fairly incurred in obtaining a restoration of the proceeds of the ship, on condemnation and sale. *Francis v. Ocean Ins. Co.*, 6 Cow. 404.]

But though an underwriter is liable for all damage arising to the owner of the ship or goods from the restraint or detention of princes, yet that rule shall not be extended to cases where the insured shall navigate against the laws of those countries, in the ports of which he may chance to be detained,

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or to cases where there shall be a seizure for nonpayment of customs. This was so ruled by Lord Commissioner Hutchins in Chancery, in the year 1690: and the reason of it is obvious, because there is a gross fraud on the part of the owner of the property insured; and no man shall take advantage of his own misconduct. If, indeed, any of those acts were committed by the master of the ship, without the knowledge of the insured, the underwriter would be liable, if not for losses by detention, at least for a loss by the barratry (a) of the master, to which such conduct would most certainly amount.

2 Vern. 176. *β* Nor to cases of capture, occasioned by the misconduct of the master, in sailing toward, with an intention to enter, a blockaded port. *Vos et al. v. United Ins. Co.*, 2 Johns. C. 180. *γ* [(a) *Earle v. Rowcroft*, 8 East, 126; *Goldschmidt v. Whitmore*, 3 Taunt. 508.]

{A seizure by a foreign state of a vessel in a port of that state, under a suspicion of a breach of neutrality, is a loss by the restraint of princes. Those suspicions cannot be a guide to the tribunals of our country, unless they have been proved to be well founded.

2 Cain. Er. 158, 173, *Smith v. Steinbach*.}

[[And according to the principle of the above case, in 2 Vernon, where a neutral American ship insured in this country was captured and condemned by a French prize court as prize, on the express ground that the ship was not properly documented, according to treaties between France and the United States, the neutral assured could not recover against the British underwriter, although there was no warranty or representation that the ship was American; for the neglect of the ship-owners, who were bound to provide proper national documents, was the efficient cause of the loss. But it is otherwise in case of a mere assured of goods.

Bell v. Carstairs, 14 East, 374; and see *Bell v. Broomfield*, 15 East, 364; *Nonnen v. Reid*, 16 East, 176.

β A vessel was captured and deprived of all her papers, which she never regained, and was afterwards recaptured and restored, on payment of salvage; held that the insured were justified in breaking up the voyage, and that the ship, by the loss of her papers, not being in a legal capacity to perform her voyage, there was a total loss by capture.

Post v. Phoenix Ins. Co., 10 Johns. R. 79. *γ*

And if a chartered ship be lost by reason of the captain engaging in an illegal trade in obedience to the orders of the charterer, this is not a loss by barratry, for which the owner of the ship can recover against the underwriters.

Hobbs v. Hannam, 3 Camp. 93.

And if the ship be condemned for carrying simulated papers, contrary to the law of nations, without having any liberty by the policy to do so, the underwriters are discharged.

Horneyer v. Lushington, 3 Camp. 85; and see *Pipon v. Cope*, 1 Camp. 434.]

It is now settled, that under a policy on a ship and stores, "at and from a port" in a foreign country, the insurers are liable for the payment of damage occasioned by the detention or seizure of the ship by the government of the country in the loading port.

Rotch v. Edie, 6 Term Rep. 413.

{An American vessel was insured at New York, and, after commencing her voyage, was detained under an embargo act passed by the Congress of

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the United States, notice of which was not received till after the voyage was commenced. The insured, it was decided, might abandon and recover for a total loss.

5 Johns. Rep. 299, *M'Bride v. Marine Ins. Co.*; *Ibid.* 310, *Waldens v. Phoenix Insurance Company*.

But in England, it is held that an American citizen cannot recover from a British underwriter any indemnity for a loss occasioned by an embargo laid by the American government.

Parke, (6th edit.,) 609—614. Vide 3 Bos. & Pul. 298, *Touteng v. Hubbard*.

If the port of destination mentioned in a policy on goods be actually blockaded, this is a peril within the policy, and the insured may abandon.

1 Johns. Rep. 249, *Schmidt v. United Ins. Co.*, by three judges against two. But see *Lubbock v. Rowcroft*, and *Hadkinson v. Robinson*, *infra*.

An insurance being made on goods destined to a particular port, which, on the arrival of the ship there, was found to be in the hands of the enemy, the insured thereupon abandoned and claimed a total loss. Lord Ellenborough said that the loss could not be brought within any risk insured against: the abandonment was from an apprehension of capture by an enemy, and not from any loss within the terms of the policy.

5 Esp. Rep. 50, *Lubbock v. Rowcroft*.

So if the port of destination is shut by the government of the country against the ship, whereby the voyage is lost, this is not a peril within the policy.

3 Bos. & Pul. 388, *Hadkinson v. Robinson*.

A denial of entry at the port of destination, without any seizure or arrest by the government, is not a loss within a policy which contains an express agreement that for a seizure or detention on account of *prohibited trade* there shall be no remedy. How can underwriters, who do not assume the greater risk of seizure, be answerable for a smaller one proceeding from the same cause, *i. e.* an illicit trade.

1 Johns. Rep. 181, 190, *Suydam & Wyckoff v. Marine Ins. Co.*

Goods were insured from New York to Bordeaux, with the usual printed clause as to *illicit trade*, and by a written clause the insured "warranted not to abandon if turned away, nor if captured till condemned." The vessel was captured, and sent into England, but being released proceeded in her voyage, and reached the Garonne, 16th January, 1804, where with her cargo she was detained, and ordered to leave France, as she had come directly from England. She accordingly with her cargo went to Spain, landed it, and proceeded to Bordeaux in ballast. The assured, in consequence of advice of her situation in France, abandoned. It was held that he was not entitled to recover as for a total loss, but only for a partial loss, for expenses and average from the time of capture until her arrival at Bordeaux: for the detention at and turning away from Bordeaux were not a loss within the policy, being excepted by the clause relating to illicit trade, according to *Suydam & Wyckoff v. Marine Ins. Co.* (*supra*); and if it was admitted that they were consequences of the British capture, this was not a case for abandonment, as no abandonment was to be made in case of capture until condemnation. It was agreed that the *turning away* in the written clause applied only to the case of a blockade.

3 Johns. Rep. 88, *Speyer v. New York Ins. Co.* }

|| Every insurance on alien property by a British subject must be under-

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stood with this implied exception, that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer. Thus an underwriter on French property in time of peace is not liable for a loss occasioned by capture by the king's ships during hostilities, which commenced between Great Britain and France subsequent to the policy being effected, and terminated prior to the action brought.

Gamba v. Le Mesurier, 4 East, 407; *S. C.* 1 Smith, 81; *Brandon v. Curling*, 4 East, 410; *S. C.* 1 Smith, 85; *Fartado v. Rodgers*, 3 Bos. & Pul. 191.]

LOSS BY BARRATRY.—Another of the risks insured against is the barratry of the master or mariners.

It appears from the cases upon this subject, that any act of the master, or of the mariners, which is of a criminal nature, or which is grossly negligent,^(a) tending to their { } own benefit, to the prejudice of the owners of the ship, without their consent or privity, is barratry.

1 Stra. 581; 2 Stra. 1173; Cowp. 143; [Nutt v. Bourdieu, 1 Term Rep. 323; *β* *Marcardier v. The Union Ins. Co.*, 8 Cranch, 39; *Dederer v. The Delaware Ins. Co.*, 2 Wash. C. C. R. 61.^g {See 1 Bin. 321. { } This is not essential to constitute barratry. 8 East, 126, *Earl v. Rowcroft*; 2 Cain. 67, *Kendrick v. Delafield*; 2 Bin. 580, *Wilcocks v. Union Ins. Co.* Vide 4 Dall. 294, *Crousillat v. Ball*; 2 Dall. 137, *Hood's Ex'rs v. Nesbit*.] (a) Barratry in English policies means only *wilful* misconduct. 2 Barn. & A. 82; and see 8 East, 136; 3 Camp. 620, 539; 3 Taunt. 566; 6 Taunt. 375; 8 Taunt. 688.] *β* All the definitions in the English or American authorities agree as to the definition of barratry, to wit: that fraud must be a constituent to the act of barratry. The question seems to be between "*dolus* and *culpa*," which of those two words best conveys the sense of the law. *The Patapsco Ins. Co. v. Coulter*, 3 Pet. 230; *Hendrick v. Delafield*, 2 Cain. R. 71; *Cook v. Commercial Ins. Co.*, 11 Johns. R. 40; *Grim v. Phoenix Ins. Co.*, 13 Johns. R. 451; *Wiggin v. Amory*, 14 Mass. R. 1.^g

It is not necessary, in order to entitle the insured to recover for barratry, that the loss should happen *in the act of barratry*; that is, it is immaterial whether it take place *during* the *fraudulent voyage*, or *after* the ship has returned to the regular course; for the moment the ship is carried from its right track with an evil intent, barratry is committed.

Cowp. 155; *β* *Swan v. The Union Ins. Co. of Maryland*, 3 Wheat. 168.^g

But the loss, in consequence of the act of barratry, must happen *during the voyage insured*, and within the time limited by the policy, otherwise the underwriters are discharged. Thus, if the captain be guilty of barratry by smuggling, and the ship afterwards arrive at the port of destination, and *be there moored at anchor twenty-four hours in good safety*; the underwriters are not liable, if, after this, she should be seized for that act of smuggling.

Lockyer v. Offley, 1 Term Rep. 252; [and see *Hibbert v. Martin*, 1 Camp. 538.]

{ If an assured be apprized by his master of his pursuing another voyage than that insured, on which he has been sent, and do not disapprove of it, it is only a deviation and not barratry, though the master ultimately run away with the ship, sell her, and embezzle the proceeds.

3 Cain. 89, *Thurston v. Columbian Ins. Co.* }

From the above descriptions of barratry, it will appear, that if the act of the captain be done with a view to the benefit of his owners, and not to advance his own private interest, no barratry is committed. To constitute barratry, it must be without the knowledge or consent of the owners; ^(b) because nothing can be so clear as this, that no man can complain of an act done to which he himself is a party. It is material to consider, in what sense the word owner is to be understood, in this definition. It has been

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argued, that if A be the owner of a ship, and let it out to B as freighter, who insures it for the voyage; and if the deviation be with the knowledge of A, though unknown to B, the insurer is discharged. But the court overruled that argument, and said, that, in order to discharge the insurer from the loss by barratry, it must appear that the act done was by the consent or with the privity of the owner *pro hac vice*; that is, the freighter, the person insured.

¶(b) See 3 Camp. 93; ¶ Vallejo v. Wheeler, Cowper, 154. {The following distinction has been made on this subject; that where by the terms of the charter-party, the owner of the ship appoints the master and mariners, and retains the management and control of the vessel, the charter is to be considered as a covenant to carry goods, and the freighter is not owner *pro hac vice*; but where the whole management is given over to the freighter, it is more properly a hiring of the vessel for the voyage, and in such case the hirer will be deemed owner *pro hac vice*. 1 Johns. Rep. 229, 239; McIntire v. Bowne. And this distinction appears to be supported by the case of Vallejo v. Wheeler. See that case as reported in Loft, 640; } ¶Soares v. Thornton, 1 Moo. 373; 7 Taunt. 627.¶ § Where the owner of the vessel was on board at the time that the captain and crew ran away with it, held, that this circumstance alone could not be construed into an assent on his part, so as to change the nature of the offence, and preclude its being considered as an act of barratry. Millaudon v. New Orleans Ins. Co., 11 Mar. La. R. 602.¶

¶And where the ship is let out to freight by a charter-party, and a policy is effected for the benefit of the several owners, an act done by consent of the freighter is not barratry, since the consent of the freighter is the consent of the owners.

Hobbs v. Hamman, 3 Camp. 94; and see 1 Camp. 434. § But where the general owner of a ship retains the possession, command, and navigation of the same, and contracts to carry a cargo or freight for the voyage, the charter-party is to be considered as a mere affreightment, sounding in covenant; and the freighter is not clothed with the character of legal responsibility of ownership. In such a case, the general owner is also owner for the voyage. Consequently, if he be master of the vessel, he is incapable of committing barratry. Macardin v. The Chesapeake Ins. Co., 8 Cranch, 39. So the hire of a vessel for a term of time, even by parol, is so far the owner that he cannot commit barratry. Taggard v. Loring, 16 Mass. 336.¶

And on the principle that the consent of the ship-owner will negative the charge of barratry, if the crew are guilty of repeated acts of smuggling, and the owner through gross negligence omit to prevent them, the insurers are not liable for a loss by seizure for forfeiture.

Pipon v. Cope, 1 Camp. 434.¶

If a declaration state a ship to have been lost by the *fraud and negligence* of the master, that is a sufficient averment of a loss by *barratry*.

Knight v. Cambridge, 2 Ld. Raym. 1349; 1 Str. 581, S. C.; ¶and see Boehm v. Combe, 2 Maul. & S. 172.¶

But where a ship sailed a different course from that first intended, which alteration was publicly notified before the ship sailed, and where the master was to have no benefit by the change, it was held not to be barratry.

Stamma v. Brown, 2 Stra. 1173.

So, if a ship take a prize, and instead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, against the orders of his owners, the captain is justified by necessity; and it is not barratry, because not done to defraud the owners.

Elton v. Brogden, 2 Stra. 1264.

¶So, a deviation of a vessel from the voyage insured, through the ignorance of the captain, or from any other motive not fraudulent, though it avoids the policy, does not constitute an act of barratry.

Phynn v. Royal Exchange Assurance Company, 7 Term Rep. 505.

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But if the crew, in conjunction with prisoners of war on board, run away with the ship, this is an act for which the underwriters are answerable.

Hucks v. Thornton, Holt, Ca. 30; and see *Toulmin v. Inglis*, 1 Camp. 411.

So, if the crew are all imprisoned by the prisoners, except one sailor, who is heard on deck in conversation with them, this is evidence to go to the jury to show barratry.

Toulmin v. Anderson, 1 Taunt. 227.]

§ If a master knowing the inevitable danger of capture if he proceed in his voyage, should continue it, and expose his vessel to certain seizure, this will be a loss not arising from the usual perils insured against, but from a criminal breach of duty, which is barratry.

Richardson v. Marine Ins. Co., 6 Mass. 109.g

A ship was insured from London to Seville; she was let to freight for the voyage; she sailed from London to the Downs, from whence she sailed to Guernsey, *which was out of the course of the voyage*. The captain went there to take in brandy *on his own account*, with the knowledge of the original owner of the ship, *but not of the freighter for that voyage*. This was held to be barratry.

Vallejo v. Wheeler, Cowp. 143; [see also *Dixon v. Reid*, 5 Barn. & A. 597; *S. C. 1 Dow. & Ry.* 207; *Roscow v. Corson*, 8 Taunt. 684.]

{So a deviation by the master, at the request of the captain of another vessel for the purpose of recovering that vessel which had been run away with by the seamen, for which service he was to receive 100*l.*, was held not to be barratry, it being found that the master had no view of any exclusive profit or advantage to himself, but intended that the benefit and advantage received should be for his owners and himself.

2 Dall. 137, *Hood's Exrs. v. Nesbit*.

Ship and cargo were insured on a voyage from Philadelphia to Cape François, thence to New Orleans, back to Cape François, and thence to Philadelphia. At the Cape, on her return, the master, for freight to be paid to his owner, and a large *douceur* for himself, took French property on board; which he agreed to cover as American. The captain was addressed to merchants at the Cape, and was intrusted with the disposition of the cargo only in case of their absence. The vessel was taken by the British, and the whole cargo condemned. The court charged the jury, that if the captain meant to take the premium for covering to his own private benefit, and not in the first instance to pay it to his owners, expecting a gratuitous compensation, it was an act of barratry, unless they were of opinion that he was the general agent of the owner. The verdict was for the plaintiff, the assured.

4 Dall. 294, *Crousillat v. Ball*.]

A breach of an embargo is, it seems, an act of barratry in the master.(a)

Roberts v. Ewer, 1 Term Rep. 127. [(a) If without the assent and privity of the owner. *Everth v. Hannam*, 6 Taunt. 375; *S. C.* 2 Marsh. 72.]

{So if the master sail out of port, without paying the port duties, which he should have done, whereby the ship is subjected to forfeiture, it is barratry.

Knight v. Cambridge, as stated in Cowp. 153; and 8 East, 135, 136. Vide 1 Cain. Er. xl.

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Any fraudulent or criminal conduct against the owners by the master, in breach of the trust reposed in him, and to the injury of the owners, is barratry, although it may not be done with intent to injure them, or for the benefit of the master at their expense, but is on the contrary done with a view to their benefit. Therefore when the captain of an African slave ship, having general instructions to make the best purchases with despatch, went into an enemy's settlement with their permission, as he could more speedily and cheaply complete his cargo there, in consequence of which the ship was seized and confiscated for trading with an enemy, it was held to be barratry. For this, though intended for the benefit of the owners, was a breach of his trust, which bound him to obey the instructions of his owners, if any are given, and where the instructions are silent, to do nothing, at all events, but what is consonant to the laws of the land, whether with or without a view to their advantage. In the absence of express orders to the contrary, obedience to the law is implied in their instructions; and therefore the master is guilty of a breach of their implied orders, by acting in contravention of the laws of his country.

8 East, 126, *Earl v. Rowcroft*; 2 Bin. 580, *acc.*

And there is no material difference in this respect between a violation of a law of his own country and a violation of the law of nations; for that is considered as a part of the former. An unlawful rescue, therefore, of a neutral vessel by the master from a belligerent captor is barratry.

2 Bin. 574, *Wilcocks v. Union Ins. Co.*, at *nisi prius*, before C. J. Tilghman.}

In an action on a policy on goods on board the *Live Oak*, whereof Joseph Rati was master, at and from Jamaica to New Orleans, it appeared, that the ship was put up as a general ship in Jamaica in 1783; that she sailed on the voyage insured in May, 1783, and arrived in June following at the mouth of the river Mississippi, which leads up to New Orleans in Spanish America, at the distance of about thirty-five leagues. When the captain had gotten thus far, he dropped anchor, and on his return, without carrying the ship to her port of destination, stood away for the Havannah, after which he was never heard of. It appeared, that he had a private adventure of negroes of his own on board, which there was reasonable evidence for supposing he intended to have disposed of at New Orleans; but finding it difficult to do so, on account of a prohibition to import them into the Spanish government, he went to the Havannah. The jury found for the plaintiff, on the count in the declaration charging the barratry of the master; and the whole Court of King's Bench, upon a motion for a new trial, were of opinion, that the facts stated amounted clearly to the crime of barratry.

Ross v. Hunter, 4 Term Rep. 33.

So, it has been holden, that if the captain of a ship, contrary to the instructions of his owner, cruise for and take a prize, and the vessel be afterwards lost in consequence of it, he is guilty of barratry, even though he libel his prize in the Court of Admiralty in the name of himself and his owner; and though the owner had procured a letter of marque, solely with a view to encourage seamen to enter, and without any intention of using it for the purpose of cruising; for whatever is done by the captain to defeat or delay the performance of the voyage is barratry in him, it being to the prejudice of his owners; and though the captain might conceive that what he did was

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for the benefit of his owners, yet if he acted contrary to his duty to them, it is barratry.

Moss v. Byrom, 6 Term Rep. 379.

||So, where a master had general instructions to make the best purchases with despatch, it was held that it would not warrant him in going into an enemy's settlement to trade, (which was permitted by the enemy,) though his cargo could be more speedily and cheaply completed there; and that such act, in consequence of which the ship was seized and confiscated, was barratrous.

Earle v. Rowcroft, 8 East, 136.†

An act of the captain, with the knowledge of the owners of the ship, though without the privity of the owner of the goods, who happened to be the person insured, is not barratry.

Nutt v. Bourdieu, 1 Term Rep. 323; [and see *Pipon v. Cope*, 1 Camp. 434;] ‡ *Thurston v. Col. Ins. Co.*, 3 Cain. R. 89.g

If the master of the ship be also the owner, he cannot be guilty of barratry.(a)

||(a) Unless he have chartered the ship, 7 Taunt. 697. The master being supercargo does not prevent the underwriter from being liable for his barratry. 8 East, 139.† It follows from the very terms of the definition, that barratry cannot be committed by a master who is owner for the voyage, because he cannot commit a fraud against himself. *Macardin v. The Union Ins. Co.*, 8 Cranch, 39.g

It is clear, that if the owner be also the master of the ship, any act, which in another master would be construed barratry, cannot be so in him; because such doctrine would militate against one of the rules above laid down; namely, that no man shall be allowed to derive a benefit from his own crime, which he would do, were he to recover against the insurers for a loss occasioned by his own act. But where it was proved, that the person who was described in the policy as master, and who was treated with as such, carried the ship out of course for fraudulent purposes, it was holden to be *prima facie* evidence of barratry, and that it lay upon the insurer, in order to discharge himself,† to show that the person so acting as master was also the owner or freighter of the vessel.

Ross v. Hunter, 4 Term Rep. 33; [and see *Soares v. Thornton*, 1 Moore, 373.] {†} 3 Cain. 1, *Steinbach v. Ogden*, S. P.}

{If the master fraudulently procure a sale of the vessel and purchase her himself, he is not considered as owner, so as to prevent the insured (who contracted with him as master without any knowledge of the manner in which he had conducted himself, or that he pretended to be the owner of the vessel) from recovering a loss occasioned by his fraudulent conduct.

3 Cain. 1, *Steinbach v. Ogden*.}

This rule, respecting the same person being both owner and master, has been extended in the Court of Chancery to a case where such an owner and master, after mortgaging his ship, had committed barratry; and when the mortgagee brought an action at law against the insurer to recover damages for the loss which he had sustained by this act of barratry, the court, still considering the mortgagor as the owner, granted an injunction.

Lewin v. Suasso, in Can. 16 G. 2, Postlethw. Dict. vol. i. p. 147.

{The consignment of the cargo to the captain will not prevent his fraudulent act from being barratry, if that act is done in his character of master and not of consignee. The accidental circumstance of the union of the two

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characters cannot qualify or alter his acts as master. The two characters are totally distinct. The captain cannot lay aside his character and responsibility as master, until the vessel has performed her voyage, and arrived at the port of destination.

2 Cain. 72, *Kendrick v. Delafield*. See *Earl v. Rowcroft*, *supra*, p. 671.}

Even if the parties insert in the policy, that the insurance shall be upon the ship in any lawful trade, if the captain commit barratry by smuggling, the underwriters are answerable. For otherwise the word barratry should be struck out of the policy; and most clearly, the stipulation in the policy respecting the employment of the ship in a lawful trade, must mean the trade on which she is sent by the owners.

Havelock v. Hancil, 3 Term R.p. 277; *American Ins. Co. v. Dunham*, 15 Wend. R. 9; *S. C. 2 Hall's R. 422*; *Hallett v. Col. Ins. Co.*, 8 Johns. R. 272; *Steinbach v. Ogden*, 3 Cain. R. 1.g

{So though there is a warranty against seizure on account of illicit trade, the underwriter is liable for a loss occasioned by illicit trade barratrously carried on by the master.

2 Cain. 222, *Suckley v. Delafield*; 4 Dall. 294, *Crousillat v. Ball*.

So if there is a warranty that the property is neutral, it only implies that the neutral character shall not be forfeited by any acts of the insured or their agents, except such as amount to barratry.

2 Bin. 574, *Wilcocks v. Union Ins. Co.*}

If any captain or mariner belonging to any ship shall wilfully burn or destroy her, to the prejudice of any merchant loading goods thereon, or of any person underwriting any policy thereon, or to the prejudice of the owner of the ship, he shall suffer death as a felon, without benefit of clergy.(a)

||(a) Re-enacted by 7 & 8 G. 4, c. 30, § 9.||

If the offence be committed within the body of a county, the offender shall be tried in a court of common law; if upon the high seas, it shall be tried according to the directions of the 28 H. 8, c. 15.

{A policy containing a written clause "against all risks" protects the insured against every loss happening during the voyage, except such as may arise from his fraudulent acts.

1 Johns. Ca. 337, *Goix v. Knox*.

Neither a loss of the proceeds of the outward cargo destroyed by fire at the foreign port, nor damage to the vessel from worms and climate, nor an extraordinary expenditure of provisions, whether by the seamen or by centinels placed on board by the government, nor the possible earnings of the vessel during an embargo, are losses within a policy of insurance, against the usual risks, on a vessel and cargo *to, at and from a foreign port, for the purpose of selling the outward*, and purchasing a return cargo.

2 Mass. T. Rep. 420, *Martin v. Salem Marine Ins. Co.*

If a vessel be driven into a port of necessity, and a pestilential disorder break out, which renders it impossible for her to pursue her voyage, the damage resulting from it is covered by the policy. The court said that it was not requisite to decide absolutely whether a pestilence is a peril directly within the policy. It formed, however, a sound excuse for delay, and if the consequence of that delay was a deterioration of the subject insured, the insurer must be answerable for the loss.

2 Cain. 1, *Williams v. Smith.*}

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PARTIAL LOSS.—Partial, or, as it is sometimes called, average loss, *ex terminis*, implies a damage, which the ship may have sustained in the course of her voyage, from any of the perils mentioned in the policy: when applied to the cargo, it also means the damage which goods may have received, without any fault of the master, by storm, capture, stranding, or shipwreck, although the whole, or the greater part thereof, may arrive in port. These partial losses fall upon the owners of the property so damaged, who must be indemnified by the underwriter. For if the goods arrive, but lessened in value through damage received at sea, the nature of an indemnity speaks demonstrably that it can only be effected by putting the merchant in the same condition in which he would have been, if the goods had arrived free from damage.

2 Burr. 1172. {Where an average loss is claimed, the plaintiff will be nonsuited if there is no evidence of its extent; 3 Cain. 149, Clendening & Adams v. Church.} It is not essential to the plaintiff's recovery for an average loss on a valued policy on account of damage by the sea to the goods insured, that a survey should be made at the port of delivery, before breaking bulk. Morean v. The United States Ins. Co., 1 Wheat. 217.

The proportion of damage the merchant may have suffered is ascertained in this way. Where an entire thing, as one hogshead of sugar, happens to be spoiled, if you can fix whether it be a third, a fourth, or a fifth worse, then the damage is ascertained to a mathematical certainty. This is found out, not by any price at the port of discharge, but by the price at the port of delivery, where the voyage is completed, and the whole damage known. Whether the price at the latter be high or low, it is the same thing; for in either case it equally shows, whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound: consequently, whether the injury sustained be a third, fourth, or fifth of the value of the thing. And as the insurer pays the whole prime cost if the thing be wholly lost; so, if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth, not of the value for which it sold, but of the value stated in the policy. And when no valuation is stated in the policy, the invoice of the cost, with the addition of all {} charges, and the premium of insurance, shall be the foundation upon which the loss shall be computed. {And the drawback {} allowed on exportation of the goods shall not be deducted from the invoice price.}

2 Burr. 1170, Lewis v. Rucker; 2 Burr. 1167, Dick v. Allen, at Guild. after Mich. 1785, *coram* Buller, J. {The prices of the sound and damaged goods are to be taken from the gross and not the net proceeds. 2 East, 581, Johnson v. Sheddon; 3 Bos. & Pul. 308: Hurry v. Royal Exc. Ass. Co.} 1 Magens, 37. {3 Cain. 47; 1 Bin. 405, Gibson v. Philadelphia Ins. Co. {} The insured cannot charge a commission on the purchase of goods by themselves; 1 Johns. Rep. 312, Anonymous. {} 1 John. Ca. 120, Gahn & Mumford v. Broome; 1 Johns. Rep. 190 } || See Puller v. Glover, 12 East, 124; Hurry v. Roy. Ex. Ass., 3 Bos. & Pul. 308; Elsher v. Noble, 12 East, 639; and see the rule as to the calculation of loss, ably laid down by Mr. Justice Lawrence in Johnson v. Sheddon, 2 East, 581.]]

This rule of ascertaining the damage will hold wherever there is a specific description of casks or goods; but in *Le Cras v. Hughes*, the property, which consisted of various goods taken from an enemy, was valued at the sum insured, and part was lost by perils at sea; consequently, the same rule could not be adopted, on account of the nature of the thing insured. The only mode was to go into an account of the whole value of the goods, and take a proportion of that sum as the amount of the goods lost.

Le Cras v. Hughes, B. R. East. 22 G. 3, Park, 111.

{On an open policy on a vessel, her value at the time she sails, with the expense of her outfit (including one month's pay advance to the captain and

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crew) and the premium of insurance, is the rule by which the loss shall be estimated.

3 Cain. 47; 1 Cain. 75, *Kemble v. Bowne*. The two *per cent.* to be deducted in case of loss is considered as so much additional premium in the event of a disaster, and cannot therefore be added to the valuation. 1 Cain. 82.

On a policy on freight, the gross amount is, on a total loss, the sum to be recovered, without any deduction for wages or provisions which must have been paid or consumed had the vessel arrived.

3 Cain. 43, *Stevens v. Columbian Ins. Co.*

A policy was effected at New York on coffee, valued at 20 cents *per* pound, from a French port in the West Indies to New York or Baltimore. By the bill of lading, the coffee was to be delivered at Baltimore, and the freight paid on the weight at the custom-house there. It was held that the weight should be determined by the American standard, though the invoice specified the weight to be French.

2 Cain. 30, *Gracie v. Bowne*.

Where the goods were taken and forcibly sold in a port of necessity, and the plaintiff could recover only a *partial* loss, that loss was estimated by deducting the net proceeds of the sales from the invoice price or cost of the goods. It is not to be adjusted on the return by the sale of the produce, in which those proceeds were invested.

2 Johns. Rep. 138, *Suydam & Wyckoff v. Marine Ins. Co.* }

Since the 19th of G. 2, the constant usage has been to let the valuation fixed in the policy remain, in case of a total loss, unless the defendant can show that the plaintiff had a colourable interest only, or that he has greatly overvalued the goods: but a partial loss opens the policy. This custom, said Lord Mansfield, was introduced by Lord Chief Justice Lee, in a case of *Erasmus v. Banks*; and in another case of *Smith v. Flexney*, which happened about the same period, the same rule of decision was adopted.

M. 21 G. 2.

{A ship and goods were insured in a valued policy from Liverpool to Africa, and from thence to the West Indies. Part of the goods were employed in the purchase and sustenance of a cargo of slaves. The ship, after landing the slaves at the port of destination, but before the risk ended, was lost. The insurers were held liable to the full amount of the value in the policy, which was the real value when the voyage commenced, though this value was greatly diminished by the purchase and sustenance of the slaves, which were brought to a profitable market, and though only the wreck of the ship was abandoned.

2 East 109, *Shawe v. Felton*; Marshall, 139, 142. }

The underwriters of London have, by express words inserted in their policy, declared, that they will not be answerable for any partial loss happening to corn, fish, salt, fruit, flour, and seed, unless it arise by way of a general average, or in consequence of the ship being stranded. (a) This clause was introduced to prevent the vexation of trifling demands, which must have arisen in every voyage, on account of the very perishable nature of the above commodities. This form was formerly used by the two insurance companies, as well as by the private insurers, till the year 1754, when a ship having been stranded, and got off again, the insured recovered a small partial loss against the London Assurance Company, since which period the companies have left out the words, "*or the ship be stranded*;"

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and are now only liable in cases of a general average: but the old form is still retained by private insurers.

[*(a) Bowring v. Elmslie*, at N. P., cited 7 Term Rep. 216. As to the meaning of the word "*stranding*," see *Dobson v. Bolton*, Marsh. on Ins. 231, 3d ed.; *Carruthers v. Sidebotham*, 4 Maul. & S. 77.] *Cantillon v. the London Assurance Company*, cited in 3 Burr. 1555. [See Marsh. on Ins. 216, 3d ed.] *See Biays v. The Chesapeake Ins. Co.*, 7 Cranch, 415.

Upon this clause there have been several determinations, in all of which it has been uniformly held, that the underwriters can in no case be answerable for a partial loss to such commodities: and that no loss shall be deemed a total one, but the absolute destruction of the thing insured; for that while it specifically {} remains, though perhaps wholly unfit for use, no loss has happened within the meaning of this memorandum.

Corn is a general term, and includes many particulars: peas and beans have been holden to come within the meaning of the word. *Mason v. Skurray*, Sittings after Hil. 1780, at Guildhall. {Rice does not. 5 Bos. & Pul. 213, *Scott v. Bourdillion*.} But in a late trial at Guildhall, in the Court of Common Pleas, Mr. J. Wilson was of opinion, that the term salt used in the memorandum did not include saltpetre. *Jouram v. Bourdieu*, Sittings after Easter Term, 27 Geo. 3; [and in *Scott v. Bourdillion*, 2 New Rep. 213, the term corn was held not to include rice.] *Where dried fish were enumerated in the memorandum; and also, "all other articles perishable in their own nature," held, pickled fish were not included. Barker v. Ludlow*, 2 Johns. C. 289; *semble*, that the meaning of the clause, "all other articles perishable in their own nature," extends to those articles not particularly enumerated, which are liable to perish of themselves in the course of the voyage, without any external injury. *Astor v. Union Ins. Co.*, 7 Cow. R. 202. {} 1 Johns. Ca. 226, *Le Roy v. Gouverneur*; 1 Cain. 196, 211, *Maggrath & Higgins v. Church*; 3 Cain. 108, *Neilson v. Columbian Ins. Co. acc.* See 7 East 38, 43, *Anderson v. Royal Exc. Ass. Co.*]

This was held with respect to a cargo of wheat which was partially damaged in a storm.

Wilson v. Smith, 3 Burr. 1550. *And see, Le Roy et al. v. Gouverneur*, 1 Johns. C. 226; *Maggrath v. Church*, 1 Cain. R. 196; *Neilson v. Columbian Ins. Co.*, 3 Cain. R. 108; *Hills v. London Assurance Co.*, 5 Mees. & W. (Ex.) 569.

The same with respect to a cargo of fish, which was stinking, and of no value when examined.

Cockings v. Fraser, B. R. E. 25 G. 3, Park, 114; [1 Marsh. on Ins. 219, 3d ed.]

A cargo of peas was so much damaged, that the produce was three-fourths less than the freight; but as it in fact arrived at the port of destination, the underwriter was holden not to be liable.

Mason v. Skurray, Sitt. after Hil. 1780, at Guildhall. *And see Marean v. The United States Ins. Co.*, 3 Wash. C. C. R. 256.

{But where a cargo of fruit was, in the course of the voyage, so much damaged by sea-water that it became rotten and stunk, and on the ship's arrival at an intermediate port into which she was driven, the government of the place prohibited the landing of the cargo, and the ship also, being too much damaged to proceed on the voyage, was sold, and the cargo necessarily thrown overboard, the Court of Common Pleas held the insured entitled to recover for a total loss.

3 Bos. & Pul. 474, *Dyson v. Rowcroft*. See *Ibid.* 388, *Hadkinson v. Robinson*.

When a *general average* loss has been sustained, the owner is not bound to look to the owner of the vessel and freight for his proportion, but may immediately call on his underwriter for indemnity, leaving him to his suit against the other parties.

1 Cain. 196, *Maggrath & Higgins v. Church*; 1 Johns. Rep. 412.

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Under a policy on a chariot to be carried on deck, "free from average," but in which jettisons are one of the perils insured against, if the box of the chariot be thrown overboard in a storm, it is a total loss, and the insured is entitled, on abandoning, to recover for it as such.

2 Cain. Er. 324, *Judah v. Randall*;

¶ But where a ship with a cargo of *fruit* was forced by stress of weather to put into a port out of the course of her voyage, and it was there found that the fruit was spoiled by the sea-water and rotten, and the government prohibiting the landing it was necessarily thrown overboard, it was held to be a *total loss*.

Dyson v. Rowcroft, 3 Bos. & Pul. 474; and see the same principle laid down in the cases of *Glennie v. the London Assurance Company*, 2 Maul. & S. 371; *Hedberg v. Pearson*, 7 Taunt. 154; S. C. 2 Marsh. Rep. 432.

And it is now settled that if the ship be stranded, the insurer is liable for any partial loss in any of the articles, though it did not arise from the stranding, but from some other cause; for the not stranding destroys the exception, and lets in the general words of the policy.

Burnett v. Kensington, 7 Term Rep. 210; S. C. Esp. Rep. 416.

β Where goods are warranted by the memorandum in a policy of insurance, free from average, unless general, the loss by a sea damage must be total in fact, to warrant a recovery by the assured.

Astor v. Union Ins. Co., 7 Cow. R. 203; *Le Roy v. Gouverneur*, 1 Johns. R. 226; *Wain v. Thompson*, 9 S. & R. 121; *Brooks et al. v. La. Ins. Co.*, 4 N. S. 640; 5 N. S. 540; *Aranzamendi et al. v. La. Ins. Co.*, 2 L. R. 433; *Hoffman v. Marshall*, 2 Bing. N. R. 383; 2 Scott, 559; 1 Hodges, 330.

And though formerly considered a doubtful question, it is now decided that the memorandum does not exempt the insurer from the *total loss* of an *entire* individual thing. As where goods in separate packages are warranted "free of particular average," the insured shall recover for so many of the packages as are *wholly lost*; but not for those which remain in specie, however greatly damaged.

Day v. Milford, 15 East, 559. ¶ Where there was a policy on supposed profits on teas from Canton to Philadelphia, with the usual warranty against average, except general, and in consequence of perils of the seas, some of the chests of tea were *totally lost*, it was held, that the insured were not entitled to recover. *Wain v. Thompson*, 9 S. & R. 121.

When the quantity of damage sustained in the course of the voyage is known, and the amount which each underwriter upon the policy is liable to pay is settled, it is usual for the underwriter to endorse on the policy, "*adjusted this loss, at so much per cent.*," or some words to the same effect. This is called an adjustment.

Park, 117; [see also *Marshall on Insurance*, 3d ed. p. 637.]

It has been determined, that after an adjustment has been signed by the underwriter, if he refuse to pay, the owner has no occasion to go into the proof of his loss, or any of the circumstances respecting it.

Hog v. Goulding, Sitt. after Tr. 1745, at Guildh. cor. Lee, C. J., *Beawes' Lex Mercat.* 310. β An adjustment cannot be opened, except on the ground of fraud or mistake, from facts not known; but where all the facts have been disclosed, it is conclusive. *Dow v. Smith*, 1 Cain. R. 32.

However, this rule has of late been somewhat relaxed. An action was brought on a policy of assurance on ships and goods from London to *Shelburne*, in *Nova Scotia*. The policy had been adjusted by the defendant at 50 per cent., and it was contended, that he was now bound by that adjust-

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ment. On the other hand, it was argued, that the adjustment was not binding; and that if it were, it ought to have been declared upon specially. Lord Kenyon said, that he did not think it necessary to declare on the adjustment specially, that it was *prima facie* evidence against the defendant; but if there had been any misconception of the law or fact, upon which it had been made, the underwriter was not absolutely concluded by it.—This turned out to be the case, and there was a verdict for the defendant.

Rodgers v. Mayor, Sitt. after Tr. 1790, 1 Park, 194. [See also Shepherd v. Chewter, 1 Camp. 274; Christian v. Coombe, 2 Esp. 489; Reynier v. Hall, 4 Taunt. 725; 5 Esp. Rep. 96, Sheriff v. Potts, S. P. But if made on a full disclosure of all the circumstances, it will not be opened; the only grounds for opening it being fraud, or a mistake arising from facts not known. 1 Cain. 32, Dow v. Smith. See 1 Cain. 444, Bordes v. Hallett.]

Again, the plaintiff produced no other evidence at the trial but the adjustment; and the witness who proved it swore, that doubts, soon after they had signed it, arose in the minds of the underwriters, and they refused to pay; upon which Lord Kenyon said, that under those circumstances the plaintiff must go into other evidence, which not being prepared to do he was nonsuited. In the following term a motion was made to set aside the nonsuit, upon the ground that an adjustment was *prima facie* evidence of the whole case, and threw the *onus probandi* upon the underwriter; and that it amounted to more than proof of the defendant's subscription to the policy.—Lord Kenyon: I admit the adjustment to be evidence in the case to a certain extent; but I thought at the trial, and still think, that when the same witness, who proved the signature of the defendant to the adjustment, said, that doubts, soon after the adjustment took place, arose in the minds of the underwriters as to the honesty of the transaction, and they called for further proof, the plaintiff should have produced other evidence: and that to shut the door against inquiry after an adjustment, would be to put a stop to candour and fair dealing amongst the underwriters. The rule was refused.

De Garron v. Galbraiths, Sitt. after Tr. 1795 1, Park, Ins. 194, 7th ed.

An action was brought upon an insurance upon goods on board a *foreign ship*, "the policy to be deemed sufficient proof of interest in case of loss." The defendant suffered judgment to go against him by default; and on a motion to set aside the writ of inquiry, the Court of King's Bench said, that although such a policy would be void in this country, by virtue of the statute of the 19 G. 2, c. 37, yet the statute did not extend to policies on foreign ships: and in this case the underwriter, having suffered judgment to go by default, has confessed the plaintiff's title to recover; and the amount of that loss was fixed by his own stipulation in the policy, which he cannot now controvert.

Thellusson v. Fletcher, Dougl. 301.

If an insurer pay money for a total loss, and in fact it be so at the time of adjustment; if it afterwards turn out to be only a partial loss, he shall not recover back the money so paid to the insured. But substantial justice is done, by putting him in the place of the insured, and giving him all the advantages that may arise from the salvage.

[See Houstman v. Thornton, Holt, 242.]

A box of bullion was wholly lost, the loss adjusted and paid, and an agreement was entered into at the time of adjustment, that the insured would refund to the insurer whatever he should recover, in such proportion

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as the sum insured bore to the whole interest. The bullion was afterwards fished up, and the insured paid into court the insurer's proportion, after deducting salvage. The court held this to be right.

Da Costa v. Firth, 4 Burr. 1966.

¶ Where goods insured on a valued policy were seized, confiscated, and sold, by order of an enemy's government, but the necessary documents not having arrived here, the underwriters agreed to pay 50*l. per cent.* on account, but no abandonment was made, and the foreign consignees of the goods afterwards, by remonstrances, obtained the restoration of half the proceeds of the sale of the goods, which half amounted to more than the whole sum they were valued at in the policy; it was held, that the underwriters, nevertheless, were not entitled to recover back the 50*l. per cent.* paid on account, the assured having sustained a loss of half his goods, for which he was no more than indemnified by the 50*l. per cent.* received, and the superior value of the other half arising from the benefit of the market, in which the underwriters had no concern.

Tunno v. Edwards, 12 East, 488.

But after payment of a total loss on a policy on freight, freight subsequently paid to the insured, which had been earned by the ship, may be recovered by the insurer from the insured, as money had and received to his use.

Barelay v. Stirling, 5 Maul. & S. 6.

Where the insurer pays the loss with full knowledge of the facts, or with full means of knowing them, the money cannot be recovered back.

Bilbie v. Lumley, 2 East, 469; *Brisbane v. Dacres*, 5 Taunt. 143.

And a subsequent promise by the insured, to repay money to an insurer, which the latter paid unconditionally, cannot be enforced, for it is without consideration.

Forrester v. Pigou, 3 Camp. 380.

But if the money is paid under a mistake of the real facts, as where an underwriter paid a loss on a policy containing a warranty, and he afterwards discovered that the warranty had not been complied with, the money may be recovered back.

Dehahn v. Hartley, 1 Term Rep. 343.

And so a settlement made by the insured, in ignorance of facts, does not bind him; as where a ship was warranted free of capture in port, and the insured having received a letter stating the loss to have occurred in port, settled with the underwriter on that footing, but it afterwards turned out the capture was not in port; it was held, the insured was not precluded by the adjustment from recovery on the policy for such loss, though the underwriter's name had been struck off the policy.

Reynor v. Hall, 4 Taunt. 725; and see *May v. Christie*, 1 Holt, 67.¶

SALVAGE.—Salvage is an allowance made for saving a ship, or goods, or both, from the dangers of the seas, fire, pirates, or enemies: and it is also sometimes used to signify the thing itself which is saved; but it is in the former sense only in which it is here used.

Beawes' Lex Mer. 146. ¶ For the better adjustment and payment of salvage under 12 Ann. st. 2, c. 18, see 1 & 2 Geo. 4, c. 76, § 19.¶

Underwriters, by their policy, expressly undertake to bear all expenses of salvage.

Park, 140.

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The valuation of a ship and cargo, in order to ascertain the rate of salvage, may be determined by the policies of insurance made on them respectively; if there be no reason to suspect they are undervalued. If there be no policy, the real value must be proved by invoices, &c.

In order to entitle the insured to recover expenses of salvage, it is not necessary to state them in the declaration, as a special breach of the policy.

Thus, in a declaration on a policy on goods it was stated, that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. Lord Hardwicke held, that under this declaration, the plaintiffs might give in evidence the expenses of salvage.

Carey v. King, Ca. temp. Hardw. 304.

||Salvage payable under a decree of the Court of Admiralty must be proved by regular evidence of the judgment of that court.

Thelluson v. Sheddon, 2 New Rep. 229.]

But if the insurer pay to the insured such expenses, and from particular circumstances the loss be repaired by unexpected means, the insurer shall stand in the place of the insured, and receive the sum thus paid to atone for the loss.

Randal v. Cockran, 1 Ves. 98.

TOTAL LOSS AND ABANDONMENT.—Before a person insured can demand from the underwriter a recompense for a total loss, he must abandon to him whatever claims he may have to the property insured.

Park, 143; *β* Gordon v. Boune, 2 Johns. R. 150. But an omission to abandon will not deprive the assured of his right to recover the actual loss he has sustained. *Suydam v. Marine Ins. Co.*, 2 Johns. R. 138. A demand of payment for a total loss amounts to an abandonment. *Cassedy v. La. Ins. Co.*, 6 N. S. 422.*g*

{An abandonment, however, is not necessary, when the whole property has been *actually* lost, as if the ship foundered at sea. There is then nothing left to abandon. And this principle applies to a case in which the ship, not having been heard of, is presumed to have been lost at sea.

2 Dall. 280, *Camberling v. McCall*; 3 Esp. Rep. 242, *Abel v. Potts*; 2 Johns. Rep. 150, *Gordon v. Bowne*; 2 Cain. Er. 173; 1 Bin. 54, 55, 58.

Also it has been decided by the Supreme Court of Pennsylvania, that in an action on a policy of insurance, wherein the plaintiff declares for a total loss, and proves a capture and condemnation of the property insured, which he has never abandoned to the underwriters, the jury may estimate the value of the *spes recuperandi*, deduct it from the whole sum insured, and find the remainder as a partial loss.

1 Bin. 47, *Watson and Paul v. Ins. Co. of N. America*.

If profits only be insured, an abandonment is necessary when there has been no insurance on the cargo. And in such case it must be made early, that the insurer may elect either to pay only his loss, or to pay that and the price of the goods at first cost and charges; which election he is entitled to make as between him and the insured. Therefore if the assured lie by, and take his goods and sell them, he cannot afterwards call on the underwriter for any loss on the profits.

3 Cain. 245, *Tom v. Smith*.}

||But in order to render an abandonment necessary, the thing insured, or a part of it, must "exist in specie" in the hands, or at least for the benefit, of the insured; and it must exist in such a state of integrity as to be fit for some useful or available purpose.

13 East, 304; 15 East, 13; 5 Barn. & A. 597; 2 Barn. & C. 691.

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Where a ship was so much injured by perils of the sea that the expense of getting her off the place where she then lay, (if it could be accomplished,) and of repairing her, would have exceeded her value when repaired, the loss was held total, without any abandonment: and Abbott, C. J., said, "If the subject matter of insurance remained a ship, it was not a total loss; but if it were reduced to a mere *congeries* of planks, the vessel was a mere wreck. The name which you may think fit to apply to it cannot alter the nature of the thing."

Cambridge v. Anderton, 2 Barn. & C. 691; 1 Ry. & Moo. 60; and see Read v. Bonham, 3 Brod. & B. 147; Allen v. Sugrue, 8 Barn. & C. 561.

In the case of damage to goods by perils of the sea, if the goods be so far injured by the perils of the sea as to have a tendency to putrefaction, and are obliged to be thrown overboard, this seems to be in itself a total loss, without any abandonment.

Dyson v. Rowcroft, 3 Bos. & Pull. 474; Colegan v. London Assurance Company, 5 Maul. & S. 447.

But where a ship damaged by sea perils was obliged to put into port, and on survey was reported unfit to proceed without thorough and expensive repair, on notice of which the underwriters declined to interfere; and the owner then, without notice of abandonment, had the ship sold for the benefit of all concerned; and the proceeds of the sale, after deducting expenses and salvage, left a balance against the assured; it was held, that the assured could not treat this as a total loss, not having abandoned, for the ship remained in the character of a ship when sold.

Martin v. Crockatt, 14 East, 467; and see Bell v. Nixon, Holt, Ca. 423. *And see* Church v. The Marine Ins. Co., 1 Mason's R. 341.*g*

β In order to constitute that extreme danger of utter destruction, in the case of a stranded vessel, which will entitle the insured to abandon, such danger must exist, notwithstanding all the means within the power of the crew to use, and all the assistance within the power of the master to save her.

King v. The Hartford Ins. Co., 1 Conn. R. 422.*g*

It seems that in case of an insurance on freight, abandonment is unnecessary.

Idle v. Royal Exchange Assurance Company, 8 Taunt. 755; Mount v. Harrison, 4 Bing. 388; *sed vide* Parmeter v. Todhunter, 1 Camp. 541. *β* Where freight is insured, and the vessel meets with an injury during the voyage, the insured cannot recover from the insurer, unless he has entitled himself to receive freight from the shipper, by offering to carry on the goods. Herbert v. Hallett, 3 J. C. 93; Griswold v. New York Ins. Co., 1 Johns. R. 205; S. C., 3 Johns. R. 321; Bradhurst v. Columbian Ins. Co., 9 Johns. R. 17.*g*

β In a case of an insurance upon profits and a total loss, no abandonment is necessary.

Fosdick v. Norwich Marine Ins. Co., 3 Day, R. 108.*g*

As soon as the insured receive accounts of such a loss as entitles them to abandon, they must, in the first instance, make their election whether they will abandon or not: and if they abandon, they must give the underwriters notice in a reasonable time, otherwise they waive their right to abandon, and can never afterwards recover for a total loss.(a)

Mitchell v. Edie, 1 Term Rep. 608. {7 East, 38, Anderson v. Royal Exc. Ass. Co.; 9 East, 283, Barker v. Blakes; 1 Mass. T. Rep. 264, Livermore v. Newburyport Marine Ins. Co.; 2 Dall. 219, Fuller v. McCall; 4 Dall. 272, Bell v. Beveridge; 1 Bin. 52, n., S. C. In New York, it is settled that the abandonment is never too late, if the loss continues total at the time. 1 Johns. Ca. 313, Earl v. Shaw; 1 Cain. 449, Bordes

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v. Hallett; 2 Cain. 132, Steinbach v. Columbian Ins. Co.; 2 Cain. Er. 158, S. C. in error; 2 Cain. 203, Lawrence v. Sebor; 3 Cain. 250, Tom v. Smith. See *Livermore v. Newburyport Marine Ins. Co.*, and *Barker v. Blakes*, *ubi supra*.] [Hunt v. Royal Exchange Assurance Company, 5 Maul. & S. 47; Aldridge v. Bell, 1 Stark. 498; Anderson v. Royal Exchange Assurance Company, 37 East, 8; S. C. 3 Smith, 48; Martin v. Crockatt, 14 East, 465; β Marine Ins. Co. of Alexandria v. Tucker, 3 Cranch, 391; Calbreath v. Gracy, 1 Wash. C. C. R. 219; Hartin v. The Phoenix Ins. Co., 1 Wash. C. C. R. 400.β] (α) But the insured is entitled to a reasonable time for examining into the state of a damaged cargo, before he makes his election on the question of abandonment. Gernon v. Royal Exchange Assurance Company, 6 Taunt. 383; S. C. 2 Marsh, 88.β] β And what is reasonable time, is a question compounded of law and fact, which must be found by a jury, under the direction of the court. Maryland Ins. Co. v. Ruden's Adm., 1 Cranch, 338; Livingston et al. v. The Maryland Ins. Co., 7 Cranch, 506; Bell v. Beveridge, 4 D. 272; Hartin v. Phoenix Ins. Co., 1 W. C. C. R. 400; Duncan v. Koch, Wall. R. 39.β]

β It is now held, that the rule requiring abandonment to be made in a reasonable time, does not apply to the case of an *actual* total loss, arising from capture or seizure, where the property insured continues to be out of the possession or control of the owner, up to the time of the abandonment.

Brown v. Phoenix Ins. Co., 4 Bin. 445, 461, 462.

Where a vessel was forbidden to enter her port of destination, and then proceeded to another port for a market, and the assured did not abandon until three months after notice of the event, it was held, that the abandonment was too late, although the policy contained the usual agreement not to abandon in less than sixty days after advice of capture or detention.

Savage v. Pleasants, 5 Bin. 403.β]

But if the insured, hearing that his ship is much disabled, and has put into port to repair, express his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made; they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. For the reason why the notice of abandonment is deemed necessary, is to prevent surprise or fraud upon the underwriter: but in the case put, they have by their own act superseded the necessity of notice.

Da Costa v. Newnham, 2 Term Rep. 407. β As to what will constitute an acceptance of the abandonment, see *Peele v. The Merchant's Ins. Co.*, 3 Mason's R. 27. The state of the loss at the time of the offer to abandon fixes the rights of the assured and the assurers. Marshall v. The Delaware Ins. Co., 4 Cranch, 202; Dickey v. The New York Insurance Co., 4 Cow. R. 223.β]

{Though no form is prescribed for an abandonment, yet care should be taken that it be unconditional, explicit, and on sufficient ground; and particularly that the accident occasioning it be described with certainty, so as to enable the underwriter to determine whether he be bound to accept it. And if the assured rely on matter which is not a justifiable cause of abandonment, he cannot avail himself of a subsequent accident, without making a new abandonment.

1 Johns. Rep. 181, Suydam and Wyckoff v. Marine Ins. Co.; 2 Johns. Rep. 138, S. C.

If the assured give notice of the loss and demand the insurance money, but refuse to assign his interest to the underwriter, he cannot be considered as having abandoned.

8 Term, 274, Havelock v. Rockwood.

Where the act incorporating an insurance company provides, that no losses shall be settled or paid without the approbation of at least *four of the direc-*

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tors with the president or two assistants, or a plurality of them, the acceptance of an abandonment will not be valid or binding on the company, unless it appear to have been done at a board of directors constituted according to the act, and by a majority of them present. A body corporate can act only in the mode {¹} prescribed by the law creating such corporation.

2 Johns. Rep. 109, *Beatty v. Marine Ins. Co.* {¹} See 2 Cran. 127, *Head and Amory v. Providence Ins. Co. acc.*

Whether an abandonment has been accepted or not is a question of fact for the jury to determine.

2 Johns. Rep. 98, *Bell v. Smith.* What acts of the assurers do not amount to an acceptance. See 1 Johns. Rep. 205, *Griswold v. New York Ins. Co.*; 3 Johns. Rep. 321, *S. C.*]

When an abandonment is made, it must be total, and not partial.

Park, 144; *β Morean v. The United States Ins. Co., 1 Wheat. 217.* And an abandonment, once made and accepted, is irrevocable by either party, without the consent of the other. *Peele v. The Merchants' Ins. Co., 3 Mason's R. 27.β*

The insured may in all cases choose not to abandon; but he cannot at his pleasure abandon, and thereby turn a partial into a total loss.

2 Burr. 697; {1 Johns. Ca. 313, *Earl v. Shaw*;} *β Anderson v. Wallis, 2 Maul. & S. 240*; *Brotherston v. Barber, 5 Maul. & S. 418*; *Bainbridge v. Neilson, 10 East, 329*; *Falkner v. Ritchie, 2 Maul. & S. 290.*]

The insured may abandon to the underwriter, and call upon him for a total loss, if the damage exceed half {²} the value; if the voyage be absolutely lost or not worth pursuing; (a) if further expense be necessary; or if the insurer will not engage at all events to bear that expense, though it should exceed the value, or fail of success. (b)

[(a) *Wilson v. Royal Exchange Assurance Company, 2 Camp. 623*; *Barker v. Blakes, 9 East, 283.* *β* But see *Humphreys v. The Union Ins. Co., 3 Mason's R. 429*; *Moses et al. v. Col. Ins. Co., 6 Johns. R. 219*; *Pezant v. The National Ins. Co., 15 Wend. 453.* Injury to repair which would exceed half the value of the vessel makes a total loss. *Wood v. Lincoln and Kennebeck Ins. Co., 6 Mass. 479*; *Diblois v. Ocean Ins. Co., 16 Pick. 303*; *Hall v. Ocean Ins. Co., 21 Pick. 472*; *Hart v. Delaware Ins. Co., 2 W. C. C. R. 346*; *Ritchie v. United States Ins. Co., 5 S. & R. 501*; *Peters et al. v. Phoenix Ins. Co., 3 S. & R. 25*; *Hyde v. La. Ins. Co., 2 N. S. 311*; *Brooks et al. v. La. Ins. Co., 4 N. S. 640.β* {²} 1 Johns. Ca. 141, *Gardiner v. Smith*; 1 Johns. Rep. 335, *Ludlow v. Columbian Ins. Co.* If the insurance is on particular articles specifically enumerated, and a moiety of them be lost, the assured may abandon, however small a part those articles may be of his whole property on board. 1 Johns. Rep. 406, *Vandenheuvel v. United Ins. Co.* When a vessel cannot be repaired for half her value, she may be abandoned. 1 Johns. Ca. 305, *Gould v. Shaw.* And if she cannot be repaired at that expense, so as to be able to perform the voyage with the whole of her original cargo, she may be abandoned, though she might be repaired so as to perform it with a cargo more buoyant. 1 Cain. 292, *Abbott v. Broome.* If the defects in a vessel existing previous to effecting a policy of insurance be not such as to render her unseaworthy, they are not to be taken into consideration in estimating whether the repairs exceed half her value. 2 Cain. 85, *Depeyster v. Columbian Ins. Co.* But in making that estimate, one third, new for old, must be deducted from the amount of the repairs, on the principle that by replacing the old materials with the new, the value of the subject insured has been enhanced to that amount. 2 Cain. Er. 153, *Smith v. Bell.*] If the underwriter intends to resist the abandonment he is bound to do so within a reasonable time. *Hudson v. Harrison, 3 Brod. & B. 97*; *S. C. 6 Moore, 288.*]

But he cannot abandon, unless at some period or other of the voyage there has been a total loss; and if neither the thing insured, nor the voyage is lost, and the damage does not amount to a moiety of the value, he shall not be allowed to abandon.

1 Term Rep. 191. *β* A capture by one belligerent from another, in the technical sense

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of the word, is a total loss; so an embargo or detention by a friendly power; and see generally when assured may abandon. *Rhineland v. The Ins. Co. of Pennsylvania*, 4 Cranch, 29; *Symons v. The Union Ins. Co.*, 4 Dall. 417; *Marcardier v. The Chesapeake Ins. Co.*, 8 Cranch, 39; *Peele v. The Merchants' Ins. Co.*, 3 Mason's R. 37; *Oldin v. The Pennsylvania Ins. Co.*, 2 Wash. C. C. R. 312; *Olivera v. The Union Ins. Co.*, 3 Wheat. 183; *Queen v. The Union Ins. Co.*, 3 Wash. C. C. R. 331; *Hart v. The Delaware Ins. Co.*, 3 Wash. C. C. R. 340; *Columbian Ins. Co. v. Ashly et al.*, 4 Peters, 139; *Bradlie v. The Maryland Ins. Co.*, 12 Peters, 378; *Gracie v. N. Y. Ins. Co.*, 13 Johns. R. 161; *Murray v. United Ins. Co.*, 2 Johns. C. 263; *McBride v. Marine Ins. Co.*, 5 Johns. R. 299; *Walden v. Phenix Ins. Co.*, 5 Johns. R. 310; *Ogden v. N. Y. Firemen Ins. Co.*, 10 Johns. R. 177; *S. C. in error* 12 Johns. R.; *American Ins. Co. v. Ogden*, 15 Wend. R. 532; *Abbott v. Broome*, 1 Cain. R. 292; *King v. The Hartford Ins. Co.*, 1 Con. R. 422. When a technical total loss is sought to be maintained upon the mere ground of deterioration of the cargo at an intermediate port, to a moiety of its value, all deterioration of memorandum articles must be excluded from the estimate. *Marcardier v. The Chesapeake Ins. Co.*, 8 Cranch, 39.^g

β A capture of a neutral vessel as prize by a belligerent armed vessel, is a total loss under the policy of insurance; and the assured has a right to abandon.

Rhineland v. The Ins. Co. of Pennsylvania, 4 Cranch, 29; *Ibid.* 31, n., *Dutilh v. Gadliff*; 4 Dall. 446, S. C.; 3 Mass. T. Rep. 238, *Lee v. Boardman*. But a mere arrest and detention of a neutral by a belligerent for the purpose of legal adjudication, will not authorize an abandonment. *Duncan v. Koch*, *Wallace's R.* 37.

The three cases of ship, cargo, and freight, seem to rest on the same principles. When the vessel is disabled, so that she cannot proceed on the voyage, the insured on freight may abandon as for a total loss, when another ship cannot be procured for less than half the freight in the policy.

Center v. American Ins. Co., 7 Cow. 584; see *Whitney v. N. Y. Firemen's Ins. Co.*, 18 Johns. R. 210.^g

A ship was taken by a Spanish privateer, retaken by an English privateer, and carried into Boston, in New England, where, as no person appeared to give security for the salvage, she was sold; the recaptors had their moiety, and the overplus remaining in the hands of the officers of the Court of Admiralty, the owners were entitled to abandon and to recover for a total loss.

Pringle v. Hartley, 3 Atk. 195.

A ship was taken by the French, remained with them eight days, and was then retaken: the master, mates, and sailors, except a landsman and an apprentice, had been taken out and carried to France. Before the capture, the ship had been separated from her convoy, and was so far disabled by storm, as to be incapable of proceeding in her voyage without going into port to refit. Part of the cargo was thrown overboard in the storm, and the rest spoiled while the ship lay at Milford Haven. In actions upon two policies, one on the ship, and the other on the cargo, it was held that this was a total loss, so as to entitle the owner to abandon.

Goss v. Withers, 2 Burr. 683; *||M'Iver v. Henderson*, 4 Maul. & S. 576; *Cologan v. London Assurance Comp.*, 5 Maul. & S. 447.^{||}

A ship, bound from Mountserrat to London, was captured, and the captain, crew, rigging, and part of the cargo, which was sugar, were taken away. She was retaken and carried into New York, where the captain also arrived. Upon taking possession, he found that part of the cargo that was

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left had been washed overboard; that fifty-seven hogsheads of what remained were damaged; and that the ship was in such a state that she could not be repaired, without unloading her entirely. The owners had no storehouses at New York; nor were any sailors to be had. The salvage came to forty hogsheads of sugar; and if the ship had been repaired, it would have exceeded the freight by 100%. There was an embargo laid on all ships till December, and this ship was to have arrived in London in July preceding. The captain, upon the advice of his friends, sold the cargo, and was paid for it; he agreed also to sell the ship, but the person who contracted for her ran away, upon which the captain left her in a creek, and came to England. The owners of the ship had a right to abandon to the insurers on the ship and freight.

Mills v. Fletcher, Dougl. 219.

{It depends upon the particular circumstances of the case whether, if the vessel insured be captured and recaptured, the loss shall be deemed total or partial. Whether the assured has, under the circumstances, a right to abandon, is a question of law dependent upon the point of fact whether, upon the whole of the evidence, the voyage was broken up and not worth pursuing; and in the consideration of this point, the jury will inquire whether the captain did what was best for all concerned, and did not occasion the loss of the voyage by his misconduct.

3 Cranch, 357, *Marine Ins. Co. of Alexandria v. Tucker*.

If the ship be sold by the captors, and the captain, acting as agent for the owners, purchase the ship on their account, and they {} assent to it, this is considered as a recovery of the ship for the owners, and the money thus paid as salvage; and if the voyage can be prosecuted, it is only a partial and not a total loss.

Marshall, 581; 1 Esp. Rep. 237, *M^r Masters v. Shoolbred*; 1 Dall. 10, *Story v. Strettell*. {} Vide 2 Cain. 280, *United Ins. Co. v. Robinson & Hartshorne*; 1 Johns. Rep. 592, S. C. in error.

A ship is insured from Spain to Teneriffe and Jamaica. During the voyage insured, she is captured by a French national ship, and recaptured by a British privateer, and carried into Antigua, where she is libelled in the court of Vice-Admiralty, and decreed to be restored on payment of one half the value as salvage. Upon the representation of the master, who was also a part-owner, that he was unable to pay the salvage, the court order her to be sold. The master becomes the purchaser, and on his return delivers her to her former owners; after which the insured offer to abandon to the underwriters the proceeds of the sale at Antigua, but refuse to abandon the ship; the underwriters refuse to accept the abandonment as offered. It was held that the insured were entitled to recover for a partial loss only.

3 Mass. T. Rep. 37, *Oliver v. Newburyport Marine Ins. Co.* Vide 2 Mass. T. Rep. 565, *Storer v. Gray*, which appears to be *contra*, but is questioned in the former case, though it is distinguished from it on the ground that the sale in that case was compulsory and not by procurement.

A policy upon a ship is an insurance of the ship *for* the voyage, not an insurance on the ship *and* the voyage. The underwriters undertake for the *ability* of the ship to perform the voyage, not that she *shall* perform it at all events. The loss of the voyage as to the cargo is not a loss of the voyage as to the ship. If at the time of the offer to abandon, the ship be in posses-

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sion of the master, in good condition, and at full liberty to proceed on the voyage, the loss of the cargo will not authorize the owner of the vessel to recover as for a total loss of the vessel. A loss defeating the voyage and justifying an abandonment must be a loss which has befallen the thing insured.

4 Cranch, 370, *Alexander v. Baltimore Ins. Co*; 1 Johns. Ca. 293, *Gold v. Shaw, ex.*

Insurance was made on a ship (a privateer) at and from Jamaica, to any ports, &c., at sea or shore, cruising for four months without further account, &c., and free from average. The insured had interest in the *ship* to the amount insured. During the four months the crew mutinied, brought the ship by force into Jamaica, and having carried away the arms, &c., deserted her, by which the further cruise was prevented. It was decided in the Court of Exchequer-chamber (who reversed the judgment of the King's Bench) and afterwards in the House of Lords, that the insurers were not liable. For as, by the terms of the policy, they were free from all average, the plaintiffs could not be entitled to recover but in case of a total loss; and the ship being in safety, at her proper port, at and after the end of the four months for which the insurance was made, there could be no loss.

Willes, 641, *Pole v. Fitzgerald*; 5 Bro. P. C. 131, (vol. 4, p. 439, in 2d ed.) S. C.

Where a neutral ship bound from America to Havre was detained and brought into a British port, in consequence of having enemy's goods on board, which goods were condemned, but the vessel and the rest of the cargo liberated, but pending proceedings in the Admiralty, Havre was declared in a state of blockade, by which the further prosecution of the voyage was prohibited, this was held to be a total loss of the voyage occasioned by the detention, which entitled the owner of the cargo to abandon.

9 East, 283, *Barker v. Blakes*.

The owners of a ship and cargo agreed with R, who was to go as supercargo, on a voyage out and home, to pay him a gross sum out of the proceeds of the return cargo, or to give him goods out of it to the amount, at his election; in consideration of which R and his partner engaged to sell the return cargo free of commissions. On her homeward voyage from Batavia to New York, the vessel was compelled by stress of weather to put into St. Kitts, where the cargo was sold from necessity, by merchants there, on commission; part of the proceeds were vested in other articles, the produce of the island, and brought to New York. R, having effected a policy of insurance on his commissions, as stipulated in his contract with the owners, on their refusal to pay him, abandoned, and brought his action against the insurers to recover the amount. And it was held, that as the return cargo did not arrive at New York, R lost his commissions, and was therefore entitled to recover the amount from the insurers.

2 Cain. 357, *Robinson v. New York Ins. Co.*; 1 Johns. Rep. 616, S. C. in error.}

||But where the ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the assured, it was held that the underwriters on the goods, who were freed by the policy from particular average, could not be made liable as for a total loss by a notice of abandonment.

Thompson v. Royal Exchange Assurance Company, 16 East, 214.

Underwriters on freight are not liable for the loss of freight of a portion of the cargo damaged by sea-water, and which the master in his discretion

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leaves behind at a port instead of waiting till they can be dried so as to be safely reshipped ; although the master's proceedings be such as a prudent man uninsured would have adopted.

Mordy v. Jones, 4 Barn. & C. 394.¶

¶ A vessel was insured from New York to Barcelona, and being boarded by a British ship of war during the voyage, warning her against entering the ports of France, Holland, Spain, Denmark, Italy, and Portugal, &c., the master, for fear of capture if he proceeded, put into Gibraltar for advice, and was permitted to proceed on his voyage ; but hearing of the French decree, known as the Milan decree of 25th December, 1807, and being informed that Barcelona was occupied by French troops, he gave up the voyage and returned home ; held that an abandonment under such circumstances was not to be justified.

Craig v. United Ins. Co., 6 Johns. R. 225, and see Corp et al. v. United Ins. Co., 8 Johns. R. 277. But if from damages sustained by bad weather, the vessel be obliged to give up her intended voyage, and proceed to another port, the insured on cargo may abandon as for total loss. Akin v. Miss. Ins. Co., 4 N. S. 661.¶

The right to abandon must depend upon the nature of the case at the time of the action brought, or at the time of the offer to abandon ; and, therefore, if at the time advice is received of the loss it appears that the peril is over and the thing in safety, the insured has no right to abandon. Thus, in a case where there was a capture and recapture, and it was stated that at the time of the offer to abandon, the ship was safe in port, and had sustained no damage, the court held, that the insured had no right to abandon.

Hamilton v. Mendes, 2 Burr. 1198 ; 1 Bl. Rep. 276, S. C. ; {1 Cain, 49, Muir v. United Ins. Co. S. P. ; } Bainbridge v. Neilson, 10 East, 329 ; Patterson v. Ritchie, 4 Maul & S. 393 ; Brotherston v. Barber, 5 Maul. & S. 418 ; Parsons v. Scott, 2 Taunt. 363 ; ¶ Marine Ins. Co. of Alexandria v. Tucker, 3 Cranch, 357 ; Smith v. The Universal Ins. Co., 6 Wheat. 176 ; Hurton v. The Phoenix Ins. Co., 1 Wash. C. C. R. 400 ; Muir v. United Ins. Co., 1 Cain. R. 49 ; Adams v. Delaware Ins. Co., 2 Binn. 287.¶

¶ In case of capture, a restoration previous to the time of abandonment, although unknown to the assured, takes away his right to abandon.

Church v. Bedient, 1 Caines's C. E. 21 ; Hallett v. Peyton, 1 Caines's C. E. 28 ; contra, Mumford v. Church, 1 Johns. C. 147 ; Slocum et al. v. United Ins. Co., 1 Johns. C. 151 ; Murray v. United Ins. Co., 2 Johns. C. 263 ; Livingston v. Hastie, 3 Johns. C. 293.¶

{ The right to abandon depends on the *actual state* of the loss at the time of abandonment ; and not upon the state of the *information received*. Therefore, if, at the time of the abandonment, the loss has ceased to be total, though this was then unknown, the insured can only recover for a partial loss. And the total loss arising from capture ceases with a *final* decree of restitution, 'although that decree {1} may not have been executed at the time of abandonment.

4 Cranch, 29, Rhinelander v. Ins. Co. of Pennsylvania ; Ibid. 202, Marshall v. Delaware Ins. Co. ; 3 Mass. T. Rep. 238, Lee v. Boardman ; 1 Cain. Er. 21, Church v. Bedient ; Ibid. 28, Hallett v. Peyton ; 3 Cain. 157, Penny v. New York Ins. Co., contrary to the previous cases of Mumford v. Church, 1 Johns. Ca. 147, and Slocum v. United Ins. Co., Ibid. 151. {1} 4 Cran. 202. Vide 4 Cran. 31, n., Dutilh v. Gatliff ; 4 Dall. 446, S. C. }

But if the underwriter pay for a total loss, and it afterwards turn out to be but partial, the insured shall not be obliged to refund ; but the insurer shall stand in his place for the benefit of salvage.

Da Costa v. Firth, 4 Burr. 1966.

¶ And if in consequence of capture an abandonment has taken place, and

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the ship be afterwards recaptured and earn freight, the underwriters on the ship, under the abandonment of the ship to them, are entitled to such freight.

Davidson v. Case, 5 Moore, 116; S. C. 8 Price, 542; 2 Brod. & B. 379; 5 Maal. & S. 79.¶ And where the vessel and freight are separately insured, after abandonment made to each of the underwriters, the underwriters on the freight are entitled to the freight earned before that time, and the underwriters on the vessel to the freight earned after. Hammond v. The Essex Fire and Marine Ins. Co., 4 Mason's R. 196; and see 7 Cow. R. 791, 20, 21, 22, 23, 24.g

¶ If the abandonment be legal, it puts the underwriters completely in the place of the assured; and the agent of the assured becomes the agent of the underwriters.

Chesapeake Ins. Co. v. Starke, 6 Cranch, 268; Russell v. The Union Ins. Co., 4 Dall. R. 421; McKim v. Phoenix Ins. Co., 2 Wash. C. C. R. 89; Dederer v. Delaware Ins. Co., 2 Wash. C. C. R. 61; Case & Richard v. Baltimore Ins. Co., 7 Cranch, 358, 362; Simons v. Union Ins. Co., 1 Wash. C. C. R. 443; Catlett v. The Pacific Ins. Co., Paine's R. 594; Rogers v. Hosack's Ex'rs, 18 Wend. R. 319; Carcier v. Philadelphia Ins. Co., 5 S. & R. 113. And a formal instrument of cession is not essential to vest the property in the underwriter. Hurtin v. The Phoenix Ins. Co., 1 Wash. C. C. R. 530; Chesapeake Ins. Co. v. Starke, 6 Cranch, 268; Bell v. Beveridge, 4 D. 273; S. C. 1 Binn. R. 52, in note; Mellon v. Buck et al., 5 N. S. 374.g

A ship was insured from Wyburg to Lynn, at which place she arrived; the jury found that the ship was not worth repairing; but the damage sustained in the voyage insured did not exceed 48*l. per cent.* By the court,—The jury have precluded us from saying this is a total loss; and where neither the thing insured nor the voyage is lost, the insured cannot abandon.

Cazalet v. St. Barbe, 1 Term Rep. 187.

An insurance was made on ship, cargo, and freight, at and from Tortola to London, warranted free of particular average. On the first of August the whole fleet got under weigh, but not being able to get clear of the islands, they anchored that night, and the next day got clear of them. About ten o'clock of the 2d of August, several squalls of wind arose, which occasioned the ship to strain, and make water so fast, that the crew were obliged to work both pumps; on the 3d, the captain made a signal of distress, and returned to Tortola. A survey was held, by which the ship was declared unable to proceed to sea with her cargo; and that she could not be repaired in any of the English West India islands. Many of the sugars in the bilge and lower tier were washed out, and several of the casks broke and in bad order. This was holden to be a total loss, the voyage being entirely defeated.

Manning v. Newnham, Tr. 22 G. 3, Park, 260, 7th ed.; ¶ Marshall on Ins. 595, 3d ed.; 2 Camp. 623, note a.¶ But if at the time of the offer to abandon the ship be in the possession of the master in good condition, and at full liberty to proceed on the voyage, the loss of the cargo will not authorize a recovery for a total loss on the vessel. Alexander v. The Baltimore Ins. Co., 4 Cranch, 370.g

{By the abandonment, what remains of the property insured is transferred to the underwriters in proportion to their respective subscriptions. But they do not become partners; they are respectively owners of an *aliquot* part, in the *ratio* which their separate subscriptions bore to the whole sum insured.

Marshall, 601; 1 John Rep. 106, United Ins. Co. v. Scott and Seaman.

Goods were insured from New York to Cadiz, St. Lucar, or Malaga, and were consigned to the master, with directions, in case of accident, to send bills of lading to the correspondents of the insured at those places. During the voyage, the vessel was captured by a French privateer, and carried into Malaga, and was there condemned by the French consulate as good and lawful prize. The property was abandoned to the insurers, who accepted the

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abandonment and paid as for a total loss. The correspondents of the insured, at Malaga, at the request of the master, who did not know of the insurance, and without any instructions for that purpose, purchased the cargo of the captors by means of a broker, sold it, and after reimbursing themselves for the money advanced, invested the residue in a cargo of wine and brandy, which was shipped in the vessel for the account and risk of the insured, who received and sold it. In an action of trover brought by the insurers against the insured, to recover the amount of the goods thus received and sold, it was held that a purchase of property insured, by the agent or correspondent of the assured, is for the benefit of the owner, or insurer after abandonment and payment, if he choose to affirm the purchase; and if the proceeds thereof are invested in other goods, they become the property of the insurer also, for which he may maintain trover, if he elect to confirm the acts of the agent.

2 Cain. 280, *United Ins. Co. v. Robinson & Hartshorne*, affirmed on error, 1 Johns. Rep. 592.

By the abandonment of the ship, the insurer becomes the legal owner, is liable for all her out-goings, and entitled to all her future earnings.

Marshall, 602. See 1 Johns. Rep. 106, *United Ins. Co. v. Scott and Seaman*; 3 Mass. T. Rep. 563, *Frothingham v. Prince*; 2 Mass. T. Rep. 39, *Brooks v. Dorr*.

Whether, when the ship and freight have been separately insured, and abandoned to the respective underwriters, the underwriters on the ship are or are not entitled to the freight earned, is, in England, still an undecided question. It has been several times under consideration, but the cases were decided upon particular circumstances, and not on the general question.

4 East, 34, *Thompson v. Rowcroft*; 3 Bos. & Pul. 479, *Leatham v. Terry*; 5 East, 388, *McCarthy v. Abel*; 7 East, 24, *Sharp v. Gladstone*; 9 East, 378, *Ker v. Asborne*.

In New York it is held that, as freight is a distinct subject of insurance, a previous abandonment of the ship to one insurer will not prevent the insured from recovering the freight insured by another.

3 Cain. 16, *Davy v. Hallett*; 3 Johns. Rep. 49, *Livingston v. Columbian Ins. Co.* See also 1 Johns. Rep. 433, *Mumford v. Hallett*; a case on similar principles as to cargo and profits separately insured.

And that, as between the two sets of underwriters, in case of abandonment to both, those on the freight are entitled to it *pro rata* to the time of the loss which occasioned the abandonment, and those on the ship *pro rata* for the time subsequent to the loss.

1 John. Ca. 377, *United Ins. Co. v. Lenox*; 1 Cain. 578, *Leavenworth v. Delafield*; 3 Cain. 16, *Davy v. Hallett*; Id. 251, *Tom v. Smith*.

If a vessel be duly abandoned, and the abandonment refused, and at a sale for the benefit of all concerned, under an order of a Court of Admiralty pronouncing her not worth repairing, she be bought in by a part-owner supercargo, it is no waiver of the abandonment, though on her arrival at home she be sold at auction by the assured for more than she cost, and he at the time of action brought have the proceeds in his hands, nor need he make a tender of her to the underwriter when she arrives, nor of her proceeds after the sale. The court said, "In the case of *Saidler and Craig v. Church*," after an abandonment, a similar purchase was made, and the assured adopted it as their own, by availing themselves of the advantage it offered, and fitting out and sending the vessel on another voyage for their own account; under which circumstances they were considered as having affirmed the purchase and waived the abandonment. The present case differs in

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this, that the assured has done no act to affirm the purchase. He offered an abandonment, which the assurers ought to have accepted; he was not bound to do more; and as they refused it, the assured was necessarily left to act as their trustee in the disposition of the property."

1 Cain. 292, Abbott v. Broome. {} 1 Cain. 297, n. 303; 2 Cain. 286; 5 Johns. Rep. 310, Waldens v. Phoenix Ins. Co. S. P.

After an abandonment, the consignee of the goods insured becomes the agent of the insurer, and his acts, if done in good faith, are at the risk and for the benefit of the insurer.

1 Johns. Ca. 141, Gardiner v. Smith; 1 Johns. Rep. 249, Schmidt v. United Ins. Co.; 2 Cain. 280, United Ins. Co. v. Robinson and Hartshorne; 1 Johns. Rep. 592, S. C.

So if an insured, after capture, appoint an agent to prosecute his claim, such agent, after due abandonment, becomes the agent of the assurer, and a receipt by him of the money, for which the property has been sold, will be deemed a receipt by the assurer, who must look to the agent for the amount, and pay the assured his full loss without any deduction. All acts by such an agent, if *bona fide*, bind the underwriter.

2 Cain. 301, Miller and Graham v. Depeyster and Charlton.

So the master of a ship insured, or whoever has charge of the property, becomes upon abandonment the agent of the assurer.

Marshall, 615; 3 Mass. T. Rep. 247.

If a vessel be captured and acquitted, the assurer is liable to the expenses incurred in prosecuting an appeal interposed against the sentence condemning the assured in costs, and to obtain compensation for damages occasioned by plundering or embezzling, though those expenses surpass the amount of the assurer's subscription. The jury will judge whether the expenses are reasonable.

1 Cain. 276, Lawrence and Whitney v. Van Horne and Clarkson; 1 Johns. Rep. 266, 413.

||But the loss of voyage for the season by perils of the sea is not a ground of abandonment upon a policy on goods, with a clause of warranty free from average, &c., when the cargo is in safety, and not of such a perishable nature as to make the loss of voyage a loss of the commodity, although the ship be rendered incapable of proceeding on the voyage.

Hunt v. Royal Exchange Assurance, 5 Maul. & S. 47.

And if another vessel can be procured to forward the cargo to its destination, there is no loss of the voyage so as to render the underwriters liable for a total loss.

Wilson v. Royal Exchange Assurance, 2 Camp. 622; and see Anderson v. Royal Exchange Assurance, 7 East, 38. ¶But it seems, that if the cargo is of such a nature that it is impracticable to reship and transport it to its place of destination, without an expense equal to its value or nearly so, or without manifest detriment to the owners, it may be sold at the port of distress, and need not be sent on in another vessel. Salts v. Ocean Insurance Company, 12 Johns. R. 107; Whitney v. The N. Y. Firemen's Ins. Co., 18 Johns. R. 208. See Schieffler v. New York Ins. Co., 9 Johns. R. 21.

And the retardation of the voyage by necessary repairs occasioned by sea perils, so that the goods lose their market for that season, does not amount to a total loss, entitling the insured to abandon.

Anderson v. Wallis, 2 Maul. & S. 240; and see Everth v. Smith, Ibid. 278; Falkner v. Ritchie, Ibid. 290; *sed vide* 2 Dow. & Ry. 474; 3 Brod. & B. 108.

Where the ship's crew deserted in tempestuous weather to save their lives, and another crew took possession and conducted the ship safely into

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port, the desertion was held not a total loss; and the ship having been sold by the Admiralty Court to pay the salvage, and the assured not having taken means to prevent the sale, they were held not entitled to abandon.

Thorneley v. Hobson, 2 Barn. & A. 513.¶

¶ Where a vessel insured on a sealing voyage was ordered by the government of Buenos Ayres not to catch seals off the Falkland Islands, and having continued to take seal there, the vessel was seized and condemned under the authority of the government of Buenos Ayres, the government of the United States not having acknowledged, but having denied the right of the government of Buenos Ayres to the Falkland Islands, the underwriters were liable to pay for the loss of the vessel and cargo; the master, in refusing to obey the orders to leave the island, having acted under a belief that he was bound so to do as a matter of duty to the owners, and all interested in the voyage, and in vindication of the rights claimed by the American government. The master was not bound to abandon the voyage under a threat or warning of such illegal capture.

Williams v. The Suffolk Ins. Co., 13 Peters, 415.g

FRAUD AND MISREPRESENTATION.—Policies are annulled by the least shadow of fraud or undue concealment of facts; and both parties are equally bound to disclose circumstances within their knowledge: for if the insurer, at the time he underwrote, knew that the ship was safe arrived, the contract will be void.

{So if the insured know of the loss before he effects the policy, it is void. But if the loss of a vessel be known in a place early in the morning of the day on which a policy is effected at noon, it is no proof of fraud in the assured, though the information be brought by some of the crew of the ship insured, if it do not appear they had been on shore.

3 Cain. 49, *Livingston v. Delafield*.

Where the assured had written four letters by different conveyances, ordering insurance, one of which was on board the vessel in which he arrived, after a knowledge of the loss, at a port from which the letter is sent by mail, he is bound to communicate the news of the loss immediately, or by the same post, so that the insurance may be countermanded.

2 Cain. 224, *Watson v. Delafield*; 1 Johns. Rep. 150, S. C.; 2 Johns. Rep. 526, S. C. in error.}

A policy was held to be void, where goods were insured as the property of an ally, when in fact they were the goods of an enemy.

Skin. 327.

¶ When the fact is not disclosed to the underwriter, that the owners of the property insured as neutral are resident and carrying on trade in a belligerent country, the concealment is material, and avoids the policy.

Bauday v. The Union Ins. Co., 2 Wash. C. C. R. 391.g

A ship was known to have sailed from Jamaica on the 24th of November, and the agent told the insurer she sailed the latter end of December; the policy was declared void.

Roberts v. Founereau, *Sittings at Guildhall*, after Tr. 1742; ¶*Park*, 285, 7th ed.; *Webster v. Foster*, 1 Esp. 407; ¶ *Johnson v. The Phoenix Ins. Co.*, 1 Wash. C. C. R. 378, but see *Livingston v. Delafield*, 1 Johns. R. 522; *Curell v. Miss. Ins. Co.*, 9 La. R. 169.g

In an insurance upon goods, the insured warranted the ship and goods to be neutral; it was expressly found by the jury, that they were not neutral.

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The court, therefore, though the loss happened by storms, and not by capture, declared that the insured could not recover.

Woolmer v. Muilman, 3 Burr. 1419; 1 Bl. Rep. 427, S. C.; [Rich v. Parker, 7 Term Rep. 705; *Baring v. Christie*, 5 East, 398; *Campbell v. Innes*, 4 Barn. & A. 423.]

Goods were insured on board a ship, warranted Portuguese. The goods were lost by a different peril, but in fact the ship was not Portuguese. The policy was adjudged void *ab initio*.

Fernandes v. Da Costa, *Sittings after Hil.* 4 G. 3.

One having an account that a ship, described like his, was taken, insured her, without giving any notice to the insurers of what he had heard. The policy was decreed in equity to be delivered up.

Da Costa v. Scandret, 2 P. Wms. 170; [and see *Lynch v. Hamilton*, 3 Taunt. 37; *Lynch v. Dunsford*, 13 East, 494; *Gladstone v. King*, 1 Maul. & S. 34; *Redman v. Loudon*, 3 Camp. 503.]

The agent for the plaintiff, two days before he effected the policy, received a letter from Cowes, in which were these words: "On the 12th of this month I was in company with the Davy, (the ship in question,) at twelve at night lost sight of her all at once; the captain spoke to me the day before that she was leaky, and the next day we had a hard gale." The ship, however, rode out the gale, and was captured by the Spaniards. The policy was held to be void, because the letter was not communicated to the insurer.

Seaman v. Fonnereau, 2 Stra. 1183. [See *Kirby v. Smith*, 1 Barn. & A. 672; *Reid v. Harvey*, 4 Dow. 97; *Willes v. Glover*, 1 New Rep. 14; *Bridges v. Hunter*, 1 Maul. & S. 15.]

§ Where a vessel was offered for insurance at and from Banacoa to Charleston, (from which last port she had previously sailed for the former,) and the plaintiff at the time of the offer was asked by the insurer when she was expected to sail, to which he replied only by stating at what time she had sailed from Charleston, although he had then in his possession letters from the captain, stating that she was ready to sail; this was held to be a material concealment, although the time of her arrival at Banacoa had been mentioned in the newspapers, and even known to one of the insurers, it not being proved that the fact had come to the knowledge of the board of directors, by whom the insurance was made.

Himely v. South Carolina Ins. Co., 1 Rep. Cir. Ct. 154.*g*

A ship was insured "*at and from Genoa*." The ship loaded at Leghorn, and was originally bound for Dublin; but losing her convoy, she put into Genoa, in August, and lay there till the January following. All these facts were known to the insured, but not communicated to the insurer. The policy was held to be void.

Hodgson v. Richardson, 1 Bl. Rep. 463; [and see *Robertson v. French*, 4 East, 130; *Grant v. Paxton*, 1 Taunt. 463; *Sawtell v. Loudon*, 5 Taunt. 359.]

A ship being bound from the coast of Africa to the British West Indies, sailed from St. Thomas's on the coast of Africa on the 2d of October, a circumstance with which the plaintiff was acquainted by a letter received in February. The policy was not made till the 21st of March. The letter was not shown, nor was any thing said of her sailing from St. Thomas's, but in the instructions "the ship was said to have been on the coast the 2d of October." The policy was held to be void.

Ratliffe v. Shoolbred, *Sittings at Guildhall*, after Tr. 1780; [Marshall on Ins. 466, 3d ed.; *M^r Andrews v. Bell*, 1 Esp. Rep. 373;] § *Johnson v. The Phoenix Ins. Co.*, 1 Wash. C. C. R. 378.*g*

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{A policy on goods from Berderigge to London (a voyage often performed in four or five days, and in unfavourable weather in about ten days) was effected by the consignees on 13th December, without communicating a letter received by them the day before, but dated 30th November, informing them that the captain would sail the next day, and directing them, if he should not be arrived, to effect the insurance as low as possible. This was held to be a material concealment, though the ship did not in fact sail till 24th December.

4 Bos. & Pul. 14, Wiles and others v. Glover.

If the assured have information of a *violent storm* about eleven hours after his vessel sailed, and he state only that "there has been blowing weather, and severe storms on the coast after the vessel had sailed," but without any reference to the particular storm, which increased the risk, it is a concealment which vacates the policy.

2 Cain. 57, Ely v. Hallett.

Whether the facts concealed were material, is a question of fact for the jury to decide; and their verdict will not be disturbed, unless the evidence preponderates against it.

4 Bos. & Pul. 151, Littledale v. Dixon; 1 Johns. Ca. 408, Mackay v. Rhineland; 2 Cain. 329, Williams v. Delafield; 1 Johns. Rep. 522; Levinston v. Delafield, 4 Dall. 424.}

The broker's instructions stated *the ship ready to sail on the 24th of December*; the broker represented to the underwriter that the ship was in port, when in fact she had sailed the 23d of December. The policy was void.

Fillis v. Brutton, Sitings at Guildhall, after Hil. 1782; ¶Park, Ins. 292, 7th ed.¶

But there are many matters as to which the insured may be innocently silent: 1st, As to what the insurer knows, however he came by that knowledge; 2d, As to what he ought to know; 3d, As to what lessens the risk. (a) An underwriter is bound to know particular perils, as to the state of war or peace. If a privateer is insured, the underwriter needs not be told her destination.—An insurance was made on Fort Marlborough in the East Indies for twelve months against the attacks of an European enemy, for the benefit of the governor. The defence set up was an undue concealment of circumstances, particularly the weakness of the fort, and the probability of its being attacked by the French. The court held that the policy was good.

Carter v. Boehm, 3 Burr. 1905; 1 Bl. Rep. 593, S. C.; {1 Johns. Ca. 6, 7, Seton v. Low; 2 Cain. 22, Williams v. Smith;} ¶Weir v. Aberdein, 2 Barn. & A. 320; Friere v. Woodhouse, Holt, 572; ¶Calbreath v. Gracy, 1 Wash. C. C. R. 198; Buck et al. v. The Chesapeake Ins. Co., 1 Peters, 160. As to what facts need not be disclosed, see De Longuemere v. New York Fire Ins. Co., 10 Johns. R. 120; Talcot v. Marine Ins. Co., 2 Johns. R. 130; Elting v. Scott, 2 Johns. R. 157; Kemble v. Boune, 1 Cain. R. 75; Duguet v. Rhineland, in error, 2 Johns. R. 476; S. C. 1 Cain. C. E. 25; Earl v. Shaw, 1 Johns. C. 313; Barnewall v. Church, 1 Cain. R. 217; Tyler v. Aetna Ins. Co., 8 Wend. 507; Ely v. Hallett, 2 Cain. R. 57. (a) The time of a ship's sailing is not in general a circumstance necessary to be communicated to the underwriters, except in the case of a missing ship, Foley v. Moline, 5 Taunt. 430; S. C. 1 Marsh. 117; Fort v. Lee, 3 Taunt. 381; nor need any ingredient of sea-worthiness be disclosed, unless information on that subject has been particularly called for, Hayware v. Rogers, 4 East, 590; Beckwith v. Sidebotham, 1 Camp. 116; or the insured of goods make any representation of their state, Boyd v. Dubois, 3 Camp. 133.¶ But if there be any particular information in the possession of the insured respecting a gale likely to enhance the danger, materially different from that possessed by the insurer, and such as the insurer was not bound to know, the concealment vitiates the policy.

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Moses v. The Delaware Ins. Co., 1 Wash. C. C. R. 385. It is incumbent on the assured to disclose all the facts in his possession which are not contained or implied in the policy itself; but he may be innocently silent as to facts which the policy necessarily imports. *Hubbard et al. v. Coolidge*, 2 Gallis. R. 353; *Seton v. Low*, 1 Johns. C. 1. But the insured is not bound to disclose to the insurer that the goods insured are contraband of war, as such goods are lawful within the meaning of the policy. *Seton v. Low*, 1 J. C. 1; *Skidmore v. Desdoity*, 2 Johns. C. 77; *Jahel v. Rhinelander*, 2 Johns. C. 120, S. C., affirmed in error; *Rhinelander v. Jahel*, 2 Johns. C. 487.g

¶ Where the insurance was from London to Jamaica generally, and the goods were destined to a particular place in the island, and the usual course was to proceed to the adjoining port and there tranship the cargo into shallops, the underwriters were held liable for a loss on board the shallops, though no notice was given them of this practice, for they were bound to take notice of the usual course of the voyage insured.

Stewart v. Bell, 5 Barn. & A. 238; and see *Kingston v. Knibbs*, 1 Camp. 508, note; *Boyd v. Dubois*, 3 Camp. 133.¶ It is the duty of underwriters to know the course of the trade which they engage to insure, and it will not afterwards lie in their mouths to object that the assured had not disclosed what they knew, or ought to have known. *Calbreath v. Gracie*, 1 Wash. C. C. R. 219; *Norris v. Ins. Co. North America*, 3 Yeates, R. 84.g

A ship was insured "from London to Nantz, with liberty to call at Ostend." The ship's clearances and papers were all made out for Ostend; but she was never intended to go thither. After the policy was made, war was declared against France. Two defences were set up: 1st, That there was a fraud in clearing out the ship for Ostend, when she never was designed for that place; 2d, That as hostilities were declared after the policy was signed, and before the ship sailed, the defendant ought to have had notice. The court held that neither of the objections were valid; for as to the first it was the common usage; and of the second the insurer was bound to take notice.

Planche v. Fletcher, Dougl. 238.

¶ Insurance on cargo to St. Andero; at the time of effecting the insurance the insured represented that the voyage was to St. Andero, but that the vessel would have a clearance for Hamburg; the cargo was shipped for Hamburg, and while prosecuting the voyage thither, the master, to avoid perils of the sea, was induced to put into St. Andero, and on his way thither was captured; held, that the vessel sailed on a voyage for Hamburg, and not to St. Andero, and that the policy had not attached.

Forbes v. Church, 3 Johns. C. 159.g

{ Under a general policy on goods, the assured need not disclose that his interest is only of an undivided part, but may recover according to his interest.

1 Cain. 276, *Lawrence and Whitney v. Vanhorne and Clarkson*; 2 Cain. 205.

The assured should communicate to the underwriter the nature of his interest in the subject insured, though it need not be specified in the policy. And if the insurance of the special interest, and not of the principal ownership, made a material difference in the risk, or would have altered the amount of the premium, and the fact was not sufficiently disclosed to the underwriter, the omission would vacate the policy.

4 Dall. 424, *Russell v. Union Ins. Co.*; 3 Mass. T. Rep. 138, *Oliver v. Green.* }

An underwriter refused to pay a loss by capture, the ship being Portuguese and condemned for having an English supercargo on board, because the insured had not disclosed that circumstance. The court held, that the con-

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demnation was unjust, and was not such a circumstance as the insured was bound to disclose.

Mayne v. Walter, B. R. East. 22 Geo. 3, Park, 306, 7th ed.; [and see Clapham v. Cologan, 3 Camp. 382; Dawson v. Atty, 7 East, 367; Littledale v. Dixon, 1 N. R. 151.]

{A general policy, unaccompanied with warranty or representation, covers war {1} risks of all kinds and all countries. In such case, a clearance for a port different from that to which the vessel sailed and was intended to sail, being proved to be a circumstance which did not increase the risk or premium, is immaterial, and need not be disclosed.

1 Cain. 217, Barnewall v. Church. {1} 2 Johns. Rep. 157, Elting v. Scott, S. P.

As an insured impliedly warrants the ship insured to be seaworthy, whatever forms an ingredient in seaworthiness need not be disclosed, unless information be particularly called for; and then the insured must disclose truly what he knows on the subject of inquiry.

4 East, 590, Haywood v. Rodgers; *post*, p. 702, Shoolbred v. Nutt.

Two letters are received from the coast of Africa; the first giving a very bad account of the state of the ship, the second giving a more favourable account, and referring to the former. The second only was shown to the insurers, and gave a true account of the state of the vessel at the time it was sent. This was held to be sufficient. If the underwriters thought that a particular knowledge of former difficulties would vary the risk, they might have called for the first letter.

7 East, 457, Freeland v. Glover.

The insured need not disclose how long the vessel has lain in port before the commencement of the risk.

1 Cain. 75, Kemble v. Bowne.

It is not necessary, in England, to communicate to the underwriters that the ship insured is foreign built, though this enabled her to sail without convoy and without a license to do so, being within the exception of the statute 38 Geo. 3, c. 76, § 6. It is the business of the underwriter to obtain this information for himself.

2 Bos. & Pul. 209, Long v. Bolton.

Articles contraband of war are *lawful goods* within the meaning of a policy on all lawful goods laden, &c. Goods not prohibited by the positive law of the country to which the vessel belongs are lawful. And the insured are not bound to disclose to the insurer that the goods insured are contraband.

1 Johns. Ca. 1, Seton v. Low.}

A representation is a state of the case, not forming a part of the written instrument or policy; and it is sufficient if it be substantially performed. If there be a misrepresentation, it will avoid the policy, as a fraud, but not as a part of the agreement. Even written instructions, if they are not inserted in the policy, are only to be considered as representations; and in order to make them valid and binding as a warranty, it is necessary that they make a part of the written instrument. But if a representation be false in any material point, it will avoid the policy; because the underwriter has computed the risk upon circumstances which did not exist.(a)

Park, 196. *¶*To constitute a representation in making insurance, there should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. Livingston et al. v. The Maryland Ins. Co., 7 Cranch, 506;

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and see *Vandervoort v. Smith*, 2 Cain. R. 155.*g* ||(a) In *Marsden v. Reid*, 3 East, 573, the court intimated an opinion that if a material fact be represented to the first underwriter, to induce him to subscribe the policy, it shall be taken to have been made to all the rest.|| *β* But a misrepresentation to have effect must be material to the risk of the voyage. *Hodgson v. The Marine Ins. Co. of Baltimore*, 5 Cranch, 100; *Maryland Ins. Co. v. Rudin's Adm'r*, 6 Cranch, 338; *Hazard's Adm'rs v. The New England Marine Ins. Co.*, 8 Peters, 557; *Baxter v. New Eng. Ins. Co.*, 3 Mass. R. 96; *Stetson v. Mass. Ins. Co.*, 4 Mass. R. 330.*g*

{If a material fact be represented to the first underwriter to induce him to subscribe the policy, it shall be taken to have been made to all the rest, without the necessity of repeating it to each. But a representation to one underwriter is not evidence of a representation to a subsequent underwriter on a different policy on the same vessel and risk.

3 East, 573, *Marsden v. Reid*; *Marshall*, 454, 772; 2 Johns. Rep. 157, *Elting v. Scott*.

A policy was underwritten on goods "at and from New York to two ports on the coast of Brazil." In a previous correspondence respecting the premium on such a voyage, the assured had stated that one of the ports was within a few hours sail of the other. But in fact the voyage was pursued from one port to another two thousand miles distant, for which a considerably higher premium was usually paid. The insurer contended that this correspondence amounted to a representation of the voyage insured, and having been materially varied from, the policy was avoided. The court decided that it would not be considered as a representation, which is of some matter out of and *collateral to the contract*, and *making no part of the policy*, but that it must be viewed as a series of propositions leading to a contract to be consummated by the policy, and must therefore fall within the salutary rule, that *where an agreement is reduced to writing, all previous treaties are resolved into that*. And judgment was given for the assured.

2 Cain. 155, *Vandervoort v. Columbian Ins. Co.* }

||Thus, where a London merchant insuring at Leith represented (contrary to the fact) that he had done some insurances at Lloyd's upon the same voyage, at the same premium given to the Leith underwriters, who (not being well acquainted with the nature of the risk themselves) subscribed the policy from their confidence in the skill and judgment of the London underwriters; it was held by the House of Lords, (reversing the judgment of the Court of Session,) that this was a fraud which vitiated the policy, though the misrepresentation was not such as affected the nature of the risk.

Sibbald v. Hill, 2 Dow. 263.|| *β* A false representation, though no breach of contract, if material, avoids the policy on the ground of fraud, or because the insurer has been misled by it. *Livingston et al. v. The Maryland Ins. Co.*, 7 Cranch, 506; *Clason et al. v. Smith*, 3 Wash. C. C. R. 156.*g*

The following instructions were shown to the first underwriter, but not inserted in the policy: "Three thousand five hundred pounds upon the ship *Julius Cæsar*, for Halifax, to touch at Plymouth, and any port in America: *she mounts twelve guns and twenty men*." These instructions were not shown to the present defendant, but she was represented *generally as a ship of force*. At the time of her capture, she had on board 6 four-pounders, 4 three-pounders, 3 one-pounders, 6 swivels, and 27 men and boys in all, of which 16 only were men. The witness said, he considered her as being stronger with this force than if she had 12 carriage-guns and twenty men; and that there were neither men nor guns on board at the time of the insurance. The court held, that these instructions were only a representation; and that they had been substantially performed.

Powson v. Watson, Cowp. 785.

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A ship was insured at and from Port l'Orient to the Isles of France and Bourbon, and to all or any ports or places where and whatsoever, in the East Indies, China, Persia, or elsewhere, beyond the Cape of Good Hope, from place to place, and during the ship's stay and trade, backwards and forwards, at all ports and places, and until her safe arrival back at her last port of discharge in France. A slip of paper, at the time the policy was underwritten, was *wafared* to it, and shown to the underwriters, on which was written the following representation:—"The ship has had a complete repair, and is now a fine and good vessel, three decks. Intends to sail in September or October next. Is to go to Madeira, the Isle of France, Pondicherry, China, the Isles of France, and l'Orient." The ship, in fact, did not sail till the 6th of December, and did not reach Pondicherry till the month of July following. She continued there till August, when, instead of proceeding to China, she sailed for Bengal, where having passed the winter and undergone considerable repairs, she returned to Pondicherry, and after taking in a homeward-bound cargo at that place, proceeded in her voyage back to l'Orient, but was taken by the Mentor privateer. The usual time, in which the direct voyage is performed between Pondicherry and Bengal, is six or seven days; but this ship was six weeks in going to, and two months in returning from Bengal, and lay off Madras, Masulipatam, Visigapatam, and Yanon, and took in goods at all those places. Lord Mansfield told the jury, that if no fraud was intended, and that the variance between the intended voyage, as described in the slip of paper, and the actual voyage as performed, did not tend to increase the risk, *this slip of paper being only a representation*, the plaintiff was entitled to their verdict.

Bize v. Fletcher, Dougl. 271; ¶Park, 313, 7th edit. ¶If a representation as to the destination of a ship be true at the time, it is sufficient, although another destination, if not fraudulently made, should ultimately be given. *Hubbard v. Coolidge et al.*, 2 Gallis. R. 353.

{A representation that a vessel insured has been out about nine weeks, when in fact she had been out ten weeks and four days, is not material, if the latter period be within the usual time of the voyage.

Johns. Ca. 408, Mackay v. Rhineland.

A representation that a man has been a naturalized citizen *since* a particular time, does not mean that he has been so *ever since*.

1 Cain. 288, *Coulon v. Bowne*.

If it be represented in time of peace that a vessel shall sail in ballast, the meaning is that she will not be exposed to the sea perils attending a loaded ship; and the representation is substantially complied with, though the vessel sails with a trunk of merchandise and ten barrels of gunpowder on board.

2 Cain. 222, *Suckley v. Delafield*.

That a ship is to sail *in the month of October* is understood by commercial men to signify that she will sail some time between the 25th of that month and the 1st or 2d of the next, and not earlier. And an assured, therefore, who made that statement, and did not disclose letters which he had received informing him that she would sail between the 5th and 10th of October, could not recover from the insurers, the ship having sailed on 11th October, and this being material to the risk.

Peake N. P. 43, Chanrand v. Angerstein, at nisi prius before Lord Kenyon.}

If the misrepresentation be in a *material* point, it will avoid the policy, even though it happen by mistake.

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Thus, in a policy on a ship from New York to Philadelphia, the broker represented to the insurer that the *ship was seen safe in the Delaware on the 11th of December* by a ship which arrived at New York; whereas in fact the ship was lost on the 9th of December. The policy was held to be void, although there was no suspicion of fraud.

Maddowell v. Fraser, Dougl. 247; ||Thompson v. Buchanan, 4 Bro. P. C. 489; {3 Cain. 22; } β Bryant v. Ocean Ins. Co., 22 Pick. R. 200.g

β But if a party makes a representation on the information of others, and states it not as known to him, but merely as information; the representation is not falsified, so as to avoid the insurance, if the fact is not so, but the party has given his information truly.

Tidmarsh . The Wash. Ins. Co., 4 Mass. R. 439.g

The same rule holds if the broker conceal any thing *material*, though the only ground for not mentioning it should be that the fact concealed appeared immaterial to him.

Shirley v. Wilkinson, Dougl. 293. β Whether the concealment of a fact by the assured is material to the risk, is a question of fact for the determination of the jury. Vale v. The Phoenix Ins. Co., 1 Wash. C. C. R. 283; Fletcher v. Commonwealth Ins. Co., 18 Pick. R. 419; Pine v. Vanuxem et al., 3 Yeates R. 30; Kohne v. Ins. Co. of N. America, 4 Binn. R. 224.g

But the thing concealed must be some *fact*, not a *mere speculation* or *expectation* of the insured. Thus, where a broker insuring several vessels, speaking of them all, said, "which vessels are *expected* to leave the coast of Africa in November or December;" the policy was held good, although in fact the ship in question had sailed in the month of May preceding.

Barber v. Fletcher, Dougl. 292; ||Bowden v. Vaughan, 10 East, 405; Hubbard v. Glover, 3 Camp. 313. || β And see Mackay v. Rhineland, 1 Johns. C. 408; Williams v. Delafield, 2 Cain. R. 329.g

{A representation stating "I am informed of the vessel's sailing, and she is out this day 26 days," is not an assertion as a fact that she is out 26 days. The *information* is applicable as well to the sailing, as the time she had been out.

2 Cain. 329, Williams v. Delafield.}

||The insured is, however, only bound to communicate *facts*, and not the impression produced by them on the public mind; for men argue differently from political appearances: but the means of information and of judging upon those subjects are open alike to the insurer and insured.

Bell v. Bell, 2 Camp. 475; Marshall on Insurance, 473, 3d edit. ||

Wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, *or of his agent*; for in either case the contract is founded in deception, and the policy is consequently void.

Park, 208; ||Gladstone v. King, 1 Maul. & S. 35. || β But see General Interest Ins. Co. v. Ruggles, 12 Wheat. 408.g

This rule prevails, even though the act cannot at all be traced to the owner of the property insured.

A man having arrived at Greenock, knowing of the loss of the ship insured, and meeting an intimate friend and acquaintance of the insured, and a partner with him in some other transactions, communicated the intelligence of the loss of the ship to him, *who desired it might be concealed*. The same day the person receiving the account held a conversation with the plaintiff's clerk, who, notwithstanding that, swore, that he had no informa-

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tion from him respecting the ship, or did he get *any hint* from him, further than the said person asking the deponent, if he knew whether there was any insurance made upon her, and if there was any account of her. The same day the plaintiff desired this clerk to write to get an insurance effected, which he did, without telling his master of this conversation. The Court of Sessions in Scotland held the policy to be void; and the House of Lords confirmed the decree.

Stewart v. Dunlop, Cas. of House of Lords, Apr. 8, 1785. [See *Wake v. Atty*, 4 Taunt. 493.]

The plaintiff's agent shipped goods for the plaintiff, and wrote to the plaintiff's agent in town to get an insurance done. The letter was dated the 16th of September, and it contained this sentence: "I this day shipped on board the *Joseph*, which sailed *immediately*, a cargo of oats, &c." This letter was not, however, sent till one o'clock on the 17th. The case states, that about six o'clock in the evening of the 16th, Thomas (the agent) heard a report that the ship was on shore; and at six o'clock in the morning of the 17th *he knew* the ship was lost. The policy was held void on account of the fraud in Thomas.

Fitzherbert v. Mather, 1 Term Rep. 12; [Gladstone v. King, 1 Maul. & S. 38; *Wake v. Atty*, 4 Taunt. 493.]

The courts of justice in this country have not yet adopted any general rule with respect to the return of premium in cases of fraud. In two or three instances in the Court of Chancery, where the underwriters have been relieved from the payment of the sums insured, on account of fraud, the decree has directed the premium to be returned.

[See *Marshall on Insurance*, 648, 3d edit.]

Thus, in a case in the year 1690, the defendant and others had come to the insurance office, and bought a policy for insuring the life of one Horwell (upon whose life they had no concern or interest depending) for a year; and the policy ran whether interested or not interested, at a premium of 5*l. per cent.* They took this way of drawing in subscribers: they agreed with one Marwood, a known merchant upon the Exchange, and a leading man in such cases, to subscribe first; but in case Horwell died within the year, Marwood was to lose nothing, but on the contrary was to share what should be gained from the other subscribers. Upon the credit of Marwood's subscribing, several others (who had inquired of Marwood about Horwell, who was his neighbour) subscribed likewise. Horwell lived about four months, and then died; and this bill was brought to be relieved against the policy: and this matter being all confessed by the answer, the court decreed the policy to be delivered up, *and the premium to be repaid.*

Wittingham v. Thornborough, Pr. Ch. 20; 2 Vern. 206, S. C.

So also, in the case of *Da Costa v. Scandrett*, Lord Macclesfield, although he held the policy to be void, on the ground of fraud, decreed the premium to be returned to the insured.

Da Costa v. Scandrett, 2 P. Wms. 170.

It is true, that during the argument in the case next to be quoted, the counsel cited a case of *Rucker v. Hollingbury*, in which the master of the Rolls had been of a different opinion from that delivered in the two preceding cases. But Lord Mansfield said, that there must be some mistake in reciting the case before the master of the Rolls; for the practice of the Court of Chancery was certainly agreeable to the two former cases.

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The case in which this observation was made was an action on a policy of insurance on a ship, with a count of a general *indebitatus assumpsit* for money had and received to the plaintiff's use ; and damages were laid at 98*l*. The trial was had, under a decree of the Court of Chancery, where the now defendant, the insurer, being there complainant, *had offered to pay back the premium, which was 10*l**. No money was, in the present case, paid into court ; though the usual course in these cases is for the defendant, the insurer, to bring the premium into court. The jury found a verdict for the plaintiff, for the ten pounds premium, on the count for money had and received to his use ; although they were of opinion against the policy, upon the foot of fraud ; and found against it, as being fraudulent. In fact, the first underwriter was only a decoy-duck, to induce other persons to underwrite the policy : and it had been previously agreed between the insured and him, that he should not be bound by signing the policy ; which this court considered as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent. With the concurrence of Lord Mansfield, (before whom this cause was tried,) and of the counsel on both sides, it was agreed to bring this question before the court, Whether, upon a policy of insurance being found fraudulent, the premium should be returned to the plaintiff, (the insured,) or retained by the defendant, (the insurer?) The cases above mentioned were quoted by the counsel for the plaintiff ; but they being all in Chancery, Lord Mansfield said, he wanted to know whether there was any common law determination to the same effect. As it did not appear that there was, his lordship said, it was plain what must be done in this case ; for he looked upon *the offer made* by the complainant's bill in equity to be the same thing as if the money had *actually been brought into court* in the present case.

Wilson v. Duckett, 3 Burr. 1361.

But although the common law has been so silent upon the subject, as not to lay down any general rule ; and although, in all the cases stated, the premium was restored ; yet, if the fraud is notorious, palpable, and gross in its nature, the court may order, and has ordered, the underwriter to retain the premium.

Thus, where an action was brought by the insured to recover 150*l*., being the amount of the defendant's subscription ; the ground of refusal was, that the insurance was fraudulent ; and that the plaintiff knew of the loss of the ship, at the time of effecting the policy. The counsel for the plaintiff were under the necessity of admitting that their client had made some fraudulent insurances upon this very ship, subsequent to the one now in dispute ; but contended, that news of the loss of the ship had not arrived till after this particular one was effected. The evidence, however, was so strong as easily to convince the jury, that the plaintiff had received information of the loss before the order for making the insurance was given to the broker ; and they found a verdict for the defendant.

Tyler v. Horne, Sittings at Guildhall, after Hil. T. 1785 ; ¶1 Park, Ins. 339, 7th ed. ; 3 Marsh. Ins. 661.¶

Lord Mansfield said, the fraud was so gross that the premium should not be recovered from the underwriter.

It is proper, however, to observe, that it has been laid down as clear law, that if the underwriter has been guilty of fraud, an action lies against him, at the suit of the insured, to recover the premium. Thus it was said by Lord Mansfield, in the case of Carter v. Boehm, 3 Burr. 1909 : "The

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policy would be void against the underwriter, if he concealed any thing; as, if he insured a ship on her voyage, which he privately knew to be arrived; and *an action would lie to recover the premium.*"

¶ Since the last-cited cases were decided, the important question, with respect to the return of premium in cases of fraud by the insured, has been set at rest by a decision of the Court of King's Bench. In the case alluded to (a) the fraud had been committed, not by the insured himself, but by his agent; yet the whole court were of opinion, that in all cases of *actual fraud* on the part of the insured, committed either by himself or his agent, the underwriter shall not be compelled to repay the premium.

(a) Chapman v. Kennett, 1 Park, Ins. 329; S. C. *nom.* Chapman v. Fraser, 2 Marsh. Ins. 661. See also Vandyck v. Hewitt, 1 East, 96, decided on the illegality of the insurance, and Morck v. Abel, 3 Bos. & Pul. 35; Lubbock v. Potts, 7 East, 449, S. P.

If, however, a policy be avoided by misrepresentation without fraud, the assured is entitled to a return of the premium.

Feise v. Parkinson 4 Taunt. 640; Oom v. Bruce, 12 East, 225; Hentig v. Stanforth, 5 Maul. & S. 122.¶

¶ DESTROYING SHIP TO DEFRAUD OWNERS OR INSURERS. ¶—By statute 1 Ann. st. 2, c. 9, § 4, it is enacted, That if any captain, master, mariner, or other officer, belonging to any ship, shall willingly cast away, burn, or otherwise destroy the ship unto which he belongeth, or procure the same to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants that shall load goods thereon, (or, by a subsequent statute, to the prejudice of any person or persons that shall underwrite any policy or policies of insurance thereon,) he shall suffer death as a felon.

4 Geo. 1, c. 12, § 3.

¶ The 1 Ann. stat. 3, c. 9, is repealed, with the exception of § 3, (which relates only to the admission of witnesses for prisoners on trial,) by the 7 & 8 Geo. 4, c. 27; but its provisions are embodied in and extended by the 7 & 8 Geo. 4, c. 30, § 9, (the malicious trespass act,) which enacts, "That if any person shall unlawfully and maliciously set fire to, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state; or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner, or part-owner, of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon."

7 & 8 Geo. 4, c. 30, § 9.¶

¶ SEAWORTHINESS OF SHIP. ¶—Every ship insured must, at the time of the insurance, be able to perform the voyage, unless some external accident should happen; and if she have a latent defect wholly unknown to the parties, that will vacate the contract, and the insurers are discharged. This arises from a tacit and implied warranty, that the ship shall be in a condition to perform the voyage.

Mills v. Roebuck, in the Exch. Park, Ins. 335, 7th ed.; {1 Cain. 217, Barnewall v. Church. And there is the same implied warranty when the insurance is on goods; Ibid. 520, Mumford v. Smith; 1 Mass. T. Rep. 436, Porter v. Bussey; 3 Mass. T. Rep. 344, Taylor v. Lowell; { Marshall on Ins. 154, 3d ed.; { § M'Lanahan v. The Universal Ins. Co., 1 Peters, 183; Silva v. Lowe, 1 Johns. C. 184; Barnewall v. Church, 1 Cain. R.

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217; *Talcott v. Marine Ins. Co.*, 2 Johns. R. 130; *Talcott v. Commercial Ins. Co.*, 2 Johns. R. 124; *Porter v. Bussey*, 1 Mass. 436; *Merchants' Ins. Co. v. Clapp*, 11 Pick. R. 56; *Starback v. New England Ins. Co.*, 19 Pick. R. 198. Though want of seaworthiness at the time the risk commenced may not vacate the policy, provided the vessel is seaworthy at the time the voyage commences, yet the vessel cannot go out of her way to supply such want. *Cruder v. Philadelphia Ins. Co.*, 2 Wash. C. C. R. 339.^g

But, though the insured ought to know whether she was seaworthy or not at the time she set out upon her voyage; yet, if it can be shown that the decay to which the loss is attributable did not commence till a period subsequent to the insurance, the underwriter will be liable, if she should be lost a few days after her departure.

{Every vessel is presumed to be seaworthy in the first instance, in respect to the implied warranty only; because the law will not, without cause, presume a party to have falsified his stipulation. But the instant she becomes innavigable, and incapable of proceeding on the voyage insured, the presumption is that this proceeds from age or internal defect arising from some other cause, until it appear to have been the effect of sea damage, or unforeseen accident insured against.

1 Cain. 246, *Barnewall v. Church*. See *Ibid.* 520, *Mumford v. Smith*.}

It was said by Lord Mansfield, that "by an implied warranty every ship insured must be tight, stanch, and strong; but it is sufficient if she be so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriter will continue liable.

Eden v. Parkinson, Dougl. 708; [*Watson v. Clarke*, 1 Dow. 344.] β A policy on a ship "at and from a port" will attach; although the ship be at the time undergoing extensive repairs in port; so as, in a general sense for the purposes of the whole voyage, to be utterly unseaworthy. *M'LANAHAN v. The Universal Ins. Co.*, 1 Peters, 183.^g

However, if a ship sail upon a voyage, and in a day or two become leaky and founder, or be obliged to return to port, without any storm, or visible or adequate cause to produce such an effect, the presumption is, that she was not seaworthy when she sailed; and the jury, upon the plaintiff's own case, may draw such a conclusion.

Munro v. Vandam, 1 Park. Ins. 333; [*Parker v. Potts*, 3 Dow. 23; *Watson v. Clark*, 1 Dow. 344; *Douglass v. Scougall*, 4 Dow. 269;] β *Cort et al. v. The Delaware Ins. Co.*, 2 Wash. C. C. R. 375; *Talcot v. Commercial Ins. Co.*, 2 Johns. R. 124; *Talcot v. Marine Ins. Co.*, 2 Johns. R. 130. But see *Patrick v. Hallett*, 1 Johns. R. 241; *Prescott v. The Union Ins. Co.*, 1 Whart. R. 399; *Wallace v. Depaus*, 2 Bay R. 503.^g

β In the insurance of a vessel on time, the warranty of seaworthiness is complied with, if the vessel be in an unexceptionable condition at the commencement of the risk; and the fact that she subsequently sustained damage, and was not properly refitted at an intermediate port, does not discharge the insurer from subsequent risk or loss, provided such loss be not the consequence of the omission.

American Ins. Co. v. Ogden, 20 Wend. R. 87; S. C. 15 Wend. R. 532.^g

As it is a condition or implied warranty in every policy of insurance that the ship is seaworthy, there need be no representation of that, for if she sail without being so, the policy is void. And any insufficiency in her former voyage will not vacate the policy.

Shoolbred v. Nutt, *Sittings at Guildhall*, after Hil. 1782; [*Park*, 346, 7th ed.; and see 4 East, 598;] β *Popleston v. Kitchen*, 3 Wash. C. C. R. 138.^g

{It is not only requisite that the ship herself be seaworthy, but she must

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also be equipped with every thing necessary to her navigation during the voyage. She must have a sufficient crew, engaged for the voyage insured, and a captain of competent skill ; and also, when she sails in a river or other place of difficult navigation, a pilot properly qualified.

7 Term, 160, *Law v. Hollingsworth* ; 1 Johns. Ca. 184, *Silva v. Low* ; 1 Cain. 32, *Dow v. Smith*.

Upon an insurance "at and from," the warranty of seaworthiness must be referred to the commencement of the *risk* ; and if, between that time and the sailing of the vessel, she becomes unfit for sea without the fault of the assured, and is afterwards lost, the assured may recover.

1 Bin. 592, *Garrigues v. Cox*.

A clause has lately been introduced into policies on vessels in the United States, that "if the above vessel after a regular survey should be condemned for being unsound or rotten, the assurers shall not be bound to pay their subscriptions on this policy."

The survey and condemnation must show unsoundness from *decay*, and not from accident ; and therefore the clause is not a bar to the assured's recovering, if the survey shows that the unsoundness proceeded from the gnawing of rats.

1 Bin. 592, *Garrigues v. Cox*.

To make it a bar, it must also appear that the vessel was condemned for unsoundness or rottenness *only*. If the survey states injuries by storm as well as by decay, and concludes that the surveyors are therefore of opinion that the vessel is unworthy of repair and unfit for sea, and the decree of the Admiralty is founded on the report generally, such a survey and condemnation are not a bar.

2 Bin. 394, *Armroyd v. Union Ins. Co.*

A report of surveyors that the vessel is unsound and rotten, but not referring to the commencement of the voyage, will not discharge the underwriters. But this case was not decided on the construction of this clause, which was in the policy ; for the plea was that the vessel was not seaworthy at the commencement of the risk, and the survey was produced as a proof of it.

3 Cranch, 187, *Marine Ins. Co. of Alexandria v. Wilson*.

If the vessel is surveyed and condemned, and the insured offer to abandon for a total loss, the survey is a necessary part of the preliminary proof to be exhibited to the insurers ; and must be produced to them with the other documents before the commencement of the action, or some account given why it was not produced.

4 Johns. Rep. 132, *Haff v. Marine Ins. Co.* }

It is the duty of the insured to keep the vessel seaworthy while the risk attaches, if he can do so ; and it seems the insurer will not be liable for a loss occasioned by an unreasonable neglect to keep her seaworthy.

Paddock v. Franklin Ins. Co., 11 Pick. 227. See *Copeland v. New England Ins. Co.*, 2 Met. R. 432.g

||ILLEGAL VOYAGES AND VOID POLICIES.||—Whenever an insurance is made on a voyage expressly prohibited by the common law, statute or maritime law of this country, the policy is void.

Park, 232. ||See *Potts v. Ball*, 8 Term Rep. 548.||

{But though a policy intended to protect a trade contrary to our own

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laws is void ; one against the risk in a trade in a foreign country contrary to its laws is valid.

1 Johns. Ca. 141, *Gardiner v. Smith*.

If there be any illegality in the commencement of an integral voyage, and an insurance be effected on the latter part of the voyage, which taken by itself would be legal, still the assured cannot recover on the policy.

8 Term, 31, *Wilson v. Marryat*.

So if a ship be insured *at* and from A to B, and there be any illegality in the traffic during her stay at A, the assured cannot recover on the policy for a loss happening between A and B.

8 Term, 562, *Bird v. Appleton*.

But goods may be insured, though purchased with the proceeds of a former illegal cargo.

8 Term, 562, *Bird v. Appleton*.

And an insurance on a ship for a particular voyage is legal, though she may have done some act in a former voyage for which she was liable to seizure.

8 Term, 562, *Bird v. Appleton* .}

The goods on board a ship were insured "at and from London to New York, warranted to depart with convoy from the channel for the voyage." She had provisions on board, which she had a license to carry to New York, under a proviso in the probitory act of 16 G. 3, c. 5 ; but *one half of the cargo, including the goods which were the subject of this insurance, was not licensed*. The commander-in-chief had issued a proclamation to allow the entry of unlicensed goods ; but he had no authority under the act of parliament to issue such proclamation, or to permit the exportation of unlicensed goods. The statute prohibits all intercourse with New York, and confiscates all ships trading to that place, unless they have a license. The court held the policy was void : it is immaterial whether the underwriter did or did not know that the voyage was illegal ; for the court cannot substantiate a contract in direct contradiction to law.

Johnson v. Sutton, Dougl. 254 ; || *S. P. Vanharthals v. Halhed*, 1 East, 487, n.1
β And see, *Colquhoun v. The N. Y. Firemen's Ins. Co.*, 15 Johns. R. 352.g

β But where, during the existence of an act of Congress prohibiting intercourse with France and her dependencies, a vessel was compelled to put into a French port, in distress, and part of her cargo was taken out by the government, and the residue only permitted to be bartered for the produce of the place, of which the cargo insured consisted ; held that this was not an illegal trade.

Jenks v. Hallett, 1 Cain. R. 60 ; S. C. in error, 1 Cain. C. E. 43.g

If a ship, though neutral, be insured on a voyage prohibited by an embargo, such an insurance is void.

Delmada v. Motteux, B. R. Mich. 25 Geo. 3, Park, 357, 7th ed. {See 5 Johns. Rep. 310, *Walden v. Phoenix Ins. Co.*;} || *Marsh. on Ins.* 75 ; and see *Gibson v. Service*, 5 Taunt. 433 ; S. C. 1 Marsh. Rep. 119. || β And see *Fontaine v. Phoenix Ins. Co.*, 11 Johns. R. 293.g

|| And if a general insurance be effected on goods, part of which is of a nature to make the voyage illegal, the policy is entirely vitiated.

Parkin v. Dick, 11 East, 503 ; S. C. 2 Camp. 221.

But it is otherwise, if no other part of the cargo, except that illegally ex-

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ported, could have been seized and forfeited; and, therefore, where 300 barrels of gunpowder were exported, half of which only were licensed, the insurance as to the 150 which were licensed was held valid.

Keir v. Andrade, 6 Taunt. 498; 2 Marsh. Rep. 196; and see Pieschell v. Allnutt, 4 Taunt. 792.

No insurance can be legally made on an enemy's property.(a)

Brandon v. Nesbitt, 6 Term Rep. 23; Bristow v. Towers, Ibid. 35; [and see Brandon v. Curling, 4 East, 410; Oom v. Bruce, 12 East, 225; {1 Bos. & Pul. 354; Bell v. Gilson; 3 Bos. & Pul. 196, Furtado v. Rodgers.} (a) But the king's license, or since the 48 Geo. 3, c. 126, the license of the secretary of state, will legalize the insurance, though it will not entitle the alien to sue in his own name. Kensington v. Inglis, 8 East, 273; Rawlinson v. Jansen, 12 East, 223; Robinson v. Morris, 5 Taunt. 730; and licenses to trade with an enemy are construed liberally. Groning v. Crockett, 3 Camp. 83; Schroeder v. Vaux, 15 East, 52; Effurth v. Smith, 5 Taunt. 329; Flindt v. Scott, 5 Taunt. 674; and see Marsh. on Ins. 86, 87.]

{And if an insurance be effected, in England, on foreign property in time of peace, after which hostilities commence, and the property is captured as prize by the British or a co-belligerent, there can be no recovery on the policy for this loss, even though the action be not brought till after the restoration of peace.

3 Bos. & Pul. 191, Furtado v. Rodgers; Ibid. 300, 302; 4 East, 396, Kellner v. Le Mesurier; Ibid. 407, Gamba v. Le Mesurier; Ibid. 410, Brandon v. Curling.

But it seems that British property may lawfully be insured against British seizures and detention.

7 East, 450, 451, Lubbock v. Potts.

Where a certain trading with an alien enemy for specie and goods to be brought from the enemy's country, in his ships, into the British colonial ports, was licensed by the king's authority, it was held that an insurance on the enemy's ship, as well as on the goods and specie put on board for the benefit of the British subjects, was incidentally legalized; and that it was competent for the British agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war.

8 East, 273, Kensington v. Inglis.

Trading {¹} with an enemy or with an enemy's country without license is illegal, and insurance on it void.

8 Term, 548, Potts v. Bell; 3 Bos. & Pul. 3, Deffis v. Parry; 1 East, 96, Van Dyck v. Hewitt; Ibid. 475, Van Dyck v. Whitmore. Vide 1 Bos. & Pul. 345, Bell v. Gilson. {¹} 2 Roll. Abr. 173, pl. 3; 1 Rob. Adm. Rep. (Am. ed.) 165, The Hoop; 4 Rob. Adm. Rep. 8, 9, The Cosmopolite; Ibid. 206, The Nayade. During a conjoint war, no subject of one belligerent can trade with the enemy, without being liable to a forfeiture of his property engaged in such a trade, in the courts of the ally. 1 Rob. Adm. Rep. 177, The Enigheid, cited by Sir William Scott; 4 Rob. Adm. Rep. 207, The Nayade.

A vessel belonging to citizens of the United States, in the year 1799, driven by distress into a French port, and obliged to land her cargo in order to make repairs, and prevented by the officers of the French government from relading her original cargo, and from taking away any thing in exchange but produce or bills, might purchase and take away such produce, without incurring the penalties of the non-intercourse act of 13th June, 1798. And such voyage was not illegal, so as to avoid the insurance. The acts of the insured were acts of necessity and coercion, and the object of the act of Congress was to prevent an intentional or voluntary traffic.

3 Cranch, 210, Hallett & Browne v. Jenks and others; 1 Cain. 60, S. C.; 1 Cain. Er. 43, S. C.

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Even if an actual and general war had existed between the United States and France, and the insured had been driven into a French port, a part of his cargo seized, and he had been permitted by the officers of the port to sell the residue and purchase a new cargo, it would not have been deemed such a traffic with the enemy as would vitiate the policy upon such new cargo.

Per C. J. Marshall, 3 Cranch, 219, in S. C.

A policy to indemnify a neutral against the consequences of an act innocently and allowably done by him in the exercise of his own neutral rights is legal. And it is no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country; the voyage and commerce not being of a hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of Great Britain, though the neutral thereby subjects his ship to be detained and carried into a British port for the purpose of search. And therefore a British underwriter, after condemnation of the enemy's goods found on board, and liberation of the ship and the rest of the cargo, is liable to the neutral owner of goods insured in the same ship whose voyage was so interrupted.

9 East, 283, *Barker v. Blakes*.

And neutral property captured by a British ship, though the Court of Admiralty pronounce for good cause of seizure, but order to be restored, is a lawful object of insurance.

5 Esp. Rep. 184, *Visger v. Prescott*.}

¶ Lord Alvanley has, however, declared it to be his opinion, that an insurance of foreign property is good against all losses but that arising from capture by British forces. (a) On this excepted head the Court of Common Pleas has decided, that no action can be maintained for a loss by British capture, though the policy was effected before the war, and the action brought after it. (b) But though foreign property cannot be insured against British hostile capture, yet it seems that British property may be legally insured against British capture, seizure, and detention. (c)

(a) *La Furtado v. Rodgers*, 3 Bos. & Pul. 191; but see the judgment of Lord Ellenborough in *Brandon v. Curling*, 4 East, 410. (b) *Furtado v. Rodgers*, *supra*; *Kellner v. Le Mesurier*, 4 East, 396; *Gamba v. Le Mesurier*, 4 East, 407. (c) *Lubbock v. Potts*, 7 East, 449.

The goods of a neutral, consigned for him to a friendly port, may be insured, though he be resident in an enemy's country. (d) And a neutral, residing in an enemy's country, and carrying on trade therein in partnership with an alien enemy, may insure his own interest in the joint property. (e)

(d) *Bromley v. Heseltine*, 1 Camp. 75; and see *Barker v. Blakes*, 9 East, 283. (e) *Rotch v. Edie*, 6 Term Rep. 413; and see *Marshall on Ins.* 40, 82.]

An insurance upon a smuggling voyage, prohibited by the revenue laws of this country, would be void. *Aliter*, if merely against the revenue laws of a foreign state; for no country pays attention to the revenue laws of another.

Planché v. Fletcher, Dougl. 238; *Lever v. Fletcher*, London Sitings, Hil. Vac. 1780, Park, 360, 7th ed.; [and see *Marshall on Ins.* 52;] *Breed v. Eaton*, 10 Mass. R. 21; *Richardson v. Marine Ins. Co.*, 6 Mass. R. 102. *Aliter*, if a breach of foreign trade laws, but such risk must be expressly assumed in the policy. *Parker v. Jones*, 13 Mass. R. 173. g

¶ Where insurance is made with warranty that insurers shall be free from

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loss in consequence of illicit trade, they are not liable although the seizure was made when the vessel was four leagues from shore.

Cuculla v. La. Ins. Co., 5 N. S. 480. Under such warranty, where part of the cargo is rightfully and part illegally seized, the insurers are liable for the part illegally seized. *Cuculla v. Orleans Ins. Co.*, N. S. 13.

All insurances upon commodities, the importation or exportation of which is prohibited by law, are void. And this rule prevails, whether the insurer did or did not know that the subject of the insurance was a prohibited commodity.

Park, 244; *Lubbock v. Potts*, 7 East, 449; *Chalmers v. Bell*, 3 Bos. & Pul. 604; *Camden v. Anderson*, 6 Term Rep. 723; 1 Bos. & Pul. 272; and see *Marshall on Ins.* 57; *Seton v. Low*, 1 Johns. C. 1; *Gardner v. Smith*, 1 Johns. C. 141; *Skidmore v. Desdouty*, 2 Johns. C. 77; *Jahel v. Rhinelander*, 2 Johns. C. 120; *S. C.* in error, 2 Johns. C. 487.

{Colonial produce cannot legally be shipped from the British West Indies for Gibraltar, and therefore the same cannot be insured on such a voyage; and it matters not that part of the cargo was shipped at one of the West India islands, with liberty to exchange it at another, (which would have been legal,) if in fact it was not exchanged, and its ultimate destination was Gibraltar.

7 East, 449, *Lubbock v. Potts*.)

By statute 4 & 5 W. & M. c. 15, § 14, 15, 16, a penalty of 500*l.* is inflicted on the insurer, who shall by way of insurance procure the importation of prohibited goods; and a like penalty on the insured.

By 8 & 9 W. 3, c. 36, § 1, the importation of any foreign alamoses or lustrings, by way of insurance or otherwise, without paying the duties, is expressly prohibited.

By 28 G. 3, c. 38, § 45, persons making insurances on wool, &c., are liable for the first offence to a fine of 50*l.* and six months' solitary imprisonment. The same penalty is imposed on the insured, and the insurance is void.

||But a legal cargo may be insured, though purchased with the proceeds of an illegal one; and though the ship had, by her previous illegal commerce, been subjected to seizure and confiscation.

Bird v. Appleton, 8 Term Rep. 562; and see *Marshall on Ins.* 68, 3d edit.||

In a policy, "valued free from average," and "interest or no interest," it is manifest, that the performance of the voyage or adventure, in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of the insurance.

It was declared from the Bench, in the reign of Queen Anne, that such insurances were *formerly* bad; for it is said in that case, that in former times, if one had no interest, though the policy ran, *interest or no interest*, the insurance was void; because insurances were made for the benefit of trade, and not that persons unconcerned therein, or uninterested in the subject-matter, should profit by them.

Assievedo v. Cambridge, 10 Mod. 77. {That a wager policy is void by the common law, see 2 Mass. T. Rep. 1, *Amory v. Gilman*. See also 5 Bos. & Pul. 296, 301, 321.} ||See *Marshall on Ins.* 122.|| β A wager policy is valid at common law. *Jahel v. Church*, 2 Johns. C. 333; *Abbott v. Sebor*, 3 Johns. C. 39; *Clendenning v. Church*, 3 Cain. R. 141.

The idea thus started is very much confirmed by what fell from the court, in the case of *Depaiba v. Ludlow*: for the court there observed, that the

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insurances upon interest or no interest were introduced since the revolution.

Depaiba v. Ludlow, Comyn's Rep. 360.

But though this mode of insuring thus gained a footing in England, yet when introduced, the courts of justice looked upon these contracts with a jealous eye; and by their determinations showed the strong prejudices which they entertained against them. The courts of equity, in particular, manifested that their inclination would lead them as much as possible to suppress such a species of contract: nay, that they still considered them as void.

The defendant had lent money on a bottomry bond, but had no interest in the ship or cargo; the money lent was 300*l.*, and he insured 450*l.* on the ship: the plaintiffs' bill was to have the policy delivered up; because the defendant was not concerned in point of interest as to the ship or cargo. *Per Curiam*,—Take it that the law is settled, that if a man has no interest, and insures, the insurance is void, though it be expressed in the policy, *interested or not interested*. The reason the law goes upon is, that insurances were made for the benefit of trade, and not that persons unconcerned therein, and who were not interested in the ship, should profit thereby; and *where one would have the benefit of the insurance, he must renounce all interest in the ship*. And the reason why the law allows that a man, having some interest in the ship or cargo, may insure more, or five times as much, is, that a merchant cannot tell how much or how little his factor may have in readiness to lade on board his ship. *Per Cur.*—Decree the policy to be delivered up to be cancelled.

Goddart v. Garrett, 2 Vern. 269; [1 Eq. Ca. Abr. 371. See 2 New R. 296.]

So, on a policy of insurance on goods, by agreement valued at 600*l.*, the insured not to be obliged to prove any interest, the Lord Chancellor ordered the defendant to discover what goods he put on board; for although the defendant offered to renounce all interest to the insurers, yet it must be referred to the master to examine the value of the goods saved, and to deduct it out of the value or sum of 600*l.*, at which the goods were valued by the agreement.

Le Pyre v. Farr, 2 Vern. 716.

The difference between policies upon interest, and such as are not, was, that in policies upon interest the insured recovered for the loss actually sustained, whether it were total or partial; but upon a wager policy he could never recover but for a total loss.

Goss v. Withers, 2 Burr. 863; [and see *Cousins v. Nantes*, 3 Taunt. 513.]

{And that loss must be *absolutely* and not *technically* total. A temporary capture will not entitle the insured to recover.

3 Cain. 141, *Clendenning & Adams v. Church*.}

It is enacted by stat. 19 Geo. 2, c. 37, that insurances made on ships or goods, *interest or no interest*, or, *without further proof of interest than the policy*, or *by way of gaming or wagering*, or *without benefit of salvage to the insurer*, shall be void. By § 2, there is an exception for insurances on private ships of war, fitted out solely to cruise against his majesty's enemies; and also by § 3, on any merchandises or effects, from any ports or places in Europe or America, belonging to the crowns of Spain or Portugal.

This statute hath been frequently holden not to extend to insurances of foreign property, and on foreign ships.

Thellusson v. Fletcher, Dougl. 315; {8 Term, 13, *Craufurd v. Hunter*.}

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It hath been also frequently holden upon this act, that a valued policy is not a wager policy, for the insured must prove some interest, although he need not prove the value of this interest. If, indeed, it could be made appear, that a valued policy were used merely as a cover to a wager, in order to evade the statute, it would be void.

Lewis v. Rucker, 2 Burr. 1167; *Grant v. Parkinson*, Mich. 22 G. 3, B. R., Marsh. Ins. 95, 3d edit.; *Da Costa v. Firth*, 4 Burr. 1966.

{The profits expected to arise from a cargo shipped on a trading voyage are an insurable interest. The policy must of necessity be a {} valued, not an open policy.

2 East, 544, *Barclay v. Causins*; *Ibid.* 550, n., *Hendrickson v. Margetson*; 3 Cain. 245, *Tom v. Smith*. See 5 Bos. & Pul. 269, *Lucena v. Craufurd*. {} 1 Johns. Rep. 433, *Mumford v. Hallett*.

But in such a case it must be shown by the assured that the loss of profits arose from a peril insured against, and not from the state of the market, and that, if the peril had not happened, there would have been some profit.

6 East, 316, *Hodgson v. Glover*.

So the commissions of the consignee or supercargo may be insured. And an insurance on *property* on board the ship covers them, if the insured has no other interest on board.

5 Bos. & Pul. 206, *King v. Glover*; 2 Cain. 357, *Robinson v. New York Ins. Co.*; 1 Johns. Rep. 616, S. C.; 2 Mass. T. Rep. 280, *Holbrook v. Brown*;}.

Upon a joint capture by the army and navy, the officers and crew of the ships have, before condemnation, an insurable interest by virtue of the prize act, which usually passes at the commencement of a war.

Le Cras v. Hughes, B. R. East. 22 G. 3, Park, 269; {} S. C. Marsh. 105, 3d edit.{}.

{So the captors of ships seized by them as prize have an insurable interest in them, in the voyage home for the purpose of bringing them to adjudication in the Admiralty.

8 Term, 154, *Boehm v. Bell*.

So also the commissioners appointed by the statute 35 Geo. 3, c. 80, for the purpose of taking care and disposing of Dutch ships and effects detained in or brought into the ports of Great Britain, and who by their commission are to manage, sell, and dispose of the same to the best advantage, according to the instructions they should from time to time receive from the king and the privy council, were held to have an insurable interest in Dutch ships and effects seized at sea by British ships of war, that they might be brought into the ports of Great Britain; they may insure in their own name; and a count in a declaration on such a policy, stating the nature of their trust, and averring that they, as such commissioners, were interested in the said ships and goods, and that the said insurance was made to and for their use, benefit, and account, as such commissioners, was upon demurrer holden to be good; the court considering them in the light of trustees, consignees, or agents, in either of which characters it was conceived they had an insurable interest. And the king had undoubtedly an interest in the ships and goods which might be insured.

8 Term, 13, *Craufurd v. Hunter*; 3 Bos. & Pul. 75, *Lucena v. Craufurd*; 5 Bos. & Pul. 269, S. C. See 2 Bos. & Pul. 242, *Page v. Fry*.

A being indebted to B, without any order from him consigns goods to C, to be held for B, and endorses the bill of lading to C. B has an insurable interest in the goods so consigned.

1 Bos. & Pul. 315, *Hill v. Secretan*.

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Where a man consigned a cargo to the Cudbear Company in London, and drew bills for the amount, but transmitted the bills of lading through the plaintiffs, his general agents, to be sent to the Cudbear Company that they might insure, and he at the same time drew on the plaintiffs for 300*l.* which was paid; but the Cudbear Company refused to accept the bills drawn on them, or to take the cargo, or to insure, upon which the plaintiffs made insurance in their own name, and informed the consignor who approved thereof; it was held that the plaintiffs were to be considered as consignees of the whole, and had a right in that character to insure for the benefit of their consignor; and that they had a clear insurable interest in themselves to the amount of 300*l.*

1 Bos. & Pul. 316, Wolff v. Horncastle; 2 Mass. T. Rep. 370, 371. And see 4 Dall. 421, Russell v. Union Ins. Co.

A part-owner of a vessel, who has chartered the remainder with a covenant to pay the value in case of a loss, may insure the whole vessel as his property.

3 Mass. T. Rep. 133, Oliver v. Greene.

One who advances a sum of money to the owners of a ship, in consideration of which they give him a right to fill up three-eighths of the tonnage of the ship for that voyage with goods either his own or the property of others, has an insurable interest; and his interest is well described in the policy as *freight advanced*. This interest is liable to contribute to a general average, and the insured may recover his proportion of the amount paid for salvage on recapture, that being a general average to which he was liable.

4 Dall. 459, Sansom v. Ball.

A vessel was chartered for a voyage from New York to Jeremie, and back to New York, for \$2400. The charterer insured "freight valued at \$1800, being two-thirds the value of freight, on a voyage from Jeremie to New York, upon the freight of goods laden or to be laden," &c. The vessel having been captured on her return voyage and condemned, the charterer brought an action on the policy, and it was held that he had not an insurable interest; for considering the policy as one on *freight*, the insured had no interest in it,—he was not owner of the vessel, but had hired her for the voyage; and the policy having described the interest to be freight generally, it could not be considered as *freight earned*.

2 Johns. Rep. 346, Cheriot v. Barker.

The owner of a ship covered by a bottomry bond to an amount beyond her value has not an insurable interest, though he was ignorant of the existence of the bottomry, which was given by a former owner.

2 Cain. Er. 110, Smith v. Williams, reversing the judgment of the Supreme Court, who held that he had an insurable interest. 2 Cain. 13, Williams v. Smith. See 1 Johns. Rep. 385, Kenny v. Clarkson and Vanhorne.}

||And since the passing of the stat. 45 Geo. 3, c. 72, which directs that property taken in conjunct expeditions of the army and navy shall be divided among the joint-captors, it has been held that the captors had an insurable interest in such prizes before condemnation, subject to the appropriation of the crown.

Stirling v. Vaughan, 2 Camp. 225, S. P.; 11 East, 619.¶

All insurances made by persons having no interest in the event about which they insure, or without reference to any property on board, are merely wagers, and are void. Thus, where the defendant, in consideration of 20*l.*

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paid by the plaintiff, undertook that the ship should save her passage to China that season, or that he would pay 1000*l.* within one month after her arrival in the river Thames; the contract was holden to be void, although the plaintiff had some goods on board.

Kent v. Bird, Cowp. 583. β A wager policy is not a valid contract. Amory v. Gilman, 2 Mass. R. 1.*g*

Wherever the court can see upon the face of the policy that it is merely a contract for gaming, where indemnity is not the object in view, they are bound to declare such policy void. As, where by the policy it appeared, that the plaintiffs had lent 26,000*l.* on bond to a captain of an East India-man, to which amount the ship and cargo were insured, and that in case of loss no other proof of interest was to be required than the exhibition of the bond; the court held, that the contract was void.

Lowrey v. Bourdieu, Dougl. 451. β But a policy of insurance underwritten for ten thousand dollars on profits on merchandise on board the brig Leonora, at and from Cal-lao to Baltimore, free of average and salvage, and the policy to be the only proof of interest required; is not in our law to be deemed a wager policy, where the assured had property on board, and neither he nor the underwriters intended to insure upon a wager policy, but intended it as a policy on interest. Also *v. The Commercial Ins. Co.*, 1 Sumner's R. 451. The fact that goods are valued too high in a valued policy, may be used to support the inference of fraud, but is not a ground *per se* to avoid the contract. Aikin v. Miss. Ins. Co., 4 N. S. 661; Brooks et al. v. La. State Ins. Co., 4 N. S. 640.*g*

{The words "policy to be proof of interest" are not considered as being of themselves evidence of a wager policy. Nor is the want in the declaration of an averment of interest in the plaintiffs, either in their own right or as trustees, to be considered as decisive evidence of no interest, since such an averment is not requisite even in an {1} interest policy.

3 Cain. 141, Clendenning and Adams v. Church. {1} A declaration on a policy of insurance on a foreign ship (which is not within the stat. 19 Geo. 2, c. 37) need not aver any interest in the assured; though there be no such words as "interest or no interest," in the policy. 2 East, 390, Nantes v. Thompson; 8 Term, 13, Craufurd v. Hunter. See 4 East, 400; 5 Bos. & Pul. 308.}

As to re-assurances, it is declared by stat. 19 G. 2, c. 37, § 4, that it shall not be lawful to make re-assurance, unless the insurer be insolvent, become a bankrupt, or die; in any of which cases, such insurer, his executors, administrators, or assigns, may make re-assurance to the amount before by him insured, expressing in the policy that it is a re-assurance.

{This statute has not been extended to Massachusetts. A policy of re-assurance is there a valid contract as at common law. 2 Mass. T. Rep. 176, Merry v. Prince. On a re-assurance no abandonment is necessary, though the first assured has abandoned to his insurer. The re-insurer is liable to the assurer for all costs, *bona fide* incurred in defending the suit brought by the original underwritten, especially when with notice of its going on he stands by, and does not offer to settle; for as the re-assurer is entitled to every defence against the insurer, which the latter may urge against the first assured, it becomes necessary for the original underwriter to show he has been obliged to pay on a just claim against him; and he will be entitled to interest on all he has expended and paid. The assurer who makes re-assurance is obliged to prove the loading and value of the goods, in the same manner as if he was the original insured. It is however usual for the policy to contain a provision, that the re-assured shall only be obliged to produce the evidence of payment of the loss. This special contract obliges the re-assured to act with good faith, but leaves him in all other respects to his own discretion in admitting or contesting the claim of the first insured. When no such special contract is made, the re-assurer will be obliged to pay all that the first insurer ought himself to pay; and then the re-assured must prove the existence and extent of the loss; but he need not give any notice, or abandon to the re-insurer, and must therefore take

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care at his peril that the claim against him be well founded before he admits it. 3 Can. 190, *Hastie & Patrick v. Depeyster & Charlton.*}

A re-assurance was made by the defendant on a French vessel, first insured by a French underwriter at Marseilles, who was living, and, at the time of subscribing the second policy, was solvent. The court were unanimously of opinion that this re-assurance was void; and that every re-assurance in this country, either by British subjects or foreigners, on British or foreign ships, is void by the statute, unless *the first assurer be insolvent, become a bankrupt, or die.*

Andr   v. Fletcher, 2 Term Rep. 161. β Notwithstanding the 19 Geo. 2, c. 37, $\S$ 4, a policy of re-assurance is a valid contract. *Merry v. Prince*, 2 Mass. 176. γ

In the year 1763, it was ruled by Lord Mansfield, Chief Justice, and agreed to be the course of practice, that upon a double insurance, though the insured is not entitled to two satisfactions, yet upon the first action he may recover the whole sum insured, and may leave the defendant therein to recover a rateable satisfaction from the other insurers.

Newby v. Reed, Sittings in London, East. Vacat. 1763; 1 Bl. Rep. 416; {4 Dall. 348, and app. xxxii. *Thurston v. Koch*, S. P.}

Thus, also, it was determined in a subsequent case at Guildhall. It was an action on a policy of insurance on a ship from Newfoundland to Dominica, and from thence to the port of discharge to the West Indies. It was a valued policy on the ship and freight; and on the goods as interest should appear. The ship sailed from Saint John's, the 17th of December, 1775; and the plaintiff declared as for a total loss. The defendant underwrote for 200*l.*, and paid into court 124*l.* This sum was paid on a supposition, that the underwriters on a former policy should bear a share of the loss. The plaintiff had originally insured at Liverpool on a voyage from Newfoundland to Barbadoes and the Leeward Islands, with an exception of American captures: but the plaintiff afterwards, for the purpose of securing himself against captures, and having altered the course of his voyage, made the present insurance. The plaintiff now insisted he was entitled to receive the full amount of his insurance against the defendant, and not to any part from the Liverpool underwriters, because the voyage now insured was different from that insured at Liverpool. There was, however, a verdict for the plaintiff for his full demand, *with liberty for the defendant to bring an action against the Liverpool underwriters, if he thought fit.*

Rogers v. Davis, Sittings in Mich. Vac. 17 G. 3, before Lord Mansfield, [Park, 422, 7th edit.]

Accordingly, in the Easter term following, an action was brought for money had and received to the use of the plaintiff, who was the defendant in the last cause, in order to recover a contribution for the loss which the plaintiff had been obliged to pay. It was agreed by both parties to admit, that on the London policy (which was the subject of the former action) 2200*l.* were insured: that on the two Liverpool policies 1700*l.* were insured: that the merchant was interested to the amount of 500*l.* on the ship; 300*l.* on the freight; and 1400*l.* on the cargo. That the plaintiff had paid 200*l.* loss, and 47*l.* for the costs. The question was, Whether the defendant was liable to contribute any thing, and what? The whole interest was 2200*l.*, and the whole insurance was 3900*l.* It was insisted by the counsel for the defendant, that the insurance in London was an illegal re-assurance; and

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therefore the plaintiff might have made a good defence in an action brought against him: and if so, he could not now recover over against the defendant.

Davis v. Gildart, Sittings in East. Vac. 17 G. 3, at Guildhall, [Park, 424 7th edit.]

Lord Mansfield.—The question seems to be, whether the insured has not two securities for the loss that has happened? If so, can there be a doubt that he may bring in his action against either? It is like the case of two securities; where, if all the money be recovered against one of them, he may recover a proportion from the other. Then this would bring it to the question, whether the second insurance is void as a *re-assurance*? But a *re-assurance* is a contract made by the insurer to secure himself; and *this is only a double insurance*.—There was another ground taken in the cause, which is not material to be mentioned here: but upon this direction, the plaintiff had a verdict.

¶ To constitute a double insurance, the property must be twice insured on the same risk, and for the benefit of the same person. If different persons claim different interests in the same subject, each may lawfully insure his own interest.

Thurston v. Koch, C. C., 4 D. 350; Warder v. Horton, 4 Binn. 539; Wells v. Philadelphia Ins. Co., 9 S. & R. 107.

In case of double insurance, the insured may elect whether to claim a proportionate part from each insurer, or to claim the whole of one, who will then look to the other for contribution.

Wiggin v. Suffolk Ins. Co., 18 Pick. 145.

Although a man, by making a double insurance, shall not be allowed to recover a double satisfaction for the same loss, yet various persons may insure various interests on the same thing, and each to the whole value, (as the master for wages, the owner for freight, one person for goods, another for bottomry); and such a contract does not fall within the idea of a double insurance.

Godin v. Lond. Assur. Company, 1 Burr. 489; 1 Bl. Rep. 103, S. C.; [Lucena v. Craufurd, 2 N. R. 292.]

{ Where a vessel was valued at 2000 dollars, and insured for that sum, and there was a prior insurance for 3000 dollars, the insured were allowed to prove that the vessel was worth enough to cover both policies.

1 Johns. Rep. 385, Kenny v. Clarkson. }

¶ If a policy be effected on behalf of a person having a certain interest, the proceeds of the insurance cannot be claimed by another person not privy to the insurance, though he has a distinct interest in the subject-matter insured. Thus, where A sold goods to B, to be shipped at B's risk to Lisbon, to be paid for by bills drawn upon R and Co., and C went as supercargo and trustee for A and B, and was to retain possession of the goods until the amount of bills drawn upon R and Co. was remitted, and then the bills of lading were to be delivered up to B: B directed R and Co. to effect an insurance, which was done at B's expense, and not in pursuance of any agreement with A; and the ship, with the goods on board, was captured, and the underwriters paid a total loss to R and Co., who gave B credit for the money, part of which they paid over to him, and part to B after his bankruptcy. R and Co. paid part of the bills drawn upon them,

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and rejected others. In an action brought by A against R and Co. for money had and received to his use, it was held, that they were not bound to apply the money paid on the policy to the discharge of the bills drawn by B for the goods.

Neale v. Reid, 1 Barn. & C. 657; and see Sidaways v. Todd, 2 Stark. Ca. 400.

Where it is stated, in a case reserved for the court's opinion, that the interest in the insurance is in A, the court is precluded from taking any notice of a count in the declaration avowing the interest to be in B. Where the defendant had taken bills of lading from a bankrupt after his bankruptcy, as security for a debt due from the bankrupt, and the defendant effected for his own account an insurance on the cargoes, and a loss happening, he recovered from the underwriters on a count alleging the interest in the assignees of the bankrupt; it was held, that defendant did not become a trustee for the assignees of the sum recovered, and that they could not recover the sum as money had and received to their use.

Routh v. Thompson, 11 East, 428; Grant v. Hill, 4 Taunt. 380; but it would rather seem that the underwriters might in such case recover back the money paid to the defendant.

But an insurance effected for the benefit of a third person, although without his authority, may be adopted by such third person; and in such case the interest may be alleged to be in him.

Hagedorn v. Oliverson, 2 Maul. & S. 485. § And see Turner v. Burrows, 8 Wend. R. 144; Bridge v. Niagara Ins. Co., 1 Hall, R. 246. §

§ If it clearly appears that the owner who effected insurance did it on joint account, and the language of the policy is for account of whom it may concern, or for account of the owners, any one having an interest in the vessel insured may claim the benefit of the policy; but when the policy contains no words importing interest in any other than the person effecting it, none but himself can claim the benefit of the policy.

Turner v. Burrows, 5 Wend. R. 541; Pacific Ins. Co. v. Catlet, 4 Wend. 75. §

§ OF DEVIATION. §—A deviation is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular or usual course of the specific voyage insured. Whenever this happens the voyage is determined; and the insurers are discharged from any responsibility.

The reason of this is, because the ship goes upon a different voyage from that against which the insurer undertook to indemnify.

Nor is it material whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference whether the insured was or was not consenting to the deviation.

A ship was insured from Dartmouth to Liverpool; she put into Loo, *a place she must of necessity pass by*; and although no accident befell her in going into or coming out of Loo, (for she was lost after she got out to sea,) it was held to be a deviation.

Fox v. Black, Exeter Ass. 1767, *coram* Yates, J., 2 Park. Ins. 488. § And see generally as to deviation, Martin v. The Delaware Ins. Co., 2 Wash. C. C. R. 254; Vos v. Robinson, 9 Johns. R. 192; Tenet v. Phoenix Ins. Co., 7 Johns. R. 363; Robertson v. Columbian Ins. Co., 8 Johns. R. 491; Lawrence v. Ocean Ins. Co., 11 J. R. 241. A voluntary deviation to avoid a peril not insured against, discharges the insurer. Breed v. Eaton, 10 Mass. R. 21; Snowden v. Phoenix Ins. Co., 3 Binn. R. 466. §

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A ship being insured from Dunkirk to Leghorn, comes to Dover for a Mediterranean pass; and it was held to be a deviation.

Townson v. Guyon, before Lord Mansfield, *Ibid*.

¶ But a ship may *trade* where she has liberty to *touch*, without express permission; provided this occasion no delay or additional risk.

Raine v. Bell, 9 East, 195; Cormack v. Gladstone, 11 East, 347; Laroche v. Oswin, 12 East, 131; ¶ *β Contra*, United States v. The Paul Shearman, Peters's C. C. R. 98. *g*

¶ A policy of insurance on a vessel, "at and from an island," protects her in sailing from port to port in the island to take in a cargo.

Dickey v. The Baltimore Ins. Co., 7 Cranch, 327. *g*

If the master of a vessel put into a port not usual, or stay an unusual {1} time, it is a deviation.

Park, Ins. 488. {1} 4 Dall. 274, Kingston v. Girard. See 1 Johns. Rep. 184, 191. Suydam & Wyckoff v. Marine Ins. Co., 2 Johns. Rep. 138, S. C.} ¶ Williams v. Shee, 3 Camp. 469; Redman v. Loudon, 3 Camp. 503; 5 Taunt. 462; ¶ *β* Coles v. Marine Ins. Co., 3 Wash. C. C. R. 159; Kingston v. Girard, 4 Dallas. R. 274. But where the voyage is in the contemplation of the parties, a trading voyage, a long stay at one port, for the purpose of selling the cargo, such stay being necessary for that purpose, does not amount to a deviation. Gilfert v. Hallet, 2 Johns. C. 296. *g*

¶ A deviation is not merely going out of the track or course usually taken; but it is also a departure from the express or implied terms of the contract.

Warder et al. v. Goods, &c., 1 Adm. Decis. 31; Maryland Ins. Co. v. Le Roy et al., 7 Cranch, 26.

If a vessel be captured and taken out of her course, by reason of her having contradictory papers on board, it is a deviation.

Goix v. Low, 1 Johns. C. 341, 346. *Per* Kent, J. *g*

{Ship, cargo, and freight are insured in the same policy, "from Boston to the Canaries, and at and from thence to any port or ports of Spanish America, and at and from thence to her port of discharge in the United States, under whatever papers she may sail." She goes to the Canaries, and thence under Spanish colours with Spanish papers to Vera Cruz, where the outward cargo is landed, and afterwards seized as an illegal importation. The master remains with the ship at Vera Cruz five months to recover the cargo. Failing in that object, he takes a cargo on freight for the Havanna, where he was to exchange his papers, and return to the United States. On her passage to the Havanna the ship was captured. It was held, that the voyage out was terminated by the delivery of the cargo at Vera Cruz; that the stay there was not a deviation; but that the voyage to the Havanna was; and the excuse that the ship went there to meet one of a Spanish house, for the purpose of exchanging her papers, was not a sufficient justification.

3 Mass. T. Rep. 409, Stocker et al. v. Harris.

Where a vessel stayed in port six months after the date of the policy, it was held not to be a deviation, it not being fraudulent or varying the risk.

1 Johns. Ca. 313, Earl v. Shaw.}

The insured ordered their broker to insure on a particular vessel from Carron to Hull, *with liberty to call as usual*. These instructions were entered in the broker's books; and the insurer subscribed a policy on the goods, "at and from the loading thereof, on board the said ship at Carron wharf, and to continue and endure until the said ship (*being allowed a liberty to call at Leith*) shall arrive at Hull. It being usual for these vessels to call at Borrowstoness, Leith, and Morison's Haven, this vessel stopped at the latter; and received no damage in going into or coming out of it. The

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courts in Scotland held it was no deviation ; but their judgment was reversed in the House of Lords.

Elliot v. Wilson, 7 Br. P. C. 459.

¶ Insurance was made on a voyage from New York to Bremen, " with liberty to enter a Dutch port, when informed, on arriving on the coast, that it may be done with safety." On arriving off the coast of Holland, the captain was informed, from two Dutch boats, " that Amsterdam was not blockaded, and that he might proceed to that port free from molestation by *British* cruisers." He then took a pilot on board and shaped his course for the *Texel*, near the first bay, in which he was captured by a *French* privateer, by which he was carried into *Amsterdam*. Both vessel and cargo were afterwards condemned. *Held*, that the information received by the captain did not warrant him in proceeding towards the *Texel*, and that consequently, the departure from the course of the voyage to Bremen was a deviation which discharged the insurers.

Duerhagen v. United States Ins. Co., 2 S. & R. 309.*g*

If several places are named in the policy, the ship must go to those places in the order in which they are named, unless some usage, or some special facts be proved, to vary the general rule.

Beatson v. Howard, 6 Term Rep. 531. {Where there is an intention of going to more than one port, the order described in the policy must be pursued. But the assured is not bound to go to all the ports mentioned, but may proceed directly to any one of them. 3 East, 572, Marsden v. Reid ; 2 Johns. Rep. 264, Kane v. Columbian Ins. Co.}

¶ And leave to call at all or any of the West India islands must be confined to places in their geographical order in the course of the voyage,*(a)* and will not justify going to any of them for purposes unconnected with the voyage.*(b)*

(a) Gairdner v. Senhouse, 3 Taunt. 16. *(b)* Hammond v. Reid, 4 Barn. & A. 79; and see Rucker v. Allnutt, 15 East, 278; Langhorne v. Allnutt, 4 Taunt. 519; Solly v. Whitmore, 5 Barn. & A. 46; Bottomley v. Bovill, 5 Barn. & C. 211.¶

If the deviation be but for a single night, or for an hour, it is fatal.

Clason v. Simmond, Sittings at Guildhall, Hil. 1741, ¶cited by Lawrence, J., 6 Term Rep. 433.¶

A ship was bound from Cork to Jamaica, under convoy. Being of force, she, with two other vessels, took advantage of the night, and cruised in hopes of meeting with a prize ; it was held a deviation.

Cock v. Townson, C. B. before Lord Camden.

But, if a merchant ship carry letters of marque, she may *chase* an enemy, though she may not *cruise*, without being deemed guilty of a deviation.

Jolly v. Walker, Sittings at Guildhall after East. 1781. ¶Parr v. Anderson, 6 East, 202;¶ β Haven et al. v. Holland, 2 Mason, 230.*g*

¶ Liberty, however, to a letter of marque to *chase, capture, and man prizes*, will not enable her to convoy a prize taken by her into port ;*(c)* nor will the further liberty to see into port any prize justify her waiting in port to get a prize repaired.*(d)*

(c) Lawrence v. Sydebotham, 6 East, 45. β Convoying her prizes for ten days, the policy being " with liberty to cruise and capture," is not a deviation, if the risk be not thereby increased. Ward v. Wood, 13 Mass. 539.*g* *(d)* Jarrat v. Ward, 1 Camp. 265; and see Hibbert v. Halliday, 2 Taunt. 428.¶

If the insured, without the knowledge of the underwriters, take out a letter of marque, (but without a certificate, which by the prize act of the

33 Geo. 3, c. 66, § 15, is absolutely necessary to its validity,) for the purpose of inducing the seamen to enter, and without any intention of cruising, this does not so essentially vary the risk as to avoid the policy.

Moss v. Byrom, 6 Term Rep. 379. [And see *Toulmin v. Inglis*, 1 Camp. 491.]

In an action on a policy of insurance on freight of the ship *Bethiah* at and from Bordeaux to Virginia, warranted American ship and property; the declaration alleged, that the ship was an American ship, and the property of American subjects. The plaintiff proved the ship to be American, and it was to have been contended, that the warranty extended to the goods on board as well as to the ship; but upon the evidence it appeared, that the goods, whether American or not, were to be carried in the ship from Bordeaux to Saint Domingo, and that she was only to call at Norfolk in Virginia for orders; so that it was unnecessary to decide or discuss the question upon the construction of the warranty, Lord Kenyon being of opinion, that the underwriters upon this policy had a right to expect, that the goods upon which the freight was payable were consigned to Virginia; and that if the freight was payable for the carriage of them from Bordeaux to Saint Domingo, the underwriters were not liable for the loss, though the ship was to call at Norfolk for orders, the freight payable being in such case different from the freight insured. The plaintiff was accordingly nonsuited, and no application was made to set the nonsuit aside.

Murdock v. Potts, *Sittings at Guildhall after Tr. 1795*.

Wherever the deviation is occasioned by absolute necessity,—as, where the crew forced the captain to deviate,—the underwriter continues liable.

Elton v. Brogden, 2 Str. 1264; [Driscoll v. Bovill, 1 Bos. & Pul. 313; *Scott v. Thompson*, 1 New Rep. 181.] Instances of necessity for a deviation which are generally met with, are stress of weather, injury sustained by the ship, which requires to be repaired, going to join convoy, and the like. But these are only examples to illustrate the principle. There may be many other instances, where the necessity will be equally great and equally valid to excuse a deviation. *Winthrop v. The Union Insurance Co.*, 2 Wash. C. C. R. 7; *Maryland Ins. Co. v. Le Roy et al.*, 7 Cranch, 26; *Wood et al. v. The United States Ins. Co.*, 2 Wash. C. C. R. 301. But the danger that will justify remaining in port a long time without discharging the underwriters, must be obvious, immediate, directly applied to the interruption of the voyage, and imminent, not distant, contingent, and indefinite. *Oliver v. The Maryland Ins. Co.*, 7 Cranch, 487. A deviation from necessity, will excuse the assured, in case of an insurance against a particular risk, as well as in case of a general insurance. *Robinson v. Marine Ins. Co.*, 2 Johns. R. 89.

{And where the policy was on goods against *sea risks and fire only*, and on the voyage the ship was carried out of the course by a king's ship against the will of the captain, but being afterwards released proceeded on her voyage, and while so proceeding the goods sustained sea-damage, the underwriters were held to be answerable for the loss.

4 Bos. & Pul. 181, *Scott v. Thompson*; 2 Johns. Rep. 89, *Robinsons v. Marine Ins. Co. S. P.*, *Livingston, J.*, dissenting. *Quære*, if the deviation would be justified, if the force by which it was produced was occasioned by the negligence of the insured in not having proper documents on board, or by his having contradictory papers. See 1 Johns. Ca. 341, *Goix v. Low*, in which *Kent* and *Benson, Js.*, were of opinion that it would not, but the other three judges expressed no opinion on the point.

A ship was insured from Lisbon to Madeira, from Madeira to Saffi, and from Saffi to Lisbon. When she arrived a Madeira, all the crew except two, being alarmed by reports of some pirates being off Saffi, and of their having captured and ill treated a Dane and an American, quitted the ship, and refused to return to it unless the captain would promise to sail imme-

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diately to Lisbon. The captain therefore carried the ship to Lisbon; but the charterers insisting on his proceeding thence directly to Saffi, he did so, and was captured on his return from Saffi to Lisbon. It was held that the deviation was excused by necessity, and the insurers were liable.

1 Bos. & Pul. 313, Driscoll v. Bovill; and see Ibid. 200, Driscoll v. Passmore.

{If part of the crew who are necessary to the navigation of the ship be arrested by a press-gang, and the captain go ashore to procure their release, a delay so occasioned arises *ex justa causa*, and the underwriters will not be discharged by it; *aliter*, if they are unnecessary.

Warwick v. Scott, 4 Camp. 62.

But the deviation must be from strict necessity, or the underwriters will be discharged. Thus, where the master of a merchant vessel, while taking in his loading at a port, was ordered by a king's ship to go out to sea, to examine a strange sail in the offing, and the master without compulsion, or making any remonstrance, obeyed, this was held an inexcusable deviation.

O'Reilly v. Gonne, 4 Camp. 249; and see Wolf v. Claggett, 3 Esp. Ca. 277; Phelps v. Auldjo, 2 Camp. 350; and see Forshaw v. Chabert, 3 Brod. & B. 158; O'Reilly v. Royal Exchange Assurance, 4 Camp. 246; || *β* Stocker v. Harris, 3 Mass. R. 409; Kattell v. Wiggin, 13 Mass. R. 68; Brazier v. Clap, 5 Mass. R. 1.*g*

If a ship is decayed, and goes to the nearest port to refit, it is no deviation.

Motteux v. London Assurance Company, 1 Atk. 545. *β* But the party who claims the benefit of this rule should satisfy the jury that the port to which he did go was in fact the nearest. Cruder v. The Philadelphia Ins. Co., 2 Wash. C. C. R. 339.*g*

Wherever a ship, in order to escape a storm, goes out of the direct course; or when, in the due course of the voyage, she is driven out of it by stress of weather; this is no deviation.

Harrington v. Halkeld, Sitings at Guildhall, after Mich. 1788.

If a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return to the point from which she was driven.

Delany v. Stoddart, 1 Term Rep. 22; Smith v. McNeil, 2 Dow. R. 538.

{Policy on a cargo of corn and flour from New York to Madeira, with the usual memorandum. In her passage the vessel met with bad weather, and arriving in sight of Madeira was prevented by adverse winds from going into port; and suspecting a ship in sight to be a privateer, the master bore away, and falling into the trade winds went to the Cape de Verd Islands; where the cargo being found much damaged, was ordered to be sold by the government there. Not being able to repair the vessel, the insured broke up the voyage, and abandoned as for a total loss; but the vessel afterwards got some repairs and went to Lisbon. It was held that the going to the Cape de Verd Islands was not warranted by necessity, and therefore was a deviation.

1 Johns. Rep. 301, Neilson & others v. Columbian Ins. Co.}

A deviation may also be justified, if done to avoid an enemy, or to seek for convoy; (*a*) because it is, in truth, no deviation to go out of the course of a voyage in order to avoid danger, or to obtain a protection against it.

β Guyon et al. v. Pleasants, 3 Wash. C. C. R. 241; Patrick v. Ludlow, 3 Johns. C. 10; Post v. Phoenix Ins. Co., 10 Johns. R. 80; Reade v. The Com. Ins. Co., 3 Johns. R. 352.*g* || (*a*) Or to succour a ship in distress. *Per* Lawrence, J., in Lawrence v. Sidebotham, 6 East, 54; || {1 Bay, 309, Miller v. Russell.} *β* But a voluntary deviation to avoid a peril not insured against discharges the insurer. Breed v. Eaton, 10 Mass. R. 21; but see Riggan v. The Patapsco Ins. Co., 7 Har. & J. 279.*g*

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¶ If a vessel go out of her way to save the life of man, this will not be considered a deviation. The humanity of the motive, and the morality of the act, give it a strong claim to indulgence; but after this object is effected, if the stoppage be continued, or the risk increased, by adding to the cargo, diminishing the crew, or by other means, for the purpose of saving the property found, the underwriters are discharged.

Bond v. The Cora, 2 Wash. C. C. R. 80; **The Henry Ewbank and cargo**, 1 Sumner's R. 424; **Masson et al. v. The Blaireau**, 2 Cranch, 240.

If the master of a ship finds that a change has taken place in the commercial relations of his port of destination, he may proceed to a neighbouring port to obtain information, and continue there until the impediment obstructing his voyage is removed; and while he lies by for fair purposes, the property insured is protected by the policy.

Savage v. Pleasants, 5 Binn. R. 403, 415, 416.

In an action upon a policy, which was to insure the William Galley in a voyage from Bremen to the port of London, warranted to depart with convoy, the case was this: the Galley set sail from Bremen, under convoy of a Dutch man-of-war to the Elbe, where they were joined by two other Dutch men-of-war, and several Dutch and English merchant ships, whence they sailed to the Texel, where they found a squadron of English men-of-war and an admiral. After a stay of nine weeks, they set out from the Texel, and the Galley was separated in a storm, and taken by a French privateer, taken again by a Dutch privateer, and paid 80*l.* salvage. It was ruled by Lord Chief Justice Holt, that the voyage ought to be according to usage, and that their going to the Elbe, though in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for ships directly from Bremen to London. And the plaintiff had a verdict.

Bond v. Gonsales, 2 Salk. 448.

On an insurance from London to Gibraltar, warranted to depart with convoy, it appeared, there was a convoy appointed for that trade at Spithead, and the ship *Ranger* having tried for convoy in the Downs, proceeded to Spithead, and was taken in her way thither. The insurers insisted, that this being the time of a French war, the ship should not have ventured through the channel, but have waited in the Downs for an occasional convoy: and many merchants and office-keepers were examined to that purpose. But Lord Chief Justice Lee held, that the ship was to be considered as under the defendant's insurance to a place of general rendezvous, according to the interpretation of the words *warranted to depart with convoy*. And if the parties meant to vary the insurance from what is commonly understood, they should have particularized her departure with convoy from the Downs. The juries were composed of merchants; and in both cases they found for the plaintiffs upon the strength of this direction.

Gordon v. Morley; **Campbell v. Bourdieu**, 2 Stra. 1265.

In the case of **Bond** against **Nutt**, the point of deviation for the purpose of procuring convoy also came under the consideration of the court. Upon that occasion, Lord Mansfield and the whole court held, that if a ship go to the usual place of rendezvous, for the sake of joining convoy there ready, though such place be out of the direct course of the voyage, it is no deviation.

Cowp. R. 601.

And in a more modern case, the only question was, whether there was a

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deviation or not? Lord Mansfield there directed the jury to find for the plaintiffs, if they believed that the captain fairly and *bond fide* acted according to the best of his judgment: that he had no other view or motive but to come the safest way home, and to meet with convoy; for that it was no deviation to go out of the way to avoid danger.

Enderby and another v. Fletcher, *Sittings in London*, Trin. Vac. 1780; [Park, 463 7th edit.]

In our law books it is sometimes said, that a deviation may be justified by the usage and custom of the trade. But that is not quite correct; for if by the usage of any particular trade it is customary to stop at certain places, lying out of the direct course from A to B, it is not a deviation to stop there, because it is a part of the voyage. There is no deception upon the insurer, because he is bound to take notice of the usages of trade; they are notorious to all the world; and when the usage has declared it lawful in a specific voyage to go to any place, though out of the immediate track, it is as much a part of the contract of insurance between the parties as if it had been particularly mentioned. But in order to justify the captain of a ship in quitting the straight and direct line from the port of loading to that of delivery, there must be a precise, clear, and established usage upon the subject, not depending merely upon one or two loose and vague instances.

β Bentlee v. Pratt, *Wallace's R.* 61.g

Where a ship was insured from Liverpool to Jamaica, and had put into the Isle of Man; it appeared that there were *some instances* of the Liverpool ships putting in there, but it was not the settled, common, established, and direct usage of the voyage and trade: it was therefore held a deviation, and the underwriters were discharged from any loss that happened subsequent to the deviation.

Salisbury v. Townson, *Park*, 309.

Wherever a ship does that which is for the general benefit of all parties concerned, the act is as much within the intention and spirit of the policy, and, consequently, as much protected by it, as if expressed in terms. And therefore in all cases, in order to determine whether a diversion from the direct course of the voyage is such a deviation as in law vacates the policy, it will be proper to attend to the motives, end, and consequences of the act, as the true criterion of judgment.

Cowp. 601. β Where a master of a vessel, insured from one port to another, intends to deviate by putting into an intermediate port, and actually puts in there, the assured may, nevertheless, give evidence that necessity, and not the original intention, was the immediate cause of putting in, and that therefore there was no deviation. *Hobart v. Norton*, 8 Pick. 159.g

If any of the circumstances above stated do really and *bond fide* occur, so as to render a deviation absolutely necessary, the ship must pursue such *voyage of necessity* in the direct course, and in the shortest time possible, otherwise the underwriters will be discharged. Because a voyage super-added by necessity ought to be subject to the same qualifications, and entitled only to the same sort of latitude as the original voyage, it having become, by operation of law, a part, as it were, of that original voyage.

Lavabre v. Walter, *Dougl.* 271.

But though an actual deviation from the voyage insured is thus fatal to the contract of insurance, yet a deviation merely intended, but *never carried* into effect, is considered as no deviation, and the insurer continues liable. This has been frequently so decided. Thus, in the case of an *insurance*

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from Carolina to Lisbon, and at and from thence to Bristol; it appeared, that the captain had taken in salt, which he was to deliver at Falmouth, before he went to Bristol; but the ship was taken in the direct road to both, and before she came to the point where she would have turned off to Falmouth. It was held, that the insurer was liable; for it is but *an intention to deviate*, and that was held not sufficient to discharge the underwriter.

Foster v. Wilmer, 2 Stra. 1249; [Heseltou v. Allnutt, 1 Maul. & S. 45;] Ld. Ch. Just. Lee. *The Marine Ins. Co. of Alexandria v. Tucker*, 3 Cranch, 357; Maryland Ins. Co. v. Wood, 7 Cranch, 404; Lee v. Gray, 7 Mass. 349; Coffin v. Newburyport Ins. Co., 9 Mass. 436; Hobart v. Norton, 8 Pick. R. 159; Snowden v. Phoenix Ins. Co., 3 Binn. R. 467.

In the case of Carter v. The Royal Exchange Assurance Company, where the insurance was from Honduras to London, and a consignment to Amsterdam; a loss happened before she came to the dividing point between the two voyages, for which the insurers were held liable to pay.

2 Stra. 1249.

The doctrine laid down in these cases has since been frequently recognised in subsequent decisions, and particularly by Lord Mansfield in the case of *Thellusson v. Fergusson*. The insurance was from Guadaloupe to Havre; and one of the grounds of defence was, that the ship never sailed from Guadaloupe to Havre, but on a voyage from Guadaloupe to Brest. Lord Mansfield, in answer, said, "the voyage to Brest was, at most, but an *intended deviation*, not carried into effect."

Dougl. 346.

If, however, it can be made appear by evidence, that it never was intended, nor came within the contemplation of the parties, to sail upon the voyage insured; if all the ship's papers and documents be made out for a different place from that described in the policy, the insurer is discharged from all degree of responsibility, even though the loss should happen before the dividing point of the two voyages. This distinction was very properly taken by the Court of King's Bench, in a very modern case: and by that distinction they admitted the general doctrine, with respect to the intention to deviate, in its fullest extent.

The ship *Molly*, being insured "at and from Maryland to Cadiz," was taken in Chesapeake Bay, in the way to Europe. Upon this the insured brought this action against the defendant, one of the underwriters on the policy. The trial came on at Guildhall before Lord Mansfield, when a verdict was found for the defendant. A new trial being moved for, the material facts of the case appeared to be as follows:—The ship was cleared from Maryland to Falmouth, and a bond given that all the *enumerated* goods should be landed in Britain, and all the other goods in the British dominions. An affidavit of the owner stated that the vessel was bound for Falmouth. The bills of lading were, "To Falmouth and a market:" and there was no evidence whatever that she was destined for Cadiz. The place where she was taken was in the course from Maryland both to Cadiz and Falmouth, before the dividing point. Many circumstances led to a suspicion that she was, in truth, neither designed for Falmouth nor Cadiz, but for the port of Boston, to supply the American army; but there was not sufficient direct evidence of that fact. At the trial, Lord Mansfield told the jury, that if they thought the voyage intended was to Cadiz, they must find for the plaintiff. If, on the contrary, they should think there was no design

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of going to Cadiz, they must find for the defendant. It also appeared in evidence, that the premium to insure a voyage from Maryland to Falmouth, and from thence to Cadiz, would have greatly exceeded what was paid in this case. Upon the motion for a new trial being argued, the counsel for the plaintiff cited the two cases above stated from Strange's Reports.

Wooldridge v. Boydell, Dougl. 16.

Lord Mansfield,—The policy on the face of it is from Maryland to Cadiz, and therefore purports to be a direct voyage to Cadiz. All contracts of insurance must be founded in truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured arise from after-thoughts, after-interest, after-temptation; and the party who actually deviates from the voyage described, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the cases of that sort, the *terminus à quo*, and *ad quem*, were certain and the same. Here, was the voyage ever intended for Cadiz? There is not sufficient evidence of the design to go to Boston for the court to go upon. But some of the papers say to Falmouth and a market: some to Falmouth only. None mention Cadiz, nor was there any person in the ship who ever heard of any intention to go to that port. A market is not synonymous to Cadiz; that expression might have meant Naples, Leghorn, or England. No man upon the instructions would have thought of getting the policy filled up to Cadiz. In short, that was never the voyage intended, and, consequently, is not what the underwriters meant to insure.

In a later case the same doctrine was holden; viz., that if a ship be insured from a day certain from A to B, and, before the day, sail on a different voyage from that insured, the assured cannot recover; even though the ship afterwards fall into the course of the voyage insured, and be lost after the day on which the policy was to have attached.

Way v. Modigliani, 2 Term Rep. 30.

An insurance was at and from Grenada to Liverpool; the ship sailed from Grenada bound for Liverpool, but with a design formed before the commencement of the voyage, as appeared by the clearances, and was admitted on all sides, to touch at Cork, in her way to Liverpool, but was totally lost before she arrived at the dividing point. The Court of C. P. held, that where the *termini* of the intended voyage were really the same as those described in the policy, it was to be considered as the same voyage, and a design to deviate, not effected, would not vitiate the policy. That in *Wooldridge v. Boydell* it appeared, there was no intention in the ship to go to Cadiz, which was mentioned as her port of delivery, at all; and in *Way v. Modigliani* there was an actual deviation, by the ship going to fish on the banks of Newfoundland: these cases therefore were wholly different from the present, for here the ship was really bound to Liverpool, though there were also clearances for Cork.

Kewley v. Ryan, 3 H. Bl. Rep. 343.

{ The rule established by the decisions on this point is, that if the *termini* of the voyage on which the vessel sails are the same with those described in the policy, a determination, though formed previous to the commence-

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ment of the voyage, to call at an intermediate port, either with a view to land a cargo, for orders, or the like, does not constitute it a different voyage, on which the policy does not attach, but is merely a case of intended deviation; and the insurer will be liable for a loss happening before that intention has been carried into execution and persisted in after the vessel has arrived at the dividing point.

3 Cranch, 357, *Marine Ins. Co. of Alexandria v. Tucker*; 2 Cain. 274, *Henshaw v. Marine Ins. Co.* Vide 1 Johns. Ca. 184, *Silva v. Low*;

From the proposition just established, namely, that a mere intention to deviate will not vacate the policy, it follows as an immediate consequence, that whatever damage is sustained before actual deviation will fall upon the underwriters.

Thus it was held by Lord Chief Justice Holt, who said, that if a policy of insurance be made to begin from the departure of the ship from England until, &c., and after the departure a damage happen, &c., and then the ship deviate; though the policy is discharged from the time of the deviation, yet, for the damages sustained before the deviation, the insurers shall make satisfaction to the insured.

Green v. Young, 2 Ld. Raym. 840; 2 Salk. 444, S. C.; *Heselton v. Allnutt*, 1 Manl. & S. 46. *Lawrence v. Ocean Ins. Co.*, 11 Johns. R. 241; *Silva v. Low*, 1 Johns. C. 184; *Henshaw v. Marine Ins. Co.*, 2 Cain. R. 274; *New York Fire Ins. Co. v. Lawrence*, in error, 14 Johns. R. 46.

So, where the policy was on pearl-ashes from Liverpool to London, and the captain took on board goods for Southampton, intending to go there, and he accordingly delivered the goods, and then proceeded to London; the termini of the voyage being the same as those described in the policy, it was held to be the same voyage till the vessel reached the dividing point; and that the policy attached, although putting into Southampton was a deviation: and the cargo having received sea-damage in the course of the voyage, it was a question for the jury on the evidence, whether the damage accrued before the deviation or subsequently, since the underwriters were liable for damage sustained previous to the deviation.

Hare v. Travis, 7 Barn. & C. 14.

Where the policy is general to all or any ports, &c., in a certain district, without enumerating them, they must be visited in the natural and usual course of the voyage, not in an oblique or inverse order.

Clason v. Simmonds, 6 Term Rep. 533. If the insurance be from A to B and at and from B to C, the vessel may proceed immediately from A to C; or if she has been obliged to put into a port of necessity, she may proceed to C without first stopping at B; for where the assurance is to several places, if the insured intend to go but to one of them, that one is at his election, but if to more than one, the order described in the policy must be observed. *Kane v. Columbian Ins. Co.*, 2 Johns. R. 264.

But if the policy be from London to the ship's discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders, or any other purpose, the ship, in touching for orders before she has selected her port of discharge, is not confined to take the ports in the successive order in which they lie, but may return to a port she has quitted for orders as to her port of discharge; though, after she has once selected her port of discharge, she must touch at the ports only in their successive order.

Andrews v. Mellish, 5 Taunt. 496; and see 16 East, 315.

On a policy from London to New South Wales, and from thence to all ports and places in the East Indies or South America, with liberty in that

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voyage to touch and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports and places in the channel, Cork in Ireland, Madeira, Cape of Good Hope, St. Helena, and wheresoever the ship might proceed to, as well on this as on the other side of the Capes of Good Hope and Horn, and for all purposes whatsoever, particularly to trade and sail backwards and forwards, and forwards and backwards: it was held, that after the arrival at New South Wales, the ship was only protected by the policy so long as she was sailing on a voyage either to South America or the East Indies, or on some intermediate voyage, having for its ultimate object the accomplishment of a voyage either to South America or the East Indies.

Bottomley v. Bovill, 5 Barn. & C. 210; and see *Armet v. Innes*, 4 B. Moo. 150; *Langhorn v. Allnutt*, 4 Taunt. 518.]

§ But where goods were insured "at and from New York to the Cape of Good Hope, with liberty to proceed to and trade at the Isle of France, and thence to any other port or ports in the Indian Seas, and at and from the ports she might go to, back to New York, with liberty to touch and trade as usual for refreshments, on the outward and homeward voyage." The ship touched at the Isle of France, went thence to Trincomalee, and thence to Madras, where she sold part of her cargo, and received an order on Tranquebar, where she took in goods purchased with the order, and proceeded to Batavia, where she sold the residue of her original cargo, as well as that taken in at Tranquebar, and invested the proceeds in a return cargo. The first and second officers being dead, the captain on his death-bed, being then on his return voyage, directed the crew to take the vessel to the Isle of France, and deliver her to the American consul, which was done. The crew, after the death of the captain, in a council, determined that it was expedient to make the Isle of France. On her arrival there, the correspondent of the plaintiff claimed possession, but the court decreed it to the consul, who procured a survey; and thinking the vessel overloaded, sold part of her cargo and put in a lighter load. He also put on board a British subject as captain; and the vessel was lost on her return. Held, that the permission to trade at the Isle of France ought to be carried forward to the ports in the Indian Seas; that this trading was not limited to the mere selling of the outward cargo, but embraced repeated acts of buying and selling; that the acts of trading stated, did not amount to a deviation; that the going to the Isle of France, being from necessity, and for the general benefit of all concerned, was justifiable; that the insured were not bound by acts of third persons, performed in consequence of a misfortune occurring in the voyage, which misfortune alone, and not the act of the insured, or his agent, gave to such third person a right to interfere; that the changing the cargo at the Isle of France, if it could be imputed to the insured, would have avoided the policy; because it would have altered the risk.

Winthrop v. The Union Ins. Co., 2 Wash. C. C. R. 7.g

Subject to the rules already advanced, deviation or not is a question of fact, to be decided according to the circumstances of the case.

Dougl. 758; § *Bentaloe v. Pratt*, Wallace's R. 61.g

In cases of deviation, the premium is not to be returned; because the risk being commenced, the underwriter is entitled to retain it.

{It is not an implied condition in a common marine policy on ship and

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freight that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay, or otherwise increasing the risk of the insurers. And therefore where a ship was compelled, in the course of her voyage, to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course, by reason of a scarcity at her lading ports, and during her justifiable stay, she took on board bullion on freight, which the jury found did not occasion any delay in the voyage; it was held not to avoid the policy.

9 East, 195, *Raine v. Bell*. Vide 2 Esp. Rep. 610, *Stitt v. Wardell*; 5 Esp. Rep. 96, *Sheriff v. Potts*; 4 Dall. 274, *Kingston v. Girard*.

Selling a perishable part of a cargo in a port of necessity, before the necessary repairs are completed, does not avoid a policy on ship and cargo.

2 Johns. Rep. 264, *Kane v. Columbian Ins. Co.*}

||OF WARRANTIES.||—A warranty, in a policy of insurance, is a condition or a contingency that a certain thing shall be done or happen; and unless that is performed, there is no valid contract. It is immaterial for what end the warranty is inserted in the contract; but being inserted it becomes a binding condition upon the insured, and he must show a *literal* compliance with it.

De Hahn v. Hartley, 1 Term Rep. 345. β That only can be a warranty which is introduced into the policy. *Maryland Ins. Co. v. Ruden's Adm'r*, 6 Cranch, 338. A description in the policy of the vessel as an American ship, is an implied warranty that she is American property. *Goix v. Low*, 1 Johns. C. 341; *Murray v. United Ins. Co.*, 2 Johns. C. 168; *Haskin v. New York Ins. Co.*, 2 Johns. C. 127; *S. C.* 2 Johns. C. 451; *Barker v. Phoenix Ins. Co.*, 8 Johns. R. 307. Stipulations in policies are express warranties; and whether mutual or not, is a matter of indifference, for being a part of the contract; like a condition or contingency, must be strictly performed; unless it be performed there is no contract. *Duncan v. Sun Fire Ins. Co.*, 8 Wend. R. 488. See *Craig v. The United States Ins. Co.*, Pet. C. C. R. 410.γ

Neither is it any matter whether the loss happen in consequence of the breach of warranty or not; for the very meaning of inserting a warranty is to preclude all inquiry about its materiality.

De Hahn v. Hartley, 1 Term Rep. 345.

It is also immaterial to what cause the noncompliance is to be attributed; for although it might be owing to wise and prudential reasons, the policy is avoided.

Cowp. 607.

In this strict and literal compliance with the terms of a warranty consists the difference between a warranty and representation.

Cowp. 708. β There is a material distinction between a *warranty* and a *representation*. A representation may be equitably and substantially answered, but a warranty must be strictly complied with. A warranty makes a part of the written policy, and is a condition or contingency, without the performance of which there is no contract. But all matters stated in policies do not amount to warranties. *Mackie v. Pleasant*, 3 Binn. 371, 372, *Yeates, J.*γ

In order to make *written* instructions binding as a warranty, they must appear on the face of, and make a part of, the policy.

Cowp. 708.

Even though a written paper be *wrapped up in a policy*, and shown to the underwriters at the time of subscribing; or even *though it be wafered to the policy*, it is not a warranty but a representation.

Bize v. Fletcher, Dougl. 12, notes. β A reference to a paper distinct from the policy is not enough to make it a part of the contract, unless there be an express stipulation to that effect. 13 Wend. R. 92.γ

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Thus, when evidence was offered to prove that a paper enclosed was always deemed a part of the policy, Lord Mansfield refused to hear it.

A warranty written *in the margin* of the policy is considered to be equally binding, and liable to the same strict construction as if written in the body of the policy.

Bean v. Stupart, Dougl. 10.

Words written transversely on the policy were held to be a warranty.

Kenyon v. Berthon, Dougl. 12.

Where it was said *in the margin* that the ship sailed from Liverpool with *fifty hands and upwards*, the court held this was a warranty; and as she in fact sailed from Liverpool with only forty-six, though she had upwards of fifty hands from Beaumaris, which is within six hours sail from Liverpool, the underwriters were discharged.

De Hahn v. Hartley, 1 Term Rep. 343.

{If a vessel is described in the policy as "an American ship," it is an implied warranty that she is American.

1 Johns. Ca. 341, Goix v. Low; 3 Bos. & Pul. 499, Lothian v. Henderson; 6 East, 385, 386, Le Mesurier v. Vaughan.

Where a vessel is described, in a policy against perils of the sea only, as a British brig, it does not imply that she is a British *registered* vessel, but only that she is owned by a British subject.

2 Bin. 363, Mackie v. Pleasants. Vide 3 Bos. & Pul. 201, Baring v. Clagett.

A policy stated the insurance to be on goods on board the ship called "the American ship President." This was taken to be all *name* of the ship, and not a warranty of her being an American ship called The President.

6 East, 382, Le Mesurier v. Vaughan.}

If a man warrant to sail on a particular day and be guilty of a breach of that warranty, the underwriter is no longer answerable: and this rule holds, though the ship be delayed for the best and wisest reasons, or even though she be detained by force. Thus, where a ship was insured at and from Jamaica, warranted to sail on or before the 26th of July; and it appeared that the ship was ready, and would have sailed on the 25th, *if she had not been restrained by the order and command of Sir Basil Keith, governor of Jamaica, and detained beyond the day*; the insurer was discharged.

Hore v. Whitmore, Cowp. 784. β But see Cochrane v. Fisher, (in error,) 1 C. M. & R. 809; S. C. *nom.* Fisher v. Cochrane, 5 Tyr. 496, affirming S. C. 2 C. & M. 581; 4 Tyr. 424.g

β A warranty to sail on or before a particular day, is not complied with by leaving the harbour on that day, without having a sufficient crew on board, although the remainder of the crew are engaged and ready to sail.

Graham v. Barraç, 3 Nev. & M. 125; 5 B. & Adol. 1011.g

If the warranty be to sail *after* a specific day, and the ship sail before, the policy is equally avoided as in the former case.

Vezeian v. Grant, *coram* Buller, J., after East, 1779; ||Park, 485, 7th ed.||

Upon a warranty to sail on or before a particular day, if the ship sailed before the day from her port of loading, *with all her cargo and clearances on board*, to the usual place of rendezvous at another part of the island, merely for the sake of joining convoy, it is a compliance with the warranty, though she be afterwards detained there by an embargo, beyond the day. But if

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her cargo was not complete, it would not be a commencement of the voyage.

[*Ridesdale v. Newnham*, 3 Maul. & S. 456; 4 Camp. 111, S. C.]

A ship being insured at and from Jamaica to London, warranted to sail on or before the 1st of August, was *completely laden* for her voyage to England at St. Ann's in Jamaica, and sailed from thence on the 26th of July, for Bluefields, in order to join the convoy there; but was detained by an embargo till the 6th of August. The court held that the sailing from St. Ann's was the commencement of the voyage. For when a ship leaves her port of loading, having a full and complete cargo on board, and having no other view but the safest mode of sailing to her port of delivery, her voyage must be said to commence from her departure from that port.

Bond v. Nutt, Cowp. 601; [*Wright v. Shiffner*, 11 East, 515; S. C. 2 Camp. 247; and see *Lang v. Anderdon*, 3 Barn. & C. 496.]

|| But if the warranty be to *depart* on or before a certain day, the ship must be actually out of her port of departure on that day, and it is not enough that she have broken ground so as to satisfy a warranty to *sail* on that day.

Moir v. Royal Exchange Assurance, 4 Camp. 84; 3 Maul. & S. 461; 1 Marsh. 70; 6 Taunt. 241.]

The same doctrine was advanced, even though it was a condition inserted in one of the ship's clearances, that *she should pass by the place* (at which she was detained by the governor beyond the day named in the warranty) to take the orders of government.

Thellusson v. Ferguson, Dougl. 346.

Thus also, where an embargo was actually published before the ship sailed, and the captain, immediately after crossing the bar, returned to make a protest, and knowingly sent his ship into the embargo; yet, as he swore that he believed the embargo would be immediately taken off, the underwriter was held liable.

Earle v. Harris, at Guildhall, Hil. Vac. 1780.

{ A warranty that "orders will be given that the ship shall not cruise" is not complied with, if the instructions are silent as to cruising, though it be apparent on the face of them that the insured did not mean to give the captain a *power to cruise*. The warranty is not *negative*, that he should *not have orders to cruise*, but *positive*, that he should *have orders not to cruise*.

1 Dall. 162, *Ogden v. Ash*. }

|| WARRANTY TO SAIL WITH CONVOY.—The sailing with convoy is imposed on the insured either by the terms of an act of parliament, or by an express warranty to that effect in the policy.

By the 38 Geo. 3, c. 76, continued by 43 Geo. 3, c. 57, no ship or vessel belonging to his majesty's subjects, except as thereafter mentioned, shall sail from any port or place whatsoever, unless under the convoy (a) or protection of such ship or ships as may be appointed for that purpose. And by § 2, the master or commander of every such ship, &c., is required to use his utmost endeavours to continue with such convoy, and shall not wilfully separate therefrom without leave from the officer commanding the same.

(a) It must be a convoy for the voyage on which the ship is sailing. *Cohen v. Hinckley*, 1 Taunt. 249. What shall be considered a sailing with convoy from a port, see *Ridesdale v. Sheddon*, 4 Camp. 109.

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By § 3, penalties are imposed on the master or commander sailing without convoy, or wilfully separating therefrom during the voyage.

By § 4, in case of a sailing without or a wilful desertion of convoy, every insurance on ship, goods, or freight, &c. (which shall be the property of the master so sailing without convoy, &c., or of any person interested in such vessel or cargo, who shall have directed or been in any way privy to, or instrumental (a) in, causing such ship, &c. to sail without convoy, &c.) shall be null and void, and nothing shall be recovered by the insured for loss or damage, or for the premium paid for such insurance.

(a) To vacate the insurance, it is not enough to show that the ship sailed without convoy by the instrumentality of an agent of the insured, unless it is shown that the agent had authority from the insured for that purpose. *Carstairs v. Allnutt*, 3 Camp. 497; and see *Wake v. Atty*, 4 Taunt. 493. And as the law requires the ship to sail with convoy, the presumption is that she did so, till the contrary is proved. *Thornton v. Lance*, 4 Camp. 231. Every person who ships goods in a vessel sailing without convoy, does so at his peril of her having a license for that purpose for the voyage. *Wainhouse v. Cowie*, 4 Taunt. 178; *Ingham v. Agnew*, 15 East, 517; *Darby v. Newton*, 2 Marsh. 252.

By § 5, (b) officers of customs shall not permit vessels to clear outwards till they have given bond (c) not to sail without or wilfully desert convoy.

(b) See *Hinckley v. Walton*, 3 Taunt. 131. (c) This bond has been received as evidence that the ship sailed on the voyage insured. *Cohen v. Hinckley*, 2 Camp. 50.

By § 6, the act is not to extend to any vessels not required to be registered, (d) nor to ships having license from the Admiralty to sail without convoy; nor to any ship proceeding with due diligence to gain convoy from the port at which the same shall be cleared outwards, in case such convoy shall be appointed to sail from some other port or place, except as to the bond on clearing outwards; or to any ship bound to or from any port in Ireland, or to ships bound from one port in Great Britain to another, or to ships in the service of the East India and Hudson's Bay Companies; nor (by § 8) to ships sailing from foreign ports, in case no convoy is appointed (e) by the Lords of the Admiralty, &c.

(d) See *Long v. Duff*, 2 Bos. & Pul. 209. (e) Where no convoys are appointed at the port from which the ship commences her voyage, she is not bound to call for convoy at a port in course of the voyage. *Park v. Hamond*, 4 Camp. 344.]

If the insured warrant that the vessel shall depart with convoy, and it do not; the policy is defeated, and the underwriter is not responsible.

A convoy means a naval force, under the command of that person whom government may happen to appoint.

Therefore, where a ship put herself under the direction of a man-of-war till she should join the convoy, which had left the usual place of rendezvous before she arrived there; it was held, not to be a departure with convoy, although she, in fact, joined, and was lost in a storm.

Hibbert v. Pigon, B. R. East. 23 Geo. 3, 2 Park. 499. *Qu.* Whether sailing orders from the commander-in-chief to the particular ships are necessary to constitute a convoy. {Such orders are necessary to the performance of a warranty to depart with convoy. They should be obtained before the ship leaves the place of rendezvous, if by due diligence of the master they can be then obtained. If, however, from any misfortune, from stress of weather, or other circumstances, he is absolutely prevented from obtaining them then, though he is at the place of rendezvous within the time appointed for the sailing of the convoy, it is still a departure with convoy; but then he must take the earliest opportunity to obtain them. 1 Bos. & Pul. 5, *Webb v. Thompson*; *Ibid.* 7, *Veedon v. Wilmot*; 2 Bos. & Pul. 164, *Anderson v. Pitcher*; 3 Esp. Rep. 124, S. C.}

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But a convoy appointed by the admiral, commanding in chief upon a station abroad, is a convoy appointed by government.

A sailing with convoy from the usual place of rendezvous, as Spithead for the port of London, is a *departure* with convoy, within the meaning of such a warranty.

Lethulier's case, 2 Salk. 443; Gordon v. Morley, 2 Stra. 1265, S. P.

Although the words used generally are "to depart with convoy," or "to sail with convoy," yet they extend to sail with convoy throughout the voyage.

2 Salk. 443; Jeffreys v. Legendra, 3 Lev. 320; Lilly v. Ewer, Dougl. 71.

But an unforeseen separation from convoy is an accident to which the underwriter is liable.

It hath been so determined where a ship was separated from her convoy by storm, and by storm prevented from rejoining it, and was lost. And even where the ship has by tempestuous weather been prevented from joining the convoy, at least, so as to receive the orders of the commander of the ships of war, if she do every thing in her power to effect it, it shall be deemed a sailing with convoy.

Victoria v. Cleeve, 2 Stra. 1250; ¶Verdon v. Wilmot, Park, Ins. 500, (7th ed.); Laing v. Glover, 5 Taunt. 49.

But it is otherwise, if the not joining be owing to the negligence and delay of the captain. As, where repeated signals for sailing had been made the night before, and continued next day from seven till eleven; notwithstanding which the ship insured did not sail till two hours after.

Taylor v. Woodmess, Sittings at Guildhall, Hil. Vac. 4 Geo. 3, Park, 510, 7th ed.; ¶Anderson v. Pitcher, 2 Bos. & Pul. 164; Waltham v. Thompson, Marsh. Ins. 381.]

But if the course upon a particular voyage has been to have a relay of convoy, protecting the trade from one port to another; or, if government appoint a convoy to escort the trade of a place to a given latitude, and no farther; and there be no convoy on that station; a vessel taking advantage of such a convoy has complied with the warranty to sail with convoy for the voyage.

De Gray v. Claggett, Lond. Sittings, after Mich. 1795; D'Eguino v. Bewicke, 2 H. Bl. 551; ¶Audley v. Duff, 2 Bos. & Pul. 111; Warwick v. Scott, 4 Camp. 62.]

¶WARRANTY OF NEUTRALITY.¶—If a man warrant the property to be neutral, and it is not, the policy is void *ab initio*.

¶See Marshall on Ins. 389, 3d ed.¶ But if the interest of one joint owner is insured, and that interest be neutral, it is no breach of the warranty of neutrality, if the other joint owner, whose interest is not insured, is a belligerent. The insured is not understood to warrant that the whole cargo is neutral; but that the interest insured is neutral. Livingston et al. v. Maryland Ins. Co., 6 Cranch, 274.

In an insurance upon goods, the insured warranted the ship and goods to be neutral; it was expressly found by the jury that they were not neutral. The court therefore, though the loss happened by storms, and not by capture, declared that the contract was void.

Woodmer v. Muilman, 4 Burr. 1419, 1 Bl. Rep. 427; ¶Garrells v. Kensington, 8 Term R. 230.]

¶ A warranty of neutrality is not satisfied by the owner being a native of the neutral country, if he reside and carry on trade in the dominions of a belligerent power; for in such case he must be considered as adhering to the enemy, and his property is liable to confiscation in a court of prize—

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and this notwithstanding he may have the *animus revertendi* to his native country, and though his ship may be built there, and equipped as a neutral ought to be.

Tabbs v. Bendelack, 4 Esp. 108, 3 Bos. & Pul. 207. β But the subject of a belligerent state, domiciliated here, is neutral, within the warranty. *Johnston v. Ludlow*, 3 Johns. C. 481; S. C. 1 Cain. C. E. 29. The meaning of the warranty of neutrality is, that the property insured is neutral in fact, and shall be so in appearance and conduct; that the property shall belong to neutrals; that it shall be so documented as to prove its neutrality; and that no act of the insured or of his agents shall be done which can legally compromise its neutrality. *Schwartz v. The Ins. Co. of North America*, 3 Wash. C. C. R. 117; *Rigg v. N. Y. Ins. Co.*, 1 Cain. R. 549; *Coolidge v. N. Y. Firemen Ins. Co.*, 14 Johns. R. 308; *Calhoun v. Ins. Co. Pennsylvania*, 1 Binn. 293; *Griffith v. Ins. North America*, 5 Binn. 454; *Ludlow v. Union Ins. Co.*, 2 Serg. & C. 119. γ

And a warranty that a ship is of a particular country means that she is entitled to all the privileges of the flag of that country, in order to which she must be properly documented; and if she is not, the insurers are discharged, though no inconvenience in fact be sustained for want of the proper documents.

Rich v. Parker, 7 Term R. 705, 1 Dow. R. 331; *Baring v. Clagett*, 3 Bos. & Pul. 201; *Baring v. Christie*, 5 East, 898; *Steel v. Lacy*, 3 Taunt. 285; β *Livingston et al. v. Maryland Ins. Co.*, 7 Cranch, 506; *Hubbard v. Coolidge, et al.*, 2 Gallia. R. 353; *Smith v. The Delaware Ins. Co.*, 3 Wash. C. C. R. 127; *Barker v. Phoenix Ins. Co.*, 8 Johns. R. 307. In general a concealment of papers is a breach of warranty. *Livingston et al. v. Maryland Ins. Co.*, 6 Cranch, 264. The warranty of American property is established by proof that the vessel is owned by citizens of the United States; that she cleared from an American port, and had a registry. *Callett v. Pacific Ins. Co.*, 1 Wend. R. 561; *Griffith v. Ins. Co. of North America*, 5 Binn. 464. γ

If the ship and property are neutral at the time when the risk commences, this is a sufficient compliance with a warranty of neutrality. The insurer takes upon himself the risk of war and peace; for if the property be neutral at the time of sailing, and a war break out the next day, the insurer is liable.

Eden v. Parkinson, Dougl. 705; *Tyson v. Gurney*, 3 Term R. 477.

β But whenever the underwriter has knowledge of the cover of neutral property under belligerent papers, and assents to it, as is done in all the cases in which it is demanded by the usage of trade, he waives all his rights under the warranty.

Livingston v. Maryland Ins. Co., 7 Cranch, 506.

If a merchant in this country agrees to deliver goods to a merchant residing in France, at a stipulated price, on the performance of certain conditions by the latter, the consignor taking upon himself all risk attending the transportation; the property remains in the consignor until delivery, and the warranty of neutrality is complied with.

Ludlow v. Bowne, 1 Johns. R. 1; and see *New York Firemen Ins. Co. v. De Wolf*, 2 Cow. R. 56. γ

{The insured, however, cannot himself change the neutral character of the property, without the forfeiture of his right on the policy. Therefore an assignment by him of part of the property to a belligerent, though after capture but before condemnation, is a breach of the warranty.

2 Cain. 73, *Goold v. United Ins. Co.*

The subject of a neutral state, who is domiciled and carries on commerce in the dominions of a belligerent, is, while he resides in those dominions, so far considered a subject of the latter as to lose the protection of the neutral

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flag, and to subject his property to capture by a country at war with that in which he resides. A warranty that his property is neutral is, therefore, not complied with.

4 Esp. Rep. 108, *Tabbs v. Benedelack*; 3 Bos. & Pul. 207, n. S. C. Vide 6 Term, 31, *Wilson v. Marryatt*; 4 Bos. & Pul. 430, S. C.

The rule is the same though he is the consul of a neutral state, and a partner of neutral merchants resident in the neutral country.

1 Johns. Ca. 363, *Arnold v. United Ins. Co.*

If a belligerent emigrate to a neutral country, *flagrante bello*, and be there naturalized, a warranty of neutrality is supported by such naturalization. At the same time, should the citizens of a belligerent power, in concert with the state, or for the purpose of multiplying the warlike resources, or aiding the enterprises of the state, emigrate to and take a stand in a neutral country, in order to mask mercantile projects under a neutral flag, there can be no hesitation in pronouncing such emigration *fraudulent*, and that an establishment and residence for such unwarrantable purposes cannot acquire to the emigrant a neutral domicil.

1 Cain. Er. xxv., *Duguet v. Rhinelander*; reversing the judgment of the Supreme Court of New York, who held that the warranty should be construed in reference to the belligerent parties and to the law of nations; and though the emigrant acquired by his naturalization the privileges of a citizen, he was still, according to the law of nations, to be considered a subject of his native country in regard to the powers at war. 1 Johns. Ca. 360, 1 Cain. 289.

Property warranted neutral must not only have {¹} every document necessary, according to treaties and the law of nations, to prove its neutrality, and entitle it to the privileges thereof, but it must not {³} be accompanied with any papers that compromit its neutral character.

{¹} 7 Term, 705, *Rich v. Parker*; 3 Bos. & Pul. 201, *Baring v. Claggett*; 5 East, 398, *Baring v. Christie*. {²} 1 Cain. 549, *Blagge v. New York Ins. Co.*

Where the national character of a vessel is not warranted or represented, it is not incumbent on the assured to show that she had a sea-letter, or other papers required by the laws of the country, or by treaties with foreign nations.

2 Johns. Rep. 157, *Elting v. Scott*; 7 East, 367, *Dawson v. Atty.* Vide 1 East, 663, *Price v. Bell*.

The insured must also, in order to comply with his warranty, not only maintain the property to be neutral, but must pursue the conduct and preserve the character of a neutral. Any forfeiture of neutrality by the act or omission of the assured or his agents is a breach of the warranty.

1 Cain. Er. xiii.; 8 Term, 230; 1 Binn. 305, 307, 313.

As by forcibly rescuing the ship, when seized and detained by a belligerent power for the purpose of search.

8 Term, 230, *Garrels v. Kensington*; 2 Binn. 574, *Wilcocks v. Union Ins. Co.*

Or by breach of a blockade; to constitute which it is necessary that an *actual attempt* to enter the blockaded port should be made. *Persisting in an intention* to enter after warning is not *attempting* to enter. Nor is sailing from another port with an *intention* to enter of itself a breach, though the port was understood to be blockaded. And it must be blockaded *in fact*; a mere notification amounts to nothing.

1 Binn. 293, *Calhoun v. Ins. Co. of Pennsylvania*; 4 Cranch, 185, *Fitzsimmons v. Newport Ins. Co.*; 1 Cain. Er. vii., *Voss & Graves v. United Ins. Co.*; 2 Cain. 1, *Williams v. Smith*; 3 Cain. 235, *Liotard v. Graves*; 1 Johns. Rep. 253. See 1 Rob. Adm. Rep. (Am. ed.) 130, *The Columbia*.

A vessel having a passport granted by a belligerent government to pro-

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tect against its own cruisers, is not considered as sailing under the protection of the flag of that government, so as to forfeit her neutral character.

1 Cain. 60, Jenks et al. v. Hallett & Bowne; 1 Cain. Er. 43, S. C.

In *Vasse v. Ball*, the Supreme Court of Pennsylvania denied that it was a breach of neutrality, or a proper cause of condemnation, to engage, during a war between France and Great Britain, in trade with the French colonies, which was not permitted by the French government previous to the war.

2 Dall. 270.

In the same case the cargo was warranted American. The vessel coming from a French port was compelled to take on board some French invalid soldiers, who were coming for their healths, with their baggage and some articles of household furniture. It was held by the court, that although generally household furniture cannot be regarded as baggage, but as part of the cargo, yet under the peculiar circumstances of the shipment there was no breach of the warranty.

2 Dall. 270.

If the general agent of neutral cargo covers belligerent property in the same vessel, though without the consent or knowledge of his principal, the property of his principal is liable to condemnation, notwithstanding it is plainly distinguished from the covered property by bills of lading and invoices on board; and the underwriters on that property, if warranted neutral, are discharged.

2 Binn. 308, *Phoenix Ins. Co. v. Pratt*.—It is not sufficient that a part only, but the whole property covered by the policy must be neutral; and if a cover is attempted for enemy's property, by an intermixture with neutral, it is held to subject the whole to confiscation. 1 Cain. 549, 565, *Blagge v. New York Ins. Co.*

Insurance on goods from New York to France, warranted American property. The goods were purchased and shipped in an American vessel, by American merchants, to merchants in France, under an agreement between them for that purpose, by which the former were to deliver the goods at St. Vallery, for which they were to be allowed eight *per cent.* commission, taking on themselves *all risks*, expressly including a premium for sea-risk, or insurance, as well as war-risks; the consignees to pay the freight on delivery, and also for the amount of cargo, in bills on London, guaranteed by a commercial house in London. During the voyage, the goods were captured by the British and condemned as French property. It was held by three judges, Kent, C. J., dissenting, that the goods remained the property of the consignors until their delivery in France; that the warranty was complied with; and that the contract was legal and valid, and did not change the property, so as to destroy its neutral character, or vitiate the contract of insurance.

1 Johns. Rep. 1, *Ludlow v. Bowne & Eddy*. Vide 3 Dall. 491, *Murgatroyd v. Crawford*; 4 Dall. 314, *Duncanson v. McClure*;

||The law of nations gives to every belligerent cruiser the right of searching merchant ships; therefore, a resistance to such search amounts to a forfeiture of neutrality. And this breach of neutrality is conclusively proved by the sentence of a Court of Admiralty, condemning her upon that ground.

Marshall on Ins. 437, 3d ed.; *Garrells v. Kensington*, 8 Term R. 230. || An attempt to enter a blockaded port is a breach of the warranty of neutrality, and discharges the underwriters. *Maryland Ins. Co. v. Wood*, 7 Cranch, 402; and see *Williams v. Smith*, 2 Cain. R. 1; *Radcliff v. United Ins. Co.*, 7 Johns. R. 38; so if there be on board two different sets of papers, one neutral and one belligerent, it will be a breach of warranty. *Riggs v. N. Ins. Co.*, 1 Cain. R. 549; *Coolidge v. N. Y. Firemen Ins. Co.*, 14 Johns. R. 308. But sailing merely with an intention to evade a blockade, is not a breach of the warranty. *Vas v. United Ins. Co.*, in error; 2 Johns. C. 469; S. C. 1 Cain. C.

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E. 7; *contra*, S. C. in Supreme Court, 2 Johns. C. 180; and see *Liotard v. Graves*, 3 Cain. R. 226.^g

The sentence of a foreign Court of Admiralty is not conclusive to show that a ship was not neutral, unless it appear that the condemnation went on that ground.^(a)

Bernardi v. Motteux, Dougl. 574; {2 Dall. 270, *Vassee v. Ball*;} [Fisher v. Ogle, 1 Camp. 418; *Pollard v. Bell*, 8 Term R. 434; *Price v. Bell*, 1 East, 663. (a) And the court here may receive evidence to prove the truth of the warranty. *Calvert v. Bovill*, 7 Term R. 523.] β In an action upon a policy of insurance on property warranted neutral, "proof of which is to be required in the United States only," a sentence of condemnation in a foreign Court of Admiralty, upon the blockade, is not conclusive evidence of a breach of neutrality. *Maryland Ins. Co. v. Wood*, 7 Cranch, 402; and see *Vanderheuevel v. United Ins. Co.*, in error, reversing the judgment of the Supreme Court, 2 Johns. C. 451; S. C. 2 Cain. C. E. 217; *Johnson v. Ludlow*, in error, 2 Johns. C. 481; *Lang v. United Ins. Co.*, in error, 2 Johns. C. 487; *Goix v. Low*, in error, 1 Johns. C. 480; *Kemble v. Rhineland*, 3 Johns. C. 130; *contra* same cases in Supreme Court, viz. *Goix v. Low*, 1 Johns. C. 341; *Vanderheuevel v. United Ins. Co.*, 2 Johns. C. 127; *Lang v. United Ins. Co.*, 2 Johns. C. 174; *Ludlow v. Dale*, 1 Johns. C. 16; S. C. 2 Cain. C. E. 348; *Haskins v. New York Ins. Co.*, and *Vanderheuevel v. Church*, 2 Johns. C. 173, n.; *Brown v. Union Ins. Co.*, 4 Day, R. 179.^g

But if it appear evident that the sentence proceeded upon the ground of the property not being neutral, that is conclusive evidence against the insured, that he has not complied with his warranty, and the underwriter is discharged.

Barzillay v. Lewis, B. R. Tr. 22 Geo. 3, Park, 359; {3 Bos. & Pul. 201, *Baring v. Claggett*; *Ibid.* 499, *Lothian v. Henderson*; *Marshall*, 423, *Kindersley v. Chase*; *Park*, 486, S. C. This principle was decided to be the established law by the Supreme Court of the United States in *Croudson v. Leonard*, 4 Cranch, 434, and by the high court of errors and appeals of Pennsylvania, in *Dempsey v. Ins. Co. of Pennsylvania*, 1 Binn. 299, n. (see *Ibid.* 293, 316, *Calhoun v. Ins. Co. of Pennsylvania*), and also by the Supreme Court of New York in *Ludlow v. Dale*, 1 Johns. Ca. 16, 2 Cain. Er. 348; *Goix v. Low*, 1 Johns. Ca. 341; and *Vanderheuevel v. United Ins. Co.*, 2 Cain. Er. 220. But by the reversal of the judgment in the last case by the court of errors, it appears to be settled in New York, that in an action on a policy of insurance, the sentence of a foreign Court of Admiralty is not conclusive on the character of the property. 2 Cain. Er. 217. In all the cases it is admitted that the sentence is conclusive with regard to the title to the property acquired under it; see also on that point 2 Show. 232, 2 Raym. 473; *Skin*, 59, *Hughes v. Cornelius*; 4 Cranch, 241, *Rose v. Himely*; *Ibid.* 293, *Hudson v. Guestier*; 1 Day, 142, *Stewart v. Warner*. To prevent the injurious consequences arising from the conclusiveness of foreign sentences, it has been usual in American policies to add to the warranty a stipulation, that it shall "be proved if required in the United States, and not elsewhere;" which entitles the assured to vindicate the truth of his warranty, not only against a foreign condemnation as enemies' property, but also against a condemnation for any act or omission by which the neutrality is alleged to have been forfeited. 1 Bin. 293, *Calhoun v. Ins. Co. of Pennsylvania*; *Ibid.* 296, n., *Calbraith v. Gracie*; 1 Johns. Ca. 364, 369, *Arnold v. United Ins. Co.* Vide *Ibid.* 318, *Earl v. Shaw*. The sentence may, however, still be read in evidence, though not as conclusive evidence. *Calbraith v. Gracie*. By an act of Assembly of Pennsylvania passed 29th March, 1809, 9 Laws Penn. 132, it is enacted that after the passing of that act, "no sentence, judgment, or decree, final or interlocutory, of any judge, court, board, council, or tribunal, having or exercising jurisdiction of prize, shall be conclusive evidence in any case of any fact, matter, or thing therein contained, stated or expressed, except of the acts and doings of such judge, court, council, or tribunal; provided always that nothing in this act contained shall be construed so as to impair or destroy the legal effects of any such sentence, judgment, or decree on the property affected or intended to be affected thereby, but the same shall be and remain as if this act had not been made."} [Geyer v. Aguilar, 7 Term Rep. 681; *Baring v. Claggett*, 3 Bos. & Pul. 201; *Bolton v. Gladstone*, 5 East, 155; S. C. in error, 2 Taunt. 85.]

{So the underwriter is discharged, if the ship is condemned as enemy's

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property, for want of having on board a certain document adjudged to be requisite according to a treaty between the neutral nation and the captors.

7 Term, 681, *Geyer v. Aguilar*; 5 East, 99, *Baring v. Royal Exc. Ass. Co.*

So if she is condemned for a breach of neutrality by forcibly rescuing the ship, which had been seized and detained by a belligerent power for the purpose of search.

8 Term, 230, *Garrils v. Kensington*.)

And even where no special ground of condemnation is stated, but the ship is condemned as good and lawful prize, the court here must consider it as conclusive evidence that the property was not neutral.

Saloucci v. Woodmess, B. R. Hil. 24 Geo. 3; ¶ *Marsh. Ins.* 405, *Kindersley v. Chase*, A. D. 1801; *Marsh. Ins.* 425.¶ It is settled, that the sentence of condemnation by a foreign Court of Admiralty is not conclusive, but only *prima facie* evidence of the facts upon which it purports to have been founded; and the court will not hear an argument in favour of its being conclusive. *New York Fire Ins. Co. v. De Wolf*, 2 Cow. R. 56.*g*

But if the ground of decision appear to be a foreign ordinance, manifestly unjust, and contrary to the law of nations, and the insured has only infringed such a partial law, that shall not be deemed a breach of his warranty, so as to discharge the insurer.(a)

Mayne v. Walter, B. R. East. 22 Geo. 3, *Park*, 531, 7th ed.; {8 Term, 434, *Polard v. Bell*; *Ibid.* 562, *Bird v. Appleton*; 1 East, 663, *Price v. Bell*; 5 Bos. & Pul. 484, *Siffken v. Lee*. Vide 5 East, 99, *Baring v. Royal Exc. Ass. Co.*} ¶(a) And in order to be conclusive, a foreign sentence must be that of a court constituted according to the law of nations, exercising its functions within the belligerent country. *Harelock v. Rockwood*, 8 Term R. 268. Case of *Flad Oyen*, 1 Rob. A. R. 135; 8 Term R. 270, note (a); *Donaldson v. Thompson*, 1 Camp. 429; *Oddy v. Bovil*, 2 East, 473. And see as to the effect of sentences of Courts of Admiralty, on the question of property, *Park*, chap. 16, (7th ed.)]

{And the sentence is not conclusive on the character of the property, if the cause assigned for it is one which will not justify a condemnation by the law of nations: as if a vessel is condemned for *persisting in an intention* to enter a blockaded port after warning not to do so.

4 Cranch, 185, *Fitzsimons v. Newport Ins. Co.*}

If the ship be condemned as prize, and the grounds of the sentence appear manifestly to contradict such a conclusion, the court here will not discharge the insurers, by declaring that the insured has forfeited his neutrality.

Saloucci v. Johnson, B. R. Hil. 23 Geo. 3; *Park*, 556, (7th ed.); {7 Term, 523, *Calvert v. Bovill*}.}

{The sentence is conclusive only as to the express ground of the sentence; not as to any of the premises that led to the adjudication.

8 Term, 192, *Christie v. Secretan*.

The insured may by express stipulation avoid this effect of a foreign sentence. A vessel warranted American was insured. After the policy was effected, doubts having arisen whether it contained a warranty, the underwriters signed an agreement, that in case of capture or seizure, the assured, before they claimed for a loss, must produce proofs of the ship being an American bottom, and by bills of lading show that the cargo had been shipped on account and risk of A B, upon which they would settle by granting bills at four months for the amount of their subscriptions; in full dependence that the insured would use their best endeavours to recover the property as for account of the shippers. It was held that on proof being produced that the ship was an American bottom, and on the cargo being shown

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to have been shipped on account and risk of A B, the assured were entitled to recover on a loss by capture, notwithstanding the production by the underwriters of any French sentence of condemnation to falsify the warranty.

3 Bos. & Pul. 499, *Lothian v. Henderson*.

To make such a sentence binding it must be pronounced by a court constituted agreeably to the law of nations, and possessed of competent jurisdiction in matters of prize.

Marshall, 388; Parke, (6th ed.) 462. See 4 Cranch, 241, *Rose v. Himely*.

Therefore the sentence of a consul of a belligerent power *resident in a neutral country* has no authority; for sentences of condemnation must be given by courts acting and exercising their judicial functions in the belligerent country. It may make a difference, however, when this has been acquiesced in {} the neutral country.

1 Rob. Adm. Rep. (Am. ed.) 114, *The Flad Oyen*; 8 Term, 270, n., S. C.; Ibid. 268, *Havelock v. Rockwood*; 3 Rob. Adm. Rep. 82, *The Kierlighett*; 1 Johns. Rep. 471, 481, *Wheelwright v. Depeyster*; 4 Cranch, 277. {} 4 Esp. Rep. 25, *Smith v. Surridge*. Vide 3 Dall. 6, 16, *Glass v. Sloop Betsey*.

But if the sentence is pronounced by a tribunal of the captors acting in the country of their belligerent ally, it is valid and conclusive.

2 East, 473, *Oddy v. Bovill*.

The sentence, also, of the court of the captor's country is invalid, if the property condemned is at the time {} in a neutral port; but is binding if the property is in a port of a co-belligerent.

1 Johns. Rep. 471, *Wheelwright v. Depeyster*; 2 Rob. Adm. Rep. (Am. ed.) 173, *The Christopher*. See 4 Cranch, 241, *Rose v. Himely*. {} *Contra*, 4 Cranch, 293, *Hudson v. Guestier*.

In American policies, the property is generally warranted by the assured, free from any charge, damage, or loss, which may arise in consequence of a seizure or detention of the property for or on account of any illicit or prohibited trade.

The trade of an Englishman domiciled here without any fraudulent motive, carried on from the United States with the enemies of his native country, is not illicit within the meaning of this warranty. And to constitute a breach of the warranty, the seizure must be for a trade really illicit, not under pretext of such a trade, when in fact it is not illicit. The expression "for and on account of" does not mean "under pretence of," but "for the cause of;" implying the actual existence of illicit trade producing the loss.

1 Cain. Er. xxix., *Johnston and Wier v. Ludlow*.

Insurance was upon sugar from Antigua to New York, warranted as above. By a proclamation of the government of Antigua, sugars were allowed to be exported in American vessels on certain terms. The vessel arrived at Antigua on 4th September, 1799, entered into the usual sugar-bond, began to load on 12th September, but did not complete the lading and clear out before 8th October. On 4th September, an order was issued for revoking the permission to export sugars, but was not delivered at the custom-house until the 10th of that month. On an opinion given by the president of the island that, where the sugar-bonds had been already entered into, the vessels might be cleared out with their sugar, the vessel was cleared and sailed on her voyage; when she was captured by a French privateer, recaptured by a British ship of war, and carried into Basseterre, where the sugar was seized and condemned as forfeited, for a breach of the laws of

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trade. It was held that the exportation of the sugar, after the revocation of the permission, was illicit, and so a breach of the warranty.

1 Johns. Rep. 20, *Tucker v. Juhel*.

If it be inserted in a policy that "the insurers are not liable for seizure by the Portuguese for illicit trade," these terms do not require an actual traffic, and a seizure in consequence of it. The underwriters are not liable if the vessel is seized and condemned for an *attempt* to trade illicitly. But if the seizure is not justifiable under the laws of Portugal, it is a loss within the policy, and is not within the exception.

2 Cranch, 187, *Church v. Hubbard*.

||RETURN OF PREMIUM.||—A clause was inserted that *8l. per cent.* of the premium should be returned, if the ship sailed from any of the West India islands with convoy for the voyage, *and arrives*. The court held, that the arrival of the ship, whether with or without convoy, entitled the party to a return of the premium stipulated.

Simond v. Boydell, Dougl. 255.

{And on such a stipulation, the assured are entitled to the return, if the ship sail with convoy, and arrive, though she has been captured and recaptured, and the assured has been obliged to pay for salvage, the amount of which is paid into court by the underwriter.

7 Term, 421, *Aguilar v. Rodgers*.

The *Ceres* was assured "at and from Oporto to Lynn, with liberty to touch at any ports on the coast of Portugal to join convoy, particularly at Lisbon; at 12 guineas *per cent.*, to return 6*l. if she sail with convoy from the coast of Portugal and arrive*." The *Ceres* sailed from Oporto with a sloop and cutter appointed to protect the trade of that place to Lisbon, from whence it was to proceed with the Lisbon trade under a large convoy for England. In the way from Oporto to Lisbon, the fleet was dispersed by a storm, and the *Ceres* judging for the best, ran for England and arrived. It was held that this was a sailing with convoy from the coast of Portugal, which entitled the assured to recover the return premium stipulated.

2 Bos. & Pul. 111, *Audley v. Duff*.

||And where the insurer on freight agreed to return part of the premium "if the ship sailed with convoy and arrived," it was held that the assured were entitled to that return, the ship having sailed with convoy and arrived; though she had been captured and recaptured, and the assured had been obliged to pay for the salvage.

Aguilar v. Rodgers, 7 Term R. 421. See also *Dalglish v. Brooke*, 15 East, 295.]

If the risk is not run, whether the cause of its not being run is attributable to the *fault, will, or pleasure* of the insured, the premium is to be returned.

Cowp. 668; 3 Burr. 1237. β So if the risk contemplated in the policy never commences, *Dederer v. The Delaware Ins. Co.*, 2 Wash. C. C. R. 61; *Murray v. Col. Ins. Co.*, 4 Johns. R. 443; *Tappen v. Atkinson*, 2 Mass. 365; or the policy becomes void by a failure of the warranty, there being no actual fraud. *Delavigne v. United Ins. Co.*, 1 Johns. C. 310; *Duquet v. Rhinelander*, 1 Johns. C. 360; *Murray v. United Ins. Co.*, 2 Johns. C. 168; *Jackson v. N. Y. Ins. Co.*, 2 Johns. C. 191; *Robertson v. United Ins. Co.*, 2 Johns. C. 191; *Forbes v. Church*, 3 Johns. C. 159; *Graves v. Marine Ins. Co.*, 2 Cain. R. 339; *Murray v. Columbian Ins. Co.*, 4 Johns. R. 443; *Richards v. Marine Ins. Co.*, 3 Johns. R. 307; *Elbers v. United Ins. Co.*, 16 Johns. R. 198.g

β When the plaintiff declares for a total loss on the policy, and adds the usual money counts, he is entitled to judgment for a return of premium, if

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the court is of opinion, that he is not entitled to recover for a total loss, on the ground that the policy never attached; provided, the defendants have never compelled him to elect whether he should proceed for a return of premium or not.

Waddington v. United Ins. Co., 17 Johns. R. 23.*g*

{It has been held that the insured may show that the ship was not seaworthy, and recover back the premium, the insurance never having attached.

1 Mass. T. Rep. 436, Porter v. Bussey.}

When a policy is void as a wager policy, *and the ship has arrived safe*, the court will not allow the insured to recover back the premium; though it might, perhaps, be otherwise, where the ship *has not arrived*.

Lowry v. Bourdieu, Dougl. 251; Andree v. Fletcher, 3 Term R. 266; [or has sustained loss, Routh v. Thompson, 11 East, 428.]

{So if it be void because covering a trade with an enemy, the premium cannot be recovered back.

1 East, 96, Vandyck v. Hewett.

Nor can the premium on any other illegal insurance.

3 Bos. & Pul. 35, Morck v. Abel; 7 East, 449, Lubbock v. Potts.

Where a policy becomes void by a breach of a warranty, the insured is entitled to a return of the premium, if there be no actual fraud.

1 Johns. Ca. 310, Delavigne v. United Ins. Co.; Ibid. 360, Duguet v. Rhinelander.}

{So, the insured on an illegal trading is not entitled to a return of premium,*(a)* even though he be a foreigner; for he shall not be presumed ignorant of the law.*(b)*

(a) Lubbock v. Potts, 7 East, 449. *(b)* Morck v. Abel, 3 Bos. & Pul. 35.

But if an alien's agent insure here, not knowing that hostilities have commenced, the premium shall be returned.*(c)*

(c) Oom v. Bruce, 12 East, 225; Henting v. Staniforth, 5 Maul. & S. 122.]

Where the risk has *once* commenced, there shall be no apportionment or return of premium afterwards.

§ Hendricks v. Commercial Ins. Co., 8 Johns. R. 1; Steinback v. Rhinelander, 3 Johns. R. 269; Cleveland v. Pettyplace, 3 Mass. 392; Taylor v. Lowell, 3 Mass. 331; Merchants' Ins. Co. v. Clapp, 11 Pick. 56; Homer v. Dorr, 10 Mass. 26.*g*

But if there are two distinct points of time, or, in effect, two voyages, either in the contemplation of the parties, or by the usage of trade, and only one of the two voyages was made, the premium shall be returned on the other, though both are contained in one policy.

[Rothwell v. Cooke, 1 Bos. & Pul. 172;] {4 Dall. 471, Donath v. Ins. Co. of N. America.

Thus, in an insurance "at and from London to Halifax, warranted to depart with convoy from Portsmouth," when the ship arrived at Portsmouth, the convoy was gone; the premium for the voyage from Portsmouth to Halifax was returned.

Stevenson v. Snow, 3 Burr. 1237; 1 Bl. Rep. 318, S. C.; [Audley v. Duff, 2 Bos. & Pul. 111;] {1 Bos. & Pul. 172, Rothwell v. Cooke, *acc.*}

A ship was insured for twelve months, at 9l. per cent., warranted free from American captures. The ship was taken within two months by the Americans. There shall be no return of premium, because the contract

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was entire; the premium was a gross sum stipulated and paid for twelve months.

Tyrie v. Fletcher, Cowp. 666.

So also, it was held, where a ship, insured for twelve months, was lost at the end of two; though the whole premium of 18*l.* was acknowledged to be received *at the rate of 15*s.* per month*; for that is only a mode of computing the gross sum.

Lorraine v. Thomlinson, Dougl. 564.

||In case of a policy on *profits* generally there is no objection to a clause providing for return of the whole premium for short interest. And short interest here means a short profit on the cargo to the extent of the whole sum insured.

Eyre v. Glover, 16 East, 218; 3 Camp. 276.||

Where the premium is entire in a policy on the voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which the risk is to end, nor any usage established upon such voyage; though there be several distinct ports at which the ship is to stop, yet the voyage is one, and no part of the premium shall be recoverable. It was so held in a case where a ship was insured "at and from Honfleur to the coast of Angola, during her stay and trade there, at and from thence to her port or ports of discharge in St. Domingo, and at and from St. Domingo back to Honfleur;" and the policy was at an end by her deviation before she arrived at St. Domingo; and, consequently, for the latter part of the voyage insured the insurer ran no risk.

Bermon v. Woodbridge, Dougl. 751; ||*Kellner v. Le Mesurier*, 4 East, 396; *Anner v. Woodman*, 3 Taunt. 299; *Tait v. Levi*, 14 East, 481; *Moses v. Pratt*, 4 Camp. 297.;

It was also held, where a ship was insured "at and from Jamaica, warranted to sail on or before the first of August, to return eight *per cent.* if she sailed with convoy;" and she did not sail till September; that there should be no return upon the warranty of the time of sailing; for the court cannot make a distinction between the risk *at* and the risk *from*, though it will be otherwise if the jury find an express usage upon the subject of return of premium. Indeed, it seems that there never has been an apportionment unless there be something like an usage found to direct the judgment of the court.

Long v. Allen, B. R. East. 25 Geo. 3, 2 Park, Ina. 580; Park, 391.

{Captors of ships seized as prize, who insure their interest therein, are not entitled to a return of the premium, although it be afterwards adjudged to be no prize, and restitution be awarded to the owners, by the Court of Admiralty.

8 Term, 154, *Boehm v. Bell*.}

||A policy on goods "at and from Gottenburgh to Riga, beginning the adventure on the goods from the loading thereof aboard the ship at Gottenburgh," will not cover goods previously loaded at London which arrived in the ship at Gottenburgh; and as the risk never attached, the assured were held entitled to a return of premium.

Horneyer v. Lushington, 15 East, 46; *Spitta v. Woodman*, 2 Taunt. 416.

And where the captors of a ship insured her, but it turned out they had no interest, the interest being in the crown, and the underwriters defended an action on the policy on this ground; it was held the insured were entitled

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to a return of premium, since there was no risk, and there was nothing illegal in the insurance.

Routh v. Thompson, 11 East, 428. *Secus*, if the captors had an interest. 8 Term R. 154; or if the vessel had arrived in safety, though the insured had no title to her. *Macculloch v. Royal Exch. Ass.*, 3 Camp. 406; and see 2 Maul. & S. 491.

So also, if a policy is made to a foreign port, but war having previously broken out, unknown to the parties, the voyage cannot be performed; (a) or if the license for the voyage is invalid by reason of its having been granted after the voyage commenced; (b) or if, by reason of the voyage being protracted to an unusual period, it is not covered by the license; (c) or if the insurance be on money advanced to the captain at a foreign port, such insurance being void but not illegal; (d) or in case of non-compliance with a warranty, without fraud, as where the broker by mere mistake represented that the ship had a French license, when she had not one; (e) or if the ship be unseaworthy, without fault of the insured, (g) a return of premium may be claimed; and the counsel in an action on a policy need not claim a return of premium in opening the cause, (h) but it must be claimed in the course of the trial. (i)

(a) *Oom v. Bruce*, 12 East, 225; 4 Maul. & S. 20. (b) *Hentig v. Staniforth*, 5 Maul. & S. 122; 4 Camp. 270. (c) *Siffken v. Allnutt*, 1 Maul. & S. 39. (d) *Ibid.* *sed vide* 2 Camp. 626. (e) *Feise v. Parkinson*, 4 Taunt. 640. (g) *Pearson v. Lee*, 2 Bos. & Pul. 330. (h) *Ibid.* (i) 1 East, 97.

¶PROCEEDINGS, EVIDENCE, &c.¶—In an action upon a policy of insurance, it appeared, that a clause was inserted, that in case of any loss or dispute about the policy it should be referred to arbitration: and the plaintiff averred in his declaration, that there had been no reference. Upon the trial at Guildhall, the point was reserved for the consideration of the court, whether this action would lie before a reference had been made; and it was held by the whole court, that if there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot oust this court; and as no reference has been, nor any is depending, the action is well brought, and the plaintiff must have judgment.

Kill v. Hollister, 1 Wils. 129; ¶*Thompson v. Charnock*, 8 Term R. 139.¶

β An action on a policy of insurance may be brought in the name of the principal, though the agent only is named in the policy; the policy not being under seal. And the courts of the United States will entertain jurisdiction where the principal is a citizen of a different state from that of the defendant, although the agent is of the same state.

Beale v. Pettit et al., 1 Wash. C. C. R. 241.g

{If, by the terms of the policy, the money is to be paid in three months after proof of the loss, the insured cannot recover in an action brought before the expiration of three months after he had given notice of the loss.

2 Dall. 280; 3 Dall. 477, *Camberling v. McCall.*}

If the plaintiff in his declaration allege, that a total loss has happened, and lay the damages as for a total loss, it shall be no bar to his recovery, though he can only prove a partial loss; for in an action for damages merely, a man may always recover *less*, but never *more* than the sum he has laid in his declaration. A contrary doctrine was once attempted to be maintained; but was unanimously overruled.

Gardiner v. Crossdale, 2 Burr. 904; 1 Bl. R. 198; β *Barney v. The Maryland Ins. Co.*, 5 Har. & J. 139.g

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An action was brought on a policy of insurance, in which the declaration stated, that the plaintiff was possessed of one third of the ship on which the insurance was made. It was proved that the plaintiff had purchased the whole ship at one period; and as there was no evidence to show that he had since parted with any share of it, the counsel for the defendant insisted, that the plaintiff had not proved his declaration, which alleged him to have but one third. Lord Mansfield overruled the objection, saying, that this was *prima facie* sufficient evidence; for *omne majus continet in se minus*.

Page v. Rogers, Sittings at Guildhall, Hil. Vac. 1785, ¶Park, 604, 7th ed.]

[In a declaration on a policy of insurance, the plaintiff averred that Messrs. H, at the time of effecting the policy and at the time of the loss, were interested in the cargo which was the subject of the insurance "to a large amount, to wit, to the amount of all the money ever insured thereon;" at the trial it appeared that previous to effecting the policy, Messrs. H had admitted another mercantile house to a joint concern in the cargo insured. The Court of Common Pleas held that there was a sufficient interest throughout the entirety of this cargo, notwithstanding other persons had a beneficial interest in a part, to support the averment in the declaration.

2 Bos. & Pul. 240, Page v. Fry; 2 Cain. 208. But in the case of Graves & Barnwell v. Boston Marine Ins. Co. in the Supreme Court of the United States, this case was denied; and that court were of opinion that the averment of interest should be supported by testimony corresponding with that interest according to the general acceptance of the term; and that an averment of interest in an individual could not be supported by evidence that the interest was in a copartnership. 2 Cranch, 419, 441, and see 2 Bos. & Pul. 155, n., Perchard v. Whitmore.

A policy was on indigo and bale goods. The declaration alleged that "divers goods, &c., of 3000*l*. value were put on board," and afterwards averred that "the said writing or policy of insurance was made on the said goods," &c. The declaration was held good on special demurrer.

5 Bos. & Pul. 77, De Symons v. Johnston. See 2 Bos. & Pul. 153, De Symonds v. Shedden.]

By 19 G. 2, c. 37, § 6, it is declared, "That in all actions or suits brought or commenced by the assured, upon any policy of assurance, the plaintiff in such action or suit, or his attorney or agent, shall, within fifteen days after he or they should be required so to do in writing by the defendant, or his attorney or agent, declare what sum or sums he had assured or caused to be assured in the whole, and what sums he had borrowed at *respondentia* or bottomry for the voyage in question in such suit or action."

[See Marshall on Ins. 709, 703, 3d ed.]

And by § 7, it is enacted, "That it shall and may be lawful for any person or persons, body or bodies corporate, sued in any action or actions of debt, covenant, or any other action or actions, on any policy or policies of insurance, to bring into court any sum or sums of money;(a) and that if any such plaintiff or plaintiffs refuse to accept such sum or sums of money so brought into court as aforesaid, with costs to be taxed, in full discharge of such action or actions, and afterwards proceed to trial in such action or actions, and the jury do not assess damages to such plaintiff or plaintiffs exceeding the sum or sums of money so brought into court, such plaintiff or plaintiffs, in every such case and cases, shall pay to such defendant or defendants, in every such action or actions, costs to be taxed; any law, custom, or usage to the contrary notwithstanding."

[(a) As to the effect of paying money into court, see 9 East, 325; 2 Term R. 275;

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3 Bos. & Pul. 557; 1 Barn. & C. 3; 2 Maul. & S. 106; 1 Taunt. 419; 1 Camp. 557; 7 Taunt. 450; 2 Bing. 377; 3 Barn. & C. 10.]

A man having purchased goods beyond sea, in order to prove his property in the cargo, in an action upon a policy of insurance, produced a *bill of parcels* of one *Gardiner* at *Petersburgh*, with his receipt to it, and proved his hand. The defendant objected, that this was no evidence against the insurers; but the chief justice allowed it.

Russell v. Boheme, 2 Strange, 1127. β A copy of a letter from a master of a ship to the correspondents of his owner, informing them of the loss, transmitted by the correspondents to the owner, was held sufficient proof of the fact of loss; that being the best evidence which the party possessed. *Lawrence v. Ocean Ins. Co.*, 11 Johns. R. 241. Proof, in a strictly legal and technical sense, or the oath of the party or witnesses, is not requisite. *Lenox v. United Ins. Co.*, 3 Johns. C. 224.γ || As to the evidence in actions on policy, see *Phillips*, vol. ii. ch. 2, *Roscoe*, p. 148, *et seq.* β Where underwriters make no objection to the sufficiency of proof of interest, but put their refusal to pay on the ground that they are not liable for the loss, it is a waiver of preliminary proof of interest. *Ocean Ins. Co. v. Francis*, 2 Wend. R. 64, and see *Vos v. Robinson*, 9 Johns. R. 192.γ

{The property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the register acts. And such parol evidence of ownership, arising from possession at a particular period, is not disproved by showing a prior register in the name of another, and a subsequent register to the same person.

4 East, 130, *Robertson v. French*. See 1 Cain. 363, *Peyton v. Hallett*.

If an insured declare upon a total loss by capture; and after proving a capture show a recapture, upon which proceedings were had in a Court of Admiralty, he cannot recover without proving the proceedings in the Admiralty under seal, though he only claim the amount of the loss sustained by the salvage, proceedings, and sale.

5 Bos. & Pul. 228, *The llusson v. Shedden*.}

|| Upon a policy on a ship, the possession of the insured as owner is *prima facie* evidence of property.

Robertson v. French, 4 East, 130; see also *Marsh v. Robinson*, 4 Esp. R. 98.]]

β The production of the policy containing in the printed form an acknowledgment of the payment of the premium, is not sufficient to entitle the plaintiff to recover. There must be further proof of the payment of the premium.

Millick et al. v. Peterson, 2 Wash. C. C. R. 31.

In an action at law, on a policy of insurance, the court will not compel the assured to produce, for the inspection of the underwriters, their instructions to the master of the vessel, the correspondence between the owners during the voyage, the clearance, and other custom-house papers in their possession, relating to the merits of the cause.

Sage v. Middletown Ins. Co., 5 Day R. 409.γ

If a merchant abroad, who is interested in goods and the freight of a cargo, mortgage them to his creditor here for the payment of money at a certain day, and by a letter enclosing the bills of lading direct an insurance, he has an insurable interest, although the mortgage was become absolute before the letter directing the insurance was received, and an action lies against the agent for not insuring agreeably to the instructions contained in such letter.

Smith v. Lascelles, 2 Term R. 187.

In an action on a policy of insurance, for insuring goods on board the ship

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A, the plaintiff declares, that the ship sprung a leak, and sunk in the river, whereby the goods were spoiled. The evidence was, that many of the goods were spoiled, but some were saved; and the question was, Whether the plaintiff might give in evidence the expense of salvage, that not being particularly laid as a breach of the policy in the declaration?

Carey v. King, Ca. temp. Hardwicke, B. R. 304; ||and see Puller v. Glover, 12 East, 124.||

Lord Hardwicke, C. J.—I think he may give it in evidence; for the insurance is against all accidents. The accident laid in this declaration is, that the ship sunk in the river; it goes on and says, that by reason thereof the goods were spoiled, that is the only special damage laid: yet it is but the common case of a declaration that lays special damage, where the plaintiff may give evidence of any damage that is within his cause of action as laid. And though it was objected, that such a breach of the policy should be laid, as the insurer may have notice to defend it; it is so in this case, for the plaintiff hath laid the accident, which is sufficient notice, because it must necessarily follow that some damage did happen.

§ In an action upon a policy on the freight of goods from New York to Orona, and thence back, the policy contained the usual clause against unseaworthiness, "that if this vessel upon a regular survey should be declared unseaworthy by reason of being unsound or rotten, or incapable of prosecuting her voyage, on account of her being unsound or rotten, that the assurers should not be bound to pay their subscription on that policy." Upon demurrer to the plea, the court held, that the conclusion of the surveyors upon a regular survey was conclusive upon the parties, and might be plead in bar of an action. The term, "unworthy of repairs," was equivalent to unseaworthy. C. J. Jones, said, that the survey was not offered in evidence to prove the unseaworthiness of the brig, it is pleaded as the adjudication or declaration of the surveyors, which the parties have, by their own compact, made conclusive on the question of seaworthiness. This clause is of modern origin. It is peculiar to us and our sister states.

Rogers v. Niagara Ins. Co., 2 Hall's R. 86; and see as to the legal effect of this clause, Brandegee v. The Nat. Ins. Co., 20 Johns. R. 323; Griswold v. Nat. Ins. Co., 3 Cow. 96; 7 Wheat. R. 582.

When a policy is for account of whom it may concern, although no express evidence is given on the trial that the person making the insurance had any authority from the owner of the goods to enter into the contract, yet the jury may presume an adoption and ratification of it by such owner, if it be for his benefit.

Fleming v. Marine Ins. Co., 4 Whart. R. 59.

Insurance was made on a box of jewelry by the defendants for A "as well in his own name, as for and in the name and names of all and every other person and persons to whom the property insured does, may, or shall appertain." Evidence was given that the plaintiff had purchased certain jewelry and shipped it on board the vessel in a box, but no evidence was given of any intercourse between A and the plaintiff, or of any agency on the part of A in purchasing or shipping it, or that at the time of obtaining the insurance, he had any intention of insuring for the plaintiff. Held, that in the absence of such evidence, the judge who tried the cause was right in directing the jury to find for the defendants.

De Bollé v. Penn. Ins. Co., 4 Wh. R. 68.

In a policy by a member of a mutual insurance club, there was a memo-

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random, amongst other exceptions, warranties, rules, terms, conditions, and agreements, that "all ships were to be inspected and approved by a committee of the club, and that all chain-cables were to be properly tested." *Held*, in an action for a loss, that it was not a condition precedent which made it necessary for the insured to prove that a chain-cable had been tested previously to the voyage.

Harrison v. Douglas, 3 Nev. & M. 180; 3 Adol. & Ellis, 396; 1 Har. & Woll. 380.g

2. Of Insurances upon Lives.

It is enacted by 14 G. 3, c. 48, § 1, "That no insurance shall be made by any person or persons, bodies politic or corporate, *on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons, for whose use, benefit, or on whose account such policies shall be made, shall have no interest, or by way of gaming or wagering*; and every insurance made contrary to the true intent and meaning thereof shall be null and void, to all intents and purposes." And in order more effectually to guard against any imposition or fraud, and to be the better able to ascertain what the interest of the person entitled to the benefit of the insurance really was, it was further enacted by the same statute, "that it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person's name interested therein, or for whose use, benefit, or on whose account such policy was so made or underwritten. § 3. And that in all cases where the insured has an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events."

[For some information respecting the various Life Insurance Companies, and other matters relating to Life Insurance, see Babbage on Life Assurance, London, 1826.]

It has been holden, that a person holding a note given for money won at play, has not an insurable interest in the life of the maker of the note. An action was brought on a policy on the life of James Russell from the 1st of June, 1784, to the 1st of June, 1785. Russell was warranted in good health, and by a memorandum at the foot of the policy it was declared, that it was intended to cover the sum of 5000*l.* due from Russell to the plaintiff, for which he had given his note payable in one year from the 14th of May, 1784. Two objections were made on the part of the defendant: 1st, That part of the consideration for the note was money won at play; 2d, That Russell, at the time he gave the note, was an infant. Buller, J., nonsuited the plaintiff upon the ground of part of the consideration being for a gaming transaction, and that therefore there was a want of interest in the plaintiff. But as to the other objection on account of infancy, he said, the interest must be contingent, for Russell might or might not avoid his note; and he doubted much whether, till so avoided, the note must not be taken against a third person to be the note of an adult, for the maker of the note only could take the objection.

Dwyer v. Edie, London, Sittings after Hil. 1788, [2 Park, Ins. 639.]

In an action on a policy of insurance on the life of Lord Newhaven, from 1st December, 1792, to 1st December, 1793, the only question made by the defendant was as to the plaintiff's interest, which it was contended was not sufficient to take the case out of the above statute. It appeared in evidence, that Lord Newhaven was indebted to the plaintiff and a Mr.

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Mitchell in a large sum of money, part of which debt had been assigned by them to another person: the remainder, being more than the sum insured, was, upon a settlement of accounts between the plaintiff and Mitchell, agreed by them to remain to the account of Mitchell only.—Lord Kenyon was of opinion, that this debt was a sufficient interest: that a creditor had certainly an interest in the life of his debtor; the means by which he is to be satisfied may materially depend upon it; and at all events the death must in every case lessen the security. Verdict for the plaintiff.

Anderson v. Edie, Sittings at Guildhall, in Tr. 1795, ¶*Park*, 640, 7th ed.] *β* An unmarried sister has an insurable interest in the life of a brother who supports her. *Lord v. Dall*, 12 Mass. 115.*g*

{An executor in trust has a sufficient interest to enable him to make assurance, in his own name, on the life of a person who has granted an annuity to the testator.

Peake, N. P. 151, *Tidgwell v. Ankerstein*.}

¶But though a creditor may insure the life of his debtor to the extent of his debt, yet such insurance is merely a contract of indemnity; and therefore, if after the death of the debtor his executors pay to the creditor the amount of his debt, the creditor cannot recover upon the policy; and this notwithstanding the debtor died insolvent, and the executors were furnished with the means of payment by a third party.

Godsall v. Boldero, 9 East, 72; and see *Ex parte Andrews*, 1 Madd. 574.]

A policy made in order to decide upon the sex of a particular person, was held to fall within the prohibition of the statute. Again, a policy having been made, on the event of there being an open trade between Great Britain and the province of Maryland, on or before the 6th of July, 1778, Lord Mansfield said, that it was clear the plaintiff could not recover. 1st, Is this an interest within the act? It was made to prevent gambling policies. Every man in the kingdom has an interest in the events of war and peace; but I doubt whether that be an interest within the act. But, 2dly, The policy is void, by not having the name inserted according to the second section of the statute.

Roebuck v. Hammerton, Cowp. 737; *Mollison v. Staples*, Sittings at Guildhall, Mich. Vac. 1788.

In a life insurance, the insurer undertakes to answer for all those accidents to which the life of man is exposed, except suicide, or the hands of justice.

¶But where the insurance is made by a person *on the life of another*, death, “by suicide, duelling, or the hand of justice,” is not excepted.

¶*Marshall on Ins.* 780, 3d ed.]

*β*F assures his life in 1815, and pays premiums regularly till 1824. In 1815 he commits a felony, for which he is convicted and executed in 1824. A bill was filed in 1825 by the representatives of F, claiming under him and in his right for payment of the sum alleged to be due on the insurance; and a decree of the master of the Rolls, in favour of the representatives; but the judgment was reversed by the Lords, on the ground that, by the general policy of the laws, the insurance was void as to those claiming under and in the right of F, in consequence of the death being occasioned by his own criminal act.

Amicable Society v. Bolland, 2 Dow & Clark, 1; S. C. 4 Bligh, N. S. 194; 3 Russ. 351.*g*

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The death must happen within the time limited in the policy; otherwise the insurers are discharged. And therefore, if a man receive a mortal wound during the existence of the policy, but does not in fact die till after, the insurers are not liable.

But if a man, whose life is insured, goes to sea, and the ship in which he sailed is never heard of afterwards, the question, whether he did or did not die within the term insured, is a fact for the jury to ascertain from the circumstances.

Patterson v. Black, Sittings at Guildhall, after Hil. 1780, ¶2 Park, Ins. 644.¶

A policy was made for one year from the day of the date thereof: the policy was dated 3d September, 1697. The person died on the 3d September, 1698, about one o'clock in the morning; and the insurer was held liable.

Sir Robert Howard's case, 2 Salk. 625; 1 Ld. Raym. 480, S. C.

Where there is a warranty that the person is in good health, it is sufficient that he be in a reasonable good state of health; for it never can mean, that he is free from the seeds of disorder.

If the person whose life was insured laboured under a particular infirmity, if it be proved by medical men, that in their judgment it did not at all contribute to his death, the warranty of health has been fully complied with, and the insurer is liable.

Willis v. Poole, Sittings at Guildhall, after East. 1780; ¶*Ross v. Bradshaw*, 1 Bl. R. 312; *Watson v. Mainwaring*, 4 Taunt. 763; *Aveson v. Lord Kinnaird*, 6 East, 188; *Morrison v. Muspratt*, 4 Bing. 60.¶

§ Where the rules of the office require a declaration as to the habits and temperance of the party, held that it was not essential to a breach of the terms that the health of the party should be affected thereby, but that it required him to be a person of temperate habits.

Southcomb v. Merriman, 1 Carr. & M. (N. P.) 286.¶

¶It is the duty of a party effecting an insurance on life or property to communicate to the insurer all material facts within his knowledge touching the subject-matter of insurance; and it is a question for a jury whether any particular fact was or was not material.

Lindenau v. Desborough, 8 Barn. & C. 586; *Huguenin v. Rayley*, 6 Taunt. 186; *Morrison v. Muspratt*, 4 Bing. 60; *Everett v. Desborough*, 5 Bing. 503.¶ § Though a material concealment will avoid a policy, the fact that a party whose life is at risk is engaged in an illegal trade, unknown to the insured, will not. *Lord v. Dall*, 12 Mass. 115. A suppression or false representation of facts material to be known by the insurers, vitiates a policy of insurance, although it was in answer to a parol inquiry. *Wainwright v. Bland*, 1 Mees. & Wels. 32.¶

If the person whose life was insured should commit suicide, or be put to death by the hands of justice, the next day after the risk commenced, there would be no return of premium.

Cowp. 669; *Dougl.* 758.

¶On a policy on the life of A, payable six months after due proof of his death, the insured are not entitled to interest on the sum insured from the expiration of the six months.

Higgins v. Sargent, 2 Barn. & C. 348.

A policy is void at the time of the insured's death, and no payment by
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any person after his decease can revive it. Thus, where by the rules of a life insurance society the insured might, (if the quarterly premium was left unpaid for fifteen days,) within six months, on certain terms, revive his policy, and the insured died five days after a quarterly payment became due; it was held, that his executor could not by paying the arrear revive the policy.

Want v. Blunt, 12 East, 183; and see Doe v. Shewin, 3 Camp. 134.‡

§ A contract of life insurance is a valid one to support an action, and the laws of marine insurance is applicable to it.

Lord v. Dall, 12 Mass. 115.‡

3. Of Insurance against Fire.

The London Assurance Company insert a clause in their proposals, by which they declare, that they do not hold themselves responsible for any damage by fire, occasioned by an invasion, foreign enemy, or any military or usurped power whatsoever. Under this proviso it was holden, that they were not exempted from loss by fire, occasioned by a mob at Norwich, which arose on account of the high price of provisions.

Drinkwater v. London Assurance, 2 Wils. 363. § In stating a loss, it is sufficient to show it to have been occasioned by a peril within the policy, without negating the exception of losses from design, invasion, public enemies, riots, &c., which are properly matters of defence. Catlin v. The Springfield Ins. Co., 1 Sumner's R. 434; Lounsbury v. The Protection Ins. Co., 8 Con. R. 459.‡

But the Sun Fire Office, in addition to these words, insert, "*civil commotions*;" which words, it was determined, protected them from any responsibility for the losses occasioned by the rioters who rose in London in 1780, to compel the repeal of a statute which had passed in favour of the Roman Catholics.

Langdale v. Mason, Sittings at Guildhall after Mich. 1780, *coram* Mansfield, C. J.

In a policy of assurance against loss by fire from half a year to half a year, the assured agreed to pay the premium half-yearly, "as long as the assurers should agree to accept the same, *within fifteen days after the expiration of the former half-year*;" and it was also stipulated, that no insurance should take place till the premium was actually paid. A loss happened within fifteen days after the end of one half-year, but before the premium for the next was paid. It was holden, that the insurers were not liable, though the insured tendered the premium before the end of the fifteen days, but after the loss.

Tarlton v. Staniforth, 5 Term R. 695; ‡ 1 Bos. & Pul. 483; and see 6 East, 571.‡

{To obviate the effect of the opinion in that case, some offices, by a subsequent advertisement, (agreed to be taken as part of the policies,) engaged that all persons insured there *by policies for a year or more had been and should be considered as insured for 15 days beyond the time of the expiration of their policies*. Notwithstanding this clause, where the assured, before the expiration of the year, received notice from the office to pay an increased premium for the ensuing year, otherwise they would not continue the insurance, and he refused to pay it, it was held that the office was not liable for a loss which happened within 15 days from the expiration of the year for which the insurance was made, though the assured, after the loss, and before the 15 days expired, tendered the full premium that had been demanded;

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the advertisement not being an engagement to indemnify during the 15 days without any regard to an intention of continuing the insurance, but having relation to the former proposals, and being to be construed with reference to them: and the effect of the whole contract then was only to give the assured an option to continue the insurance or not during 15 days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not, before the end of the year, determined the option by giving notice that they would not renew the contract.

6 East, 571, *Salvin v. James.*}

||The concealment of any material fact avoids the policy, though the terms of insurance do not expressly require the communication, and though there be no fraud in the insured; and if the property is not correctly described the insurers are not liable.

Bufe v. Turner, 6 Taunt. 338; *Dobson v. Sotheby*, 1 Moo. & Mal. Ca. 90; *Watchorn v. Langford*, 3 Camp. 422; *Newcastle Fire Insur. Comp. v. M'Morran*, 3 Dow. R. 255; || *The Columbian Ins. Co. v. Lawrence*, 2 Peters, R. 48; *Delonguemere v. The Tradesman Ins. Co.*, 2 Hall's R. 589; *Fowler v. The Ætna Fire Ins. Co.*, 6 Cow. R. 673.g

β In case of a material alteration of a building insured, without the assent of the insurer, the policy is avoided, even without the insurer's showing that a loss had been occasioned by the alteration.

Merrian v. Middlesex Ins. Co., 21 Pick. 162.g

These policies of insurance are not, in their nature assignable, for they are only contracts to make good the loss which the contracting party himself shall sustain; nor can the interest in them be transferred from one person to another without the consent of the office.(a) There is a case in which, by the proposals, these policies are allowed to be transferred, and that is, when any person dies, the policy and interest therein shall continue to the heir, executor, or administrator, respectively, to whom the property insured shall belong; provided, before any new payment be made, such heir, executor, or administrator, do procure his or her right to be endorsed (b) on the policy at the said office, or the premium be paid in the name of the said heir, executor, or administrator. But in all other cases there can be no assignment; and the party claiming an indemnity must have an interest in the thing insured at the time of the loss.

(a) *Secus* of marine insurances. *Delany v. Stoddart*, 1 Term R. 26; *Lynch v. Dalzell*, 3 Br. P. C. 497; *Saddlers' Company v. Badcock*, 2 Atk. 554.] ||(b) See *Doe v. Laming*, 4 Camp. 73; *Doe v. Shewin*, 3 Camp. 134.]

{In an action on a policy of insurance against fire, made on merchandise and utensils in a tobacco manufactory, among which were 380 kegs of manufactured tobacco, stated on the back of the policy "as worth 9,600 dollars," 157 kegs of which were destroyed by fire; it was held that the insured was entitled to recover for the loss of the 157 kegs according to the valuation of the whole number of kegs, and not the cost of the tobacco at the manufactory, or prime cost. Where there is an absolute loss of any article distinctly valued in the policy, the loss is to be estimated according to the valuation, it being in the nature of liquidated damages.

5 Johns. Rep. 368, *Harris v. Eagle Fire Co.*}

||To set fire to any house, stable, coach-house, out-house, warehouse,

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office, shop, &c., with intent thereby to injure or defraud any person, is made a capital offence by 7 & 8 G. 4, c. 30, § 2.

If the insurer defends an action on the policy on the ground that the plaintiff set fire to the house himself, he must prove the crime as fully as if the insured were indicted for it.

Thurtell v. Beaumont, 1 Bing. 339. β Presumptive as well as direct evidence will be received to establish the fact that the plaintiff set fire to his own store with the intention to defraud the underwriters. *Regnier v. La. State Marine and Fire Ins. Co.*, 12 L. R. 336; *Brugnot v. Merchants' Ins. Co.*, 12 L. R. 326. γ

An insurance against "all damage which the assured shall suffer by fire on stock and utensils in their regular-built sugar-house," does not extend to damage done to the sugar by the heat of the usual fires employed for refining being accumulated by the mismanagement of the insured, who inadvertently kept the top of the chimney closed.

Austin v. Drew, 6 Taunt. 436, 2 Marsh. 130.

A covenant to insure premises situated within the bills of mortality, mentioned in 14 G. 3, c. 78, is a covenant that runs with the land, by reason of the provisions of that act.

Vernon v. Smith, 5 Barn. & A. 1. $\dagger$

β Where the goods of an insured were levied upon by the sheriff, by virtue of an execution against him; and the sheriff took actual possession of the goods, and left them in the store of the assured, the doors of which he fastened, and the windows of which he nailed up; and the sheriff went out of town and took the key of the store with him; and during his absence a fire took place, which destroyed the store with its contents; it was held, that the assured was nevertheless entitled to recover.

Franklin Fire Ins. Co. v. Findlay, 6 Whart. R. 483.

Where a policy contained a clause declaring that "persons insuring property at this office must give notice of any other insurance *made* in their behalf on the same," &c., it was held, that this clause applied as well to other insurances made after the date of the policy as to such as were in existence at that date.

Stacy v. Franklin Fire Ins. Co., 2 W. & S. R. 506.

A policy of insurance, executed by the defendants, an incorporated company, under their seal, for the term of one year, contained a clause that persons desirous of continuing their insurances might do so by a timely payment of the premium, without being subject to any charge for the policy. The insurance was accordingly continued from year to year by endorsements on the policy, which were not under seal; held, that these endorsements did not continue the instrument as a specialty; and, therefore, that the action of covenant would not lie to recover for a loss incurred after the expiration of the first term.

Luciana v. Am. Fire Ins. Co., 2 Whart. 67.

Where the subject of insurance was a building occupied by the insured, as a manufactory of hat bodies, and *the privilege for all the process of said business*; the conditions annexed to the policy specified, among occupations denominated extra hazardous, "carpenters in their own shops, or in buildings erecting or repairing;" and it appeared, that the insured, during the existence of the risk, had used a room in such building as a shop for the purpose of repairing the machinery in such manufactory, necessary for

(K) Of Bottomry and *Respondentia*.

the business of making hat bodies ; it was held, that such use of the building was protected by the policy.

Lounsbury v. The Protection Ins. Co., 8 Con. 459.*g*

(K) Of Bottomry [and *Respondentia*].

[THE contract of bottomry is in the nature of a mortgage of a ship, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ship, as a security for the repayment ; and it is understood, that if the ship be lost, the lender also loses his whole money : but if it return in safety, then he shall receive back his principal, and also the premium or interest stipulated to be paid, however it may exceed the usual or legal rate of interest.*(a)* When the ship and tackle are brought home, they are liable, as well as the person of the borrower, for the money lent. But when the loan is not made upon the vessel, but upon the goods and merchandises laden thereon, which, from their nature, must be sold or exchanged in the course of the voyage, then the borrower only is *personally* bound to answer the contract ; who therefore in this case is said to take up money at *respondentia*. In this consists the difference between *bottomry* and *respondentia* : that the one is a loan upon the ship, the other upon the goods. In the former the ship and tackle are liable, as well as the person of the borrower ; in the latter, for the most part, recourse must be had to the *person* only of the borrower. Another observation is, that in a loan upon bottomry, the lender runs no risk though the goods should be lost ; and upon *respondentia*, the lender must be paid his principal and interest, though the ship perish, provided the goods are safe. But in all other respects the contract of bottomry and that of *respondentia* are upon the same footing, the rules and decisions applicable to one are applicable to both ; and therefore, in the course of our inquiries, they shall be treated as one and the same thing, it being sufficient to have once marked the distinction between them.

2 Blackst. Com. 457 ; Latch. 252. *(a)* 2 Blackst. Com. 458 ; 2 Valin. Com. p. 4. *g* A bottomry bond made by the master of a vessel, vests no absolute indefeasible interest in the ship upon which it is founded ; but it gives a claim upon her which may be enforced with all the expedition and efficiency of the Admiralty process. *Blaine v. The ship Charles Carter et al.*, 4 Cranch, 328.*g*

These terms are also applied to another species of contract, which does not exactly fall within the description of either, namely, to a contract for the repayment of money, not upon the ship and goods only, but upon the mere hazard of the voyage itself ; as, if a man lend 1000*l.* to a merchant to be employed in a beneficial trade, with a condition to be repaid with extraordinary interest, in case a specific voyage named in the condition shall be safely performed ; which agreement is sometimes called *fœnus nauticum* or *usura maritima*. But as this species of bottomry opened a door to gaming and usurious contracts, especially in long voyages, the legislature, at the time it suppressed insurances upon wagering policies, introduced a clause, by which it was enacted, “ That all sums of money lent on bottomry or at *respondentia* upon any ship or ships belonging to his majesty’s subjects *bound to or from the East Indies*, should be lent only on the ship, or on the merchandise or effects, laden or to be laden on board of such ship, and should be so expressed in the condition of the said bond ; and the benefit of salvage should be allowed to the lender, his agents or assigns, who alone should have a right to make assurance on the money so lent ; and in case it should appear that the value of his share in the ship, or in the merchandises

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or effects laden on board of such ship, did not amount to the full sum or sums he had borrowed as aforesaid, such borrower should be responsible to the lender for so much of the money borrowed as he had not laid out on the ship or merchandises laden thereon, with lawful interest for the same, in the proportion the money not laid out should bear to the whole money lent, notwithstanding the ship and merchandises should be totally lost."

2 Blackst. Com. 458; 1 Siderfin, 27; Molloy, lib. 2, c. 11, § 8.

This statute has entirely put an end to that species of contract which was last mentioned; namely, a loan upon the mere voyage itself, as far, at least, as relates to India voyages; but as none other are mentioned, and as *expressio unius est exclusio alterius*, these loans may be made in all other cases, as at the common law, except in the following instance, which is another statute prohibition. It is declared, that all contracts made or entered into by any of his majesty's subjects, or any persons in trust for them, for or upon the loan of any moneys by way of bottomry on any ship or ships in the service of foreigners, and bound or designed to trade in the East Indies, or parts aforesaid, shall be null and void.

7 Geo. 1, c. 21, § 2.

This act it should seem does not mean to prevent the king's subjects from lending money on bottomry on foreign ships trading from their own country to their settlements in the East Indies. The purpose of the statute was only to prevent the people of this country from trading to the British settlements in India, under foreign commissions, and to encourage the lawful trade thereto. It lately became a question in the Common Pleas, Whether an American ship since the declaration of American independency was a foreign ship, within the statute 7 G. 1, c. 21, § 2? It came before the court on a motion to discharge the defendant out of custody upon entering a common appearance. The defendant was holden to bail upon a *respondentia* bond, which was executed by the defendant, who was an American, to secure the payment of a cargo shipped by the plaintiff on board an American ship in the East Indies, homeward-bound from Calcutta to Rhode Island in America. The ship had sailed from England, and landed a cargo of European goods in Bengal, previously to her taking in the cargo on which the bond was given. The court were much inclined to think that the bond was void, the case being within the mischief intended to be remedied by the act: but as the question was of considerable consequence, they thought it not proper to be discussed on this summary application; but they ordered the defendant to be discharged, on the ground, that where it appeared from the affidavit to hold to bail that there was a probability of the contract being void, on which the action was founded, it would be wrong to detain the defendant in prison; more particularly as the plaintiff would by that means have an opportunity of tampering with the defendant in prison, and of escaping from the penalties of the act, and of preventing the case from being brought before the court.

Sumner v. Green, 1 H. Black. 301;] ||Bush v. Fearon, 4 East, 319.]

Where A lends B 100*l.* to freight a ship abroad, and it is agreed that if the ship comes home safe, A shall have 150*l.*, and that if she do not, that he shall lose the 100*l.*, this is not usury, but good by the custom of merchants, because of the great perils at sea, and both principal and interest run the same hazard of being lost. But if the principal be secured, and

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the interest only depend on an hazard, if it be more than is lawful, it is usury.

2 Roll. Rep. 48; 5 Co. 70, &c.; Cro. Ja. 208, 508; 1 Keb. 539, 711.

[Again, in debt upon an obligation, conditioned to pay so much money, if such a ship returned within six months from Ostend, in Flanders, to London, which was more by the third part than the legal interest of money; and if she did not return, then the obligation to be void; the defendant pleaded, that there was a corrupt agreement betwixt himself and the plaintiff, and that at the time of making the obligation it was agreed betwixt them, that he should have no more for interest than the law permits, in case the ship should ever return; and averred that the obligation was entered into by covin, to evade the statute of usury and the penalty thereof. Upon this averment the plaintiff took issue, and the defendant demurred.—Lord Chief Baron Hale,—Clearly this bond is not within the statute, for this is the common way of insurance; and if this were void by the statute of usury, trade would be destroyed. It is not like to the case where the condition of the bond is to give so much money if such or such a person be then alive; for there is a certainty of that at the time. But it is uncertain and a casualty, whether such a ship will ever return or not.

Joy v. Kent, Hard. Rep. 418.

||It is necessary, indeed, that the money be advanced on the credit of the ship. If it be advanced on the credit of the owner, and such a bond be afterwards given, even before the ship leaves the place of advance, it will be invalid.

The *Augusta*, 1 Dodson, A. R. 283. || But it is not necessary to the validity of a bottomry bond given by the owners of the vessel, that the money borrowed shall be for the necessities of the ship, or cargo, or voyage; though it would be otherwise, were the money borrowed by the master *virtute officii*. The *Brig Draco*, 2 Sumner's C. C. R. 157.^g

So, where the condition of a bottomry bond was, that if the obligor, or the ship, or the goods return safe, then to pay more than the legal interest; this was adjudged good by the custom of merchants, though it depends on many contingencies; and though the obligee may be said to run little hazard; and though any of the contingencies become impossible; as, if the obligor die before his return, &c., yet the bond remains payable, contrary to the general rule of law in such cases; for the law supplies those words, *which shall first happen*, and forecloses the election of the obligor, and gives it to the obligee to take his, on which the contingencies shall first happen.

Lev. 54; Sid. 27.

J S entered into a bottomry bond, whereby he bound himself in consideration of 400*l.*, as well to perform the voyage within six months, as at the six months' end to pay the 400*l.* and 40*l.* *premium*, in case the vessel arrived safe, and was not lost in the voyage: it fell out that J S never went the voyage, whereby his bond became forfeited; and he preferred a bill to be relieved: and in regard the ship lay all along in the port of London, so that the defendant run no hazard of losing his principal, the Lord Keeper decreed, that he should lose the *premium* of 40*l.*, and be contented with his ordinary interest.

Vern. 263, *Deguilder v. Depeister*.

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A part-owner of a ship borrowed money of the plaintiff upon a bottomry bond, payable on the return of the ship from the voyage; she was then going in the service of the East India Company, and the East India Company broke up the ship in the Indies; the owners brought their action against the company, and recovered damages, but they did not amount to a full satisfaction; and the obligee brought his bill to have his proportionable satisfaction out of the money recovered; but his bill was dismissed, and he left to recover as well as he could at law, the court declaring that they would never assist a bottomry bond which carried an unreasonable interest.

Abr. Eq. 372, *Dandy v. Turner*.

|| When there are several hypothecation bonds, the last in date is preferred, for it was the means of security of the whole.

The *Rhadamanthe*, Dodson, A. R. 204; || *Eliza*, 3 Hagg. A. R. 87.g

[It seems to have been a doubt, late in the last century, whether a loss by the attacks of pirates was a risk which the lender on bottomry had by his contract undertaken to bear; for it was argued in the King's Bench, in the reign of James the Second. But the court were of opinion, that piracy was one of the dangers of the seas; and the defendant had judgment.

Barton v. Wolliford, Comb. 56.

The lender is answerable likewise for losses by capture; or, to speak more accurately, if a loss by capture happen, he cannot recover against the borrower: but in bottomry and *respondentia* bonds, capture does not mean a mere temporary taking, but it must be such a capture as to occasion a total loss. And therefore if a ship be taken and detained for a short time, and yet arrive at the port of destination within the time limited, (if time be mentioned in the condition,) the bond is not forfeited, and the obligee may recover.

This doctrine was laid down by the whole Court of King's Bench, in a case upon a bond of this nature, the proceedings on which were fully stated, when the unanimous opinion of the court was delivered by Lord Mansfield:—This comes before the court upon a motion on the part of the defendant for a new trial. It was an action of debt upon a bottomry bond; the condition of which was, that upon the ship's safe arrival at New York, a certain sum of money should be paid to the plaintiff; but that in case the ship should miscarry, be lost, cast away, or taken by the enemy, the plaintiff should have nothing. The defendant pleaded three pleas: 1st, *Non est factum*; 2dly, That the ship did not arrive at New York, the port of destination; 3dly, That the ship was captured. Upon the two first pleas issue was joined; and to the last, there was a replication of recapture. The facts, which appeared in evidence on the trial are these: *the ship was taken before her arrival at New York*, by two American privateers, which detained her for one month, and plundered her of her stores; at which time *she was retaken* by an English privateer, and carried into Halifax. The Admiralty Court adjudged her to be a good prize to the English privateer, and decreed that she should be restored to the original owners, on paying one-eighth for salvage: that she proceeded with the remainder of her cargo to New York, and earned her freight: that the value of the ship was not sufficient to satisfy the bond. These are the facts. Now it is clear, that, by the law of England, *there is neither average nor salvage upon a bottomry bond*. It was, indeed, contended at the bar, on the part of the defendant,

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that this case was within the saving of the bond ; for it is provided, that in case of loss by *capture*, &c., the bond should be void : and that here there was a capture, and a detention for one month. But, upon consideration, we think that a capture within this condition does not mean a *temporary capture*, but it *must be a total loss* : now here it was not such a capture as to occasion a total loss. The voyage was not lost, for the defendant pursued it and earned his freight. Freight depends upon the safety of the ship ; and as the freight was earned, the ship must have arrived safe at the port of destination. In whatever way we determine this case, there must be a hardship : but we are all of opinion that the verdict is right, and that the rule for a new trial must be discharged.

Joice v. Williamson, B. R. Mich. Term, 23 G. 3, 2 Park, 627, 7th ed. ; ¶ Marshall on Ins. 3d ed. 760. ¶ But see Appleton v. Crowninshield, 8 Mass. 340. g

{Money was lent on a bottomry bond, conditioned that if the vessel should perform the voyage, the money should be paid in twenty days after her arrival : if she should be lost through perils of the seas, or by fire, or the enemies of the United States, the bond to be void. The vessel was captured by a British cruiser (the United States and Great Britain being at peace) and condemned as lawful prize. Upon the appeal, the condemnation was reversed, and full compensation received by the owner for vessel, cargo, and freight, by virtue of an award of the commissioners under the treaty of 1794 between the United States and Great Britain. It was held that the obligee could not recover in an action brought on the bond. The capture and condemnation as prize was a hostile act, and therefore a loss by the enemies of the United States ; and being followed by condemnation was actually total ; and the remedy of the obligee on the bond was not restored by the reversal of the sentence of condemnation, and the compensation afterwards obtained by the obligor ; for the vessel did not perform her voyage within the meaning of the condition. But the majority of the court expressed their opinion that the plaintiff could recover in another form of action ; that the lender on bottomry has a claim upon the effects saved {} in case of a loss, and those effects having come into the hands of the defendant, he was accountable for them to the plaintiff.

3 Mass. T. Rep. 443, Appleton v. Crowninshield. {} Vide 2 Pet. 295, n., Wilmer v. The Smilax.}

¶ An assured on bottomry cannot recover against the underwriter unless there has been an actual total loss of the ship : for if the ship exist in specie on the hands of the owners, though under circumstances that would entitle the assured on the ship to abandon, it will prevent its being an “ utter loss” within the meaning of the bottomry bond.

Thomson v. Royal Exchange Assurance, 1 Maul. & S. 29. ¶ In the case of *respondentia* contracts, it seems to be held both by the English and American courts, that the lender takes the risk only of a total loss ; but there is no doubt that any part of the property which arrives goes to the lender, without regard to whether it be great or small ; so that it does not exceed in value the amount of the loan. Delaware Ins. Co. v. Arches, 3 Raw. R. 226, Gibson, C. J. g

An action was brought on a policy of insurance, on a *respondentia* bond, on ship and goods at and from B to C. The ship was Danish, and an average loss was sustained upon the goods to the amount of 6l. 15s. *per cent.*, and the plaintiff as holder of a *respondentia* bond had been called upon to contribute ; and now brought his action against the English under-

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writers for the amount of that contribution. Lord Kenyon,—By the law of England a lender upon *respondentia* is not liable to average losses, but is entitled to receive the whole sum advanced, provided that the ship and cargo arrive at the port of destination. The plaintiff contends that, as by the law of Denmark such lenders upon *respondentia* are liable to average, and bound to contribute according to the amount of their interest, the insurer must answer to them. The Danish consul has proved that he received a judgment of the court of Copenhagen, the decretal part of which proves the law of Denmark to be as the plaintiff has stated it. The opinions of several men of eminence in that country have been offered on each side, but I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight than the opinions of advocates, however eminent, or even than the extrajudicial opinions of the most able judges. It seems, as if in this case the underwriters were bound by the law of the country to which the contract relates. Verdict for the plaintiff.

Walpole v. Ewer, *Sittings after Tr.* 1789.

This is not the only case in which the insurers have been holden liable to indemnify, the insured having been obliged by the law of a foreign country to pay a larger sum than by the laws of England could have been demanded: though to be sure, in the case about to be quoted, there seems to have been an usage proved, and upon that the learned judge much relied. It was an action on a policy of insurance on a cargo of fish from Newfoundland to any part of Spain, Portugal, or Italy. The ship met with bad weather, and put into Alicant and Leghorn to repair. The captain, being owner, presented a petition to the commercial court of Pisa to adjust the general average, as he had put in for the general benefit of all concerned. The court, according to its usual course, (which seems a very extraordinary one,) adjusted the loss by charging the cargo at its full value, but the ship at one-half, and the freight at one-third; and they also charged, as a part of the general average, the seamen's wages and provisions whilst in port. The defendant, as underwriter, had paid into court as much as would cover the average according to the memorandum in the policy, and the law and usage of England. The question was, Whether, the plaintiff having been compelled to pay beyond that sum according to the calculation of the sentence of the court of Pisa, it was conclusive upon the defendant, and the plaintiff was entitled to recover his average by the same standard? The plaintiff called several brokers, who said, that, in repeated instances, they had adjusted averages under similar sentences of the court of Pisa, and the underwriters, though with reluctance, had always paid them. Buller, J.—On the general law, the plaintiff would fail; but, in all matters of trade, usage is a sacred thing. I do not like these foreign settlements of average, which make underwriters liable for more than the standard of English money. But if you are satisfied it has been the usage upon the evidence given, it ought not to be shaken. The plaintiff had a verdict.

Newman v. Cazalet, *Sitt. at Guildh. after Hil.*

It has been said, that if the accident happen by the default of the borrower, or of the captain, the lender is not liable, and has a right to demand the payment of the bond. If, therefore, the ship be lost by a wilful deviation from the track of the voyage, the event has not happened upon which

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the borrower was to be discharged from his obligation. This has been decided in several cases.

An action of debt was brought upon an obligation for performance of covenants in an indenture, wherein it was recited, that such a ship was in the service of the East India Company, and that it was to obey such orders as they or their factors should give; and that she was designed for a voyage from London to Bantam, and from thence to China or Formosa. The plaintiff lent 500*l.* upon the hull of the ship, and the defendant covenanted to pay, if the ship went from London to Bantam, and returned from thence directly to London, 550*l.*; if from London to Bantam, and from thence to China or Formosa, and returned to London within twenty-four months, 650*l.* If she returned not within twenty-four months, then to pay 5*l.* per month above 650*l.*, till thirty-six months; and if she returned not within thirty-six months, then to pay 710*l.*, unless it could be proved by Wildy that the ship returned not, but was lost within thirty-six months. The ship, in fact, went from London to Bantam, and from *thence* to Surat and other parts, and so returned to Bantam; and in her voyage from Bantam to London was lost within thirty-six months: upon which the present action was brought.

The court inclined to be of opinion, that this ship having deviated from the voyage described, in going to Surat, the plaintiff was not to bear the loss, and was consequently entitled to recover. They, however, took time to deliberate; and after consideration, gave judgment for the plaintiff.

Western v. Wildy, Skin. 152.

In another case of debt upon a bottomry bond, the defendant pleaded, that the ship went from London to Barbadoes *sine deviatione*, and afterwards she returned from Barbadoes towards London, and in her return was lost *in voyage predicto*: the plaintiff replied, that the ship in her return went from Barbadoes to Jamaica; and that after a stay there, she returned from Jamaica towards London, and was lost, and so shows a deviation. The defendant rejoined, that she was pressed into the king's service, and so was compelled to go to Jamaica, which is the deviation pleaded by the plaintiff; without this, that she deviated after she was pressed. The plaintiff demurred, and judgment was given for the plaintiff. The plea of the defendant is not good; for he pleads that the ship went from London to Barbadoes without deviation, and that in the return she was lost in the voyage aforesaid; but does not show *without deviation*. Now the condition is so in express words, and he ought to show expressly that he has performed the words of the condition.

Williams v. Steadman, Holt's Reports, 126; Skin. 345, S. C.

The same rule of decision has been adopted in the courts of equity.

The plaintiff entered into a penal bond to pay 40*s.* per month for 50*l.*, the ship was to go *from Holland to the Spanish islands, and to return to England*; but if she perished, the defendant was to lose his 50*l.* The ship went accordingly to the Spanish islands, took in Moors at Africa, then went to Barbadoes, and perished at sea. The plaintiff, being sued at law upon the bond, came into equity, suggesting that *the deviation was through necessity*. But his bill was dismissed, except as to the penalty.

1 Equity Cases Abr. 372; 2 Chan. Cases, 130.

{ An agreement by a lender on *respondentia* "to be liable to average in the

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same manner as underwriters on a policy of insurance according to the usages and practices of the city of Philadelphia," does not entitle the borrower to calculate an average loss upon the whole amount of the *money loaned and the marine interest*, but merely on the cost and charges of the goods on board, and the premium of insurance: that being the manner in which underwriters on a policy would be liable.

1 Bin. 405, *Gibson v. Philadelphia Ins. Co.*

If the obligee in a bottomry bond suffer the ship to make several voyages, without asserting his lien, and executions are levied upon the ship by other creditors, he loses his lien on the ship.

4 Cranch, 328, *Blaine v. Ship Charles Carter*.

A bottomry bond was hazarded on a specified voyage, which, however, was never performed, the borrower having sent the vessel on a different voyage, and afterwards sold her to the claimant, who alleged himself to be a *bona fide* purchaser, but failed in the proof of it. It was contended that the bottomry never attached, as the risk was never run, and if it did attach, that the remedy not being pursued in time, that is, when the vessel returned to port, but she being permitted to go a second voyage, it could not now be pursued. But the court overruled both the objections, saying, that liens arising by implication of law, may be lost by parting with the possession, but those which arise from express pledge depend on very different rules; and that the objection of the bottomry not attaching was founded on the defendant's breach of his own contract and duty, which could not alter the nature of the contract.

2 Pet. 295, n., *Wilmer v. The Smilax*.

In a *respondentia* bond, the condition, after reciting that the money was lent upon the goods laden and to be laden on board a certain ship on her voyage out and home, was, that if the ship should proceed on her voyage and return within 36 months, (the dangers of the seas excepted,) and if the borrower, within 30 days after her arrival, should pay to the lender the sum agreed on, or if in the voyage and within the said 36 months the ship should be lost by fire, enemies, or other casualties, the borrower should, within six months after such loss, pay to the lender a proportionable average on all the goods carried out and acquired during the voyage which should be saved, then the obligation to be void. It was held that this was no more than a personal obligation from the borrower to the lender, and did not give the latter any specific *pledge or lien* on the home cargo or the proceeds thereof.

4 East, 319, *Busk v. Fearon*.

A bottomry bond being given on a ship and her freight, and the ship having been sold by order of the Admiralty, and the proceeds not being sufficient to discharge the bond, the freight of a subsequent voyage was attached and held answerable for it, as between the owner of the ship and the holder of the bond; no third person having become interested in it; and the plaintiffs not being chargeable with laches in prosecuting their claim.

4 Rob. Adm. Rep. (Am. ed.) 201, *The Jacob*.}

||To place obligees in bottomry and *respondentia* bonds and the assured in policies of insurance upon the same footing as other creditors in the event of the obligors or insurers becoming bankrupt, the bankrupt act, 6 G. 4, c.

(L) Of Bills of Lading.

16, § 53, enacts, "That the obligee in any bottomry or *respondentia* bond, and the assured in any policy of insurance made upon good and valuable consideration, shall be admitted to claim, and after the loss or contingency shall have happened, to prove his debt or demand in respect thereof, and receive dividends with the other creditors, as if the loss or contingency had happened before the issuing the commission against such obligor or insurer; and that the person effecting any policy of insurance upon ships or goods with any person as a subscriber or underwriter, who shall become bankrupt, shall be entitled to prove any loss to which such bankrupt shall be liable in respect of such subscription, although the person so effecting such policy was not beneficially interested in such ships or goods, in case the person or persons so interested is not or are not within the united realm."||

By the statute book it appears, that the masters and mariners of ships, having taken upon bottomry greater sums of money than the value of their adventure, had been accustomed wilfully to cast away, burn, or otherwise destroy the ships under their charge, to the great loss of the merchants and owners: it was therefore enacted, 16 Car. 2, c. 6, § 12, "That if any captain, master, mariner, or other officer belonging to any ship, should wilfully cast away, burn, or otherwise destroy the ship unto which he belonged, or procure the same to be done, he should suffer death as a felon." The duration of this act having been limited to three years, it became extinct: but the necessity of such a provision was so great, that a similar law, 22 & 23 Car. 2, c. 11, § 12, was made a few years afterwards, and is still in force.]

||The 22 & 23 C. 2, c. 11, has been repealed by the 7 & 8 G. 4, c. 27, but by 7 & 8 G. 4, c. 30, § 9, it is enacted, "That if any person shall unlawfully and maliciously set fire to or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state; or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same; every such offender shall be guilty of felony, and being convicted thereof shall suffer death as a felon."||

[(L) Of Bills of Lading, {and Stoppage *in transitu*.}]

A BILL of lading is a memorandum or acknowledgment, signed by the master of a ship, that he has received certain goods, which he undertakes to deliver at the intended place to the person named in the bill of lading. It is, regularly, made treble: one for the merchant who loads the goods: another for the consignee of the goods; and the third for the master of the ship.

The bill of lading is assignable, the undertaking being, generally, to deliver to the order or assigns of the shipper. But whether the first endorsement or assignment passes the right of property, whether the instrument be negotiable or not, is a point upon which our courts have differed.

See *Evans v. Martlett*, 1 Ld. Raym. 271; *Wright v. Campbell*, 4 Burr. 2046; 1 Bl. Rep. 628, S. C. *Snee v. Prescott*, 1 Atk. 245; *Caldwell v. Ball*, 1 Term R. 205; *Hibbert v. Carter*, Ibid. 745; *Lickbarrow v. Mason*, 2 Term R. 63; 1 H. Bl. 357, S. C.; 5 Term R. 367, S. C.; *Fearon v. Bowers*, 1 H. Bl. 364, note. *Salomons v. Nissen*, 2 Term R. 674; ||*Giles v. Nathan*, 5 Taunt. 558; *Haille v. Smith*, 1 Bos. & Pul. 363. ||It is now considered as settled in England, that the endorsement of a bill

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of lading *bond fide*, and for valuable consideration passes the property, and destroys the right of the consignor to stop *in transitu* on account of the insolvency of the original consignee. Abbott, 314, 315; 6 East, 17, Newsom v. Thornton; 9 East, 506, Cuming v. Brown; 1 Johns. Rep. 18. It seems that the mere endorsement of a bill of lading to an agent to enable him to receive the goods on account of his principal *without any consideration*, will not pass the property, and enable such agent to maintain trover in his own name for the goods. 4 East, 211, Cox v. Harden.}

||But it appears to be now settled, by the cases below, that if the assignee takes the bill of lading from the consignee for a valuable consideration, and without any knowledge of any such circumstances as would render it not fairly and honestly assignable by the consignee, he acquires a good title against the consignor, and the consignor is thereby deprived of the right of stopping the goods *in transitu*, which he might have exercised against the consignee.

Haille v. Smith, 1 Bos. & Pul. 563; Cuming v. Brown, 9 East, 506; Salomons v. Nissen, 2 Term R. 674; Lickbarrow v. Mason, *supra*; Abbott on Shipping, 389, 390, (5th edit.)

On the other hand, if the assignee assists in contravening the actual terms of the sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith; if, for instance, he knows that the consignee is in insolvent circumstances, that no bill has been accepted for the price, or that being accepted, it is not likely to be paid, he will stand in the same situation as the consignee, and his interposition in such circumstances, being in fraud of this right of the consignor, will not be available to defeat it.

9 East, 514; Vertue v. Jewell, 4 Camp. 31; Barrow v. Coles, 3 Camp. 92.

And as a factor cannot pledge the goods of his principal in his possession, so he cannot defeat the rights of the consignor of goods by assigning over the bill of lading by way of pledge.

Newsom v. Thornton, 6 East, 17; and see Martini v. Coles, 1 Maul. & S. 140; Shipley v. Kymer, 484; Solly v. Rathbone, 2 Maul. & S. 298.

The endorsement of a bill of lading is not properly an actual transfer in itself, but rather evidence, or an act raising a presumption, of a transfer, and consequently the object and legal effect of the endorsement may be ascertained by other circumstances. It seems, accordingly, that where the endorsement is made without valuable consideration to a mere agent, to enable him to receive the goods, such agent cannot sue in his own name for the goods.

Cox v. Harden, 4 East, 211, Abbott, 392.

The warrants of the West India Company are equally negotiable as bills of lading; and when endorsed for a *bond fide* consideration, are deemed equivalent to delivery of the goods.

Swinger v. Samuda, 7 Taunt. 265.

By a late act of parliament, 6 G. 4, c. 94, it is provided, that the person in whose name goods are shipped is to be deemed the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money or negotiable security advanced by him to such person, or received by such person to his use, *if he has not notice* by the bill of lading or otherwise at or before the advance or receipt, that such person is not the actual and *bond fide* owner of the goods; and such person shall be taken for the purposes of the act to have been intrusted with the goods for the purpose of consignment, or of sale, unless the contrary be made to appear, § 1. So also,

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a person intrusted with and in possession of a bill of lading, or of any of the warrants, certificates, or orders mentioned in the act, is to be deemed the true owner of the goods described therein, so far as to give validity to any contract or agreement made by him for the sale or disposition of the goods, or the deposit or pledge thereof, if the buyer, disponent, or pawnee has not notice by the document, or otherwise, that such person is not the actual and bona fide owner of the goods, § 2. But if such person deposit or pledge the goods as security for a pre-existing debt or demand, he who so takes the deposit or pledge without notice shall acquire such right, title, or interest, and no further or other than was possessed by the person making the deposit or pledge, § 3. ||

{ Though, however, the endorsee knew, at the time of the endorsement, that the consignor had not received payment for the goods in money, but had taken the consignee's acceptances payable at a future day not then arrived, and which the endorsee had no reason to suppose would not be paid, as the consignee was not then insolvent, the transfer is not fraudulent, and the consignor cannot stop the goods *in transitu*.

9 East, 506, Cuming v. Brown.

The right of stoppage *in transitu* was first established in the Court of {1} Chancery. The first case in the books is that of Wiseman v. Vandeput, 2 Vern. 203. On the first hearing, the chancellor ordered an action of trover to be brought, to try whether the consignment vested the property in the consignee; and it was then determined in a court of law that it did. But equity thought it right to interpose and give relief. And since that time, the right of stopping the goods while *in transitu* has been admitted in courts of law as well as of equity, between consignor and consignee, in case of the insolvency of the latter {2} before payment.

1 Johns. Rep. 16; Abbott, 298. {1} 2 Vern. 203; 1 Atk. 245; Amb. 399. {2} 2 Dall. 180, Wood v. Roach.

The right is possessed only by a vendor or consignor, not by one who has only a lien {3} on the goods, or who is no more than a surety {4} for the price of them.

{3} 1 East, 4, Sweet v. Pym. {4} 6 East, 371, Siffkin v. Wray.

If an agent indebted to his principal ships property to him on board a vessel belonging to a third person, (although bound to conform to the agent's orders,) and the captain signs a bill of lading deliverable to the principal, the property thereupon vests in the principal, and the agent cannot countermand or disturb the shipment.

1 Bin. 106, Summeril v. Elder.

When a party remits money on a particular account or for a particular purpose, and the consignee becomes insolvent, it may be stopped *in transitu*; but it is otherwise where the money is remitted generally from a debtor to his creditor on account of his debt.

2 Esp. Rep. 578, Smith v. Bowles.

A correspondent abroad, who, according to the orders of a trader here, procures certain goods on his own credit, without naming the trader here, and ships them to him at the original price, charging only his commission, is considered a vendor for this purpose.

3 East, 93, Feise v. Wray.

The right is not taken away by the consignee's having partly paid for

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the goods. And bills accepted by him for the price of them, and provable under his commission, amount at most to part-payment.

7 Term, 440, *Hodgson v. Loy*; 3 East, 93, *Feise v. Wray*.

If a factor, in consideration of goods being consigned to him, accept bills drawn by the consignor, and pay part of the freight, and become insolvent before the goods get into his actual possession, the consignor may stop them *in transitu*.

3 Term, 119, *Kinloch v. Craig*.

But if the consignor endorse and transmit the bill of lading to the consignee in pursuance of an agreement, and in trust to indemnify against acceptances or the like, he or his assignees cannot, on his becoming bankrupt, countermand the delivery and take back the goods, while the trust and object of the consignment remain unsatisfied; nor must the master re-deliver them to him.

Abbott, 307; 1 Bos. & Pul. 563, *Haille v. Smith*.

This right of the consignor is not divested until the goods are actually delivered to the consignee.

1 Atk. 245, *Snee v. Prescott*; 3 Term, 469, *per Buller, J.*, in *Ellis v. Hunt*.

A delivery to an agent of the consignee at the place either of the ultimate destination of the goods, or at which they are to wait for a new destination to be directed by him or his agent, is a delivery to him, and puts an end to the *transitus*.

3 Bos. & Pul. 119, *Richardson v. Goss*; *Ibid.* 320, *Leeds v. Wright*; 4 Esp. Rep. 243, S. C.; 3 Bos. & Pul. 469, *Scott v. Pettit*; 5 East, 175, *Dixon v. Baldwin*.

But a delivery to a common carrier whether by water or land, even if specially named and appointed by the consignee, although such delivery vests the property in the consignee to many purposes, leaves to the consignor this equitable right of stopping the goods; and the law is the same in the case of delivery to a packer appointed by the buyer. So if ^{1} goods are sent by sea to a certain port to be forwarded from thence by land to the residence of the consignee, and upon the ship's arrival at the port are delivered to a wharfinger, who receives them on the part of the consignee, to be forwarded to him accordingly, they are subject to this right of the consignor in the hands of the wharfinger. The right exists in every sort ^{2} of passage to the hands of the consignee.

Abbott, 303; *Stokes v. La Riviere*, cited 3 Term, 466; 3 East, 397, and 5 East, 184; *Hunter v. Beal*, cited 3 Term, 466, and 5 East, 179, 184; *Hunt v. Ward*, cited 3 Term, 467; *Hodgson v. Loy*, 7 Term, 440. ^{1} 2 Bos. & Pul. 457, *Mills v. Ball*. ^{2} 3 East, 398.

And an usage for carriers to retain goods, as a lien for a general balance of account between them and the consignees, cannot affect this right of the consignor.

3 Bos. & Pul. 42, *Appenheim v. Russel*.

A delivery of goods into a ship chartered by the vendee, that they might be sent by him on a mercantile adventure for which he had bought them, is a delivery to him, and defeats the vendor's right to stop them. In this case the ship was chartered to the vendees for three years, at 52*l.* 10*s.* per month, they finding stock and provisions for the ship, and paying the master; during which time they were to have the entire disposition of the ship, and the complete control over her.

Fowler v. McTaggart, cited 7 Term, 442; 1 East, 522; and 3 East, 396.

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But where a trader in England chartered a ship on certain conditions for a voyage to Russia, and to bring goods to him from his correspondent there, who accordingly shipped the goods on account and at the risk of the freighter, and sent him the invoices and bills of lading of the cargo; it was held that the delivery of the goods on board such chartered ship did not preclude the right of the consignor to stop them while *in transitu* on board the same to the consignee, any more than if they had been delivered on board a general ship for the same purpose. Until the arrival of the goods at their port of destination, and delivery to the consignee, they were in their passage or transit from the consignor to the consignee.

3 East, 381, *Bohtlingk v. Inglis*. Vide 3 Esp. Rep. 59, *Boehtlinck v. Schneider*; Abbott, 302.

In a prior case arising from the same transaction, the facts were, that the goods were delivered on board the chartered ship in Russia, and by a law of that country the vendor of goods, in case of the bankruptcy of the vendee, may (if he can identify that the merchandise belonging to him is in Russia, in ships, warehouses, or wherever they may be) sue out process to retake and retain them till payment. The vendors, hearing of the insolvency of the vendee, applied to the captain to sign the bills of lading to their order, which he complied with without the necessity of suing out process. The Court of King's Bench decided, that admitting the general rule to be that the delivery of goods on board a ship chartered by the vendee was a delivery to him, still the law of Russia, where the transaction took place, took this case out of the general rule: that the law had been substantially complied with, though process had not been issued, nor the goods actually taken from the ship, as the vendors had a right to do so, which it became unnecessary to exert, because it was in the first instance acknowledged and submitted to by the captain: and that the captain, on his arrival in England, was bound to deliver the goods to the order of the vendors, and not to the assignees of the vendee, who had become bankrupt.

1 East, 515, *Inglis v. Usherwood*, explained by Lawrence, J., in *Bohtlingk v. Inglis*, 3 East, 398, 399.

The *transitus* is at an end if the goods have come into the possession of the consignee, and he has exercised some act of ownership over them, though they have not reached his place of abode.

4 Esp. Rep. 82, *Wright v. Lawes*. See also 2 Cain. 38, *Hunn v. Bowne*.

Goods were sent by a wagon, which arrived at the inn in London where the wagon usually put up, and were there attached by a creditor of the vendee according to the custom of London, and in that situation were claimed by his assignee, (he having become bankrupt,) and marked by the assignee. It was held that the vendor could not afterwards countermand the delivery: the goods being deemed to have arrived at the end of their destined journey, and the assignee to have done that which was equivalent to taking actual possession; the removal of the goods being impracticable on account of the attachment. The bankruptcy of the vendee is not, of itself, a countermand.

3 Term, 464, *Ellis v. Hunt*; Abbott, 303, 304.

If a vendor deliver to his vendee a bill of parcels for goods lying in a public store, together with an order on the storekeeper to deliver them, the vendor's right of stopping *in transitu* is gone as against a third person purchasing *bond fide* for a valuable consideration.

3 Cain. 182, *Hollingsworth v. Napier*.

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The consignee has no power to divest the right of stopping *in transitu* by taking possession before the conclusion of the voyage. Therefore where a ship, which ought to have performed quarantine, came into port without doing so, and the assignees of the consignee, who had received the bill of lading, but had become bankrupt, went on board immediately and claimed the goods, and opened some of the chests, and put a person on board to keep possession, and the ship being on the same day ordered out of port to perform quarantine, an agent of the consignor, having received another bill of lading, claimed the goods of the master during the performance of quarantine, it was held that the right of the consignor to stop the goods existed when the claim was made on his behalf, because the voyage was not at an end until the performance of the quarantine.

1 Esp. Rep. 240, *Holst v. Pownall*; Abbott, 304.

And where goods are consigned, but the duties not being paid, are lodged in the king's stores, the consignor may stop them before they are sold for the duties; or if sold may claim the proceeds. The consignee has no right to the actual possession till the duties are paid. A claim by the consignor, and endeavour to get possession, is a sufficient stoppage.

2 Esp. Rep. 613, *Northey v. Field*.

A delivery of part of the goods to the vendee by the carrier or other middle-man puts an end to the *transitus* as to the whole; and the vendor cannot afterwards stop the residue; the contract being entire.

2 H. Black. 504, *Slubey v. Heyward*; 4 Bos. & Pul. 69, *Hammond v. Anderson*; 12 Ves. J. 383, *Ex parte Gwynne*. Vide 6 East, 614, *Hanson v. Meyer*.

If goods are shipped on account, and at the risk of the consignee, and the consignor takes bills of lading making the goods deliverable to his own order, one of which he sends endorsed to his own agent, and another unendorsed to the consignee, the property in the goods {} is vested in the consignee by the shipment on his account and risk, subject only to be divested by the consignor's stopping them while *in transitu*; and if upon the arrival of the goods, the consignee obtain possession of them from the captain by the production of his unendorsed bill of lading, the property becomes absolute in him, however wrongfully parted with by the captain without a competent authority from the shipper.

4 East, 211, *Coxe v. Harden*. {} 3 East, 585, *Walley v. Montgomery*; 1 Johns. Rep. 215, *Potter v. Lansing*, *acc*.

A agreed to buy some articles of plate of B, who was to get A's arms engraved on them and to pay for the engraving. A delivery to the engraver for that purpose was held not to be a delivery to A. The engraver was the agent of B, and not of A.

7 Term, 64, *Owenson v. Morse*.

If the agent of the consignor obtain the bills of lading from the consignee after his bankruptcy, upon an agreement to dispose of the goods when they arrived, and apply the proceeds to the discharge of such bills as had been drawn against the goods, such agent cannot retain the proceeds from the assignees of the bankrupt; for there was no stoppage *in transitu*, as that must be done *eo intuitu*, and adversely to the vendee; and here the goods were obtained by agreement with the vendee after his bankruptcy.

6 East, 371, *Siffkin v. Wray*.

An endorsement of the bill of lading is the regular, and in general the only mode of transferring the property of goods at sea; but other circum-

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stances may be equivalent to such an endorsement as against the consignor, or any other person acquainted with those circumstances. Thus where T. and Co. sent goods from Ireland to London to be sold by E and H, their factors there, and wrote to them to insure the goods, and sent them a bill of lading not endorsed, but having the names of E and H on the back, and being applied to by them for an endorsement, answered, that if the bill of lading was not endorsed, it was a mistake, and they would send an endorsement; upon which E and H sold the goods; and it afterwards happening that they were unable to pay bills drawn on them by T and Co., one D paid those bills for the honour of the drawers, and knowing all these transactions applied to them for an endorsement of the bill of lading, which they sent him; and D thereupon demanded the goods of the master of the ship, who refused to deliver them to him, but delivered them to the vendees of E and H; in an action brought by D against the master, and tried before Lord Kenyon, his lordship ruled that the plaintiff had, under such circumstances, no right to take the goods out of the possession of the vendees of E and H; E and H being factors authorized to transfer the property in them. and having actually done so.

Abbott, 315; Peake, N. P. 189, Dick v. Lumsden.}

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A BILL of exchange is defined to be an open letter of request from, and order by, one person on another, to pay a certain sum of money therein mentioned to a third person, on demand or at a future time therein specified.

2 Bl. Com. 466; Bayley on Bills, 1; Chit. on Bills, 1; 1 H. Bl. 586; 1 Bos. and Pul. 291, 654; Selw. N. P. 285; Leigh's N. P. 335; Byles on Bills, 1; Pard. Dr. Com. n. 330. The subject will be considered under the following heads: g

1. *Of the Nature and different Kinds of Bills of Exchange and Negotiable Notes: And herein, [of Foreign Bills, and of the Consideration for Bills.]*

1. Of Inland Bills.

2. Of Promissory and Negotiable Notes.

2. *What shall be said a Bill of Exchange, or Negotiable Note, within the Custom of Merchants.*

3. *Who shall be said liable to the Payment thereof, and therein of owing the Drawer, Endorser, or Acceptor.*

4. *Who shall be said entitled to the Money.*

5. *Of the Endorsement.*

6. *Of the Acceptance: And herein,*

1. What shall be said a good Acceptance.

2. Whose Acceptance shall bind.

3. Whether an Acceptance may be qualified.

4. Of the Effect of an Acceptance.

7 a. *Of the Protest: And herein,*

1. Of the Necessity and Validity of the Protest.

2. At what time to be made, and therein of giving Notice to the Drawer; of the Drawer's Refusal, so as to entitle the Party to Principal, Interest, and Costs.

§ 7 b. *Where a Bill is, or is not regarded as Payment, or tantamount to Payment. g*

8. *Of the Action and Remedy on a Bill of Exchange, and Manner of declaring and pleading therein.*

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1. *Of the Nature and different Kinds of Bills of Exchange and Negotiable Notes : And herein of Foreign Bills, and of the Consideration for Bills.*]

THE custom of merchants, in relation to foreign bills of Exchange, seems to have prevailed time out of mind ; and was at first introduced for the expedition of trade and its safety, and to prevent the exportation of money out of the realm ; and hath therefore been always countenanced and encouraged, as a matter of great ease and advantage to trade, and is now become part of the law of the land ; and as bills of exchange are established merely by the custom of merchants, and for their benefit, so their rules and customs are allowed to prescribe their form and several properties, as to their creating engagements on the parties that are concerned in them.

For the antiquity of exchange, vide Molloy, 277 ; Malynes, 269. That the true measure of exchange is *par pro pari*, or value for value. Molloy, 274.—Where the King of Portugal lowered his coin, this not to prejudice the drawer here.—That originally there could be no exchange without the king's license. Molloy, 274.

By this custom, if a merchant abroad draw a bill on a merchant here, or *vice versa*, requesting him to pay a certain sum of money, and the drawer set his name to it ; this amounts to a promise to pay, and subjects him, though but a collateral engagement, to an action on the non-payment.

Roll. Abr. 6 ; Cro. Car. 301.

And if the drawee, or he on whom the bill is drawn, refuse to accept it, or, having accepted it, refuse to pay it, the payee, or he in whose favour it is drawn, may protest it, and shall recover against the drawer, not only the principal sum, but likewise all interests, costs, and damages, by reason of the protest or refusal of acceptance, or payment of the money.

Cro. Car. 301 ; [Cro. Ja. 306.]

But though the custom of merchants, in relation to bills of exchange, be established by the common law, and such bills, being securities for money, are of great credit among them, yet are they not allowed to be securities of as high a nature as bonds or specialties ; and therefore it hath been adjudged, that a bill of exchange is within the statute of (*a*) limitations, and must be sued for within six years after it becomes payable.

Carth. 3 ; Renew v. Axton, Show. 341 ; Comb. 190, S. P. ; 4 Mod. 105 ; Holt, 427, pl. 2. (*a*) Nor are bills of exchange, for value received, such matters of account as are intended by the exception in the statute concerning merchants' accounts. Carth. 226. But for this, vide tit. *Limitation of Actions*.

Also, a bill of exchange is to be considered as a simple contract debt in a course of administration, which an executor or administrator cannot discharge before debts by bond, without being guilty of a *devastavit*.

Vide head of *Executors and Administrators*.

So, if a merchant in London draw a bill of exchange on his correspondent in Newcastle, in favour of J S, and the bill is refused, and J S dies intestate, his administrator, on letters of administration taken out in Durham, cannot bring an action, on the custom of merchants, against the drawer, and lay the same in London ; for that a bill of exchange is not equal to a bond or specialty, which are the deceased's goods, where they happen to be at his death, but is a simple contract, which follows the person of the debtor, and makes *bona notabilia* where the debtor resides ; and therefore administration ought to have been taken out in London.

Carth. 373, Yeomans v. Bradshaw ; Comb. 392, S. C. ; [3 Salk. 70, and 164, S. C.]

[But bills of exchange and promissory notes, though, according to the

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general principles of the law, they are to be considered only as evidence of a simple contract, are yet so far regarded as specialties, that, unless the contrary be shown by the defendant, they are always presumed to have been made on a good consideration; nor is it incumbent on the plaintiff, either to show a consideration in his declaration, or to prove it at the trial. Foreign bills were always entitled to this privilege; but it was not without a considerable struggle that it was extended to inland bills: and notes are indebted for it to the statute of Queen Anne.

1 Bl. Rep. 445, *Peckham v. Wood*, B. R. East. 18 Geo. 3. Vide 2 Ld. Raym. 758; 1 Bl. Rep. 487.] *β* *Mandevilla v. Welch*, 5 Wheat. 277; *Murry v. Clayborn*, 2 Bibb, 300; *Gains v. Kendrick*, 2 Rep. Const. Ct. 340. *g*

|| But though a consideration for a bill or note is in general presumed, yet in some cases it is necessary for the plaintiff to prove, that he or some preceding party took the bill *bonâ fide*, and for value: as in case of a bill or note given originally without consideration, and while the person giving it was under duress; (a) or in case of a bill or note obtained by fraud; (b) or in case of transfer by delivery of a person not entitled to make it, (c) as in the instance of bills and notes which have been stolen or lost. To compel the plaintiff, however, to give such proof, notice must be given him that it is required before the trial. (d)

(a) *Duncan v. Scott*, 1 Camp. 100; *β* *United States v. Price*, 2 Wash. C. C. 460. Although a bill drawn on a usurious consideration is void between the original parties, yet payment may be enforced by a *bonâ fide* endorser. *Munn v. Commission Company*, 15 Johns. 44, S. P.; *Perry v. Crammund*, 1 Wash. C. C. 100. And as to want and failure of consideration, see *Sowerwein v. Jones*, 7 G. & J. 335; *Congregational Society v. Goddard*, 7 N. H. 430. *g* (b) *Rees v. Marquis of Headfort*, 2 Camp. 574. (c) *Miller v. Race*, Burr. 452; *Grant v. Vaughan*, Burr. 1516; *Solomons v. Bank of England*, 13 East, 135, n. (d) *Patterson v. Hardacre*, 4 Taunt. 114; and see *Bayley on Bills*, 4th ed. 373.

And so also between *immediate* parties, as drawer and acceptor and endorsee and the next endorser, or their agents, it is a ground of defence that the bill was given without consideration, (e) or that the consideration has partially failed. (g) Thus, in an action against the acceptor, it is a good defence that the acceptance was, either wholly or in part, for the accommodation of the plaintiff, (h) or of some person for whom the plaintiff is a trustee. (i)

(e) *Jefferies v. Austen*, Stra. 647. (g) *Barber v. Backhouse*, Peake, 61. *β* Between the drawer and payee, the consideration of a bill may always be inquired into. *Ryberg v. Snell*, 2 Wash. C. C. 294; *Lawrence v. Stonington Bank*, 6 Conn. 464. It is no defence at law to an action on a promissory note, that it was given as part consideration of land sold by the payee, which he covenanted was free from encumbrances, and that the land is subject to a mortgage, executed by him, for a sum exceeding the amount of the note. *Lattin v. Vail*, 17 Wend. 188. *g* (h) *Darnell v. Williams*, 2 Stark. 166. (i) *Jones v. Hibbert*, 2 Stark. 304; and see *Lewis v. Cosgrave*, 2 Taunt. 2.

¹ But the partial failure of consideration will constitute no defence, if the *quantum* to be deducted on that account is matter not of definite computation, but of unliquidated damages. Thus, if a bill or note is given for the stipulated price of goods previously delivered, it is no ground of partial (k) defence, that the price was exorbitant, or that the goods were damaged when they ought to have been sound, (l) unless the contract was rescinded on that ground; (m) and notice to the plaintiff of this description of defence is necessary. (n)

(k) *Solomon v. Turner*, 1 Stark. 51. (l) *Morgan v. Richardson*, 1 Camp. 40, n.; *Tye v. Gwynne*, 2 Camp. 346; *Basten v. Butter*, 7 East, 479. (m) *Lewis v. Cosgrave*, *ubi suprà*. (n) *Patterson v. Hardacre*, *ubi suprà*; and see further, *Bayley on Bills*, 396.

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The custom of merchants shall not prevail against the privilege of infants, so as to bind them; and accordingly it hath been adjudged, that if an infant draw a bill of exchange, infancy is a good plea (a) in bar to an action brought against him.*

Carth. 160, *Williams v. Harrison*. * Or it may be given in evidence on the general issue; [(a) except, perhaps, where it is drawn for necessities. See *Trueman v. Hurst*, 1 Term R. 40; *Bayley on Bills*, 38.]

Bills of exchange are usually drawn payable on sight, so many days after sight, or after date, or on single, double, or treble (b) usances; and it is frequent to draw two or three for the same sum, and of the same date, for fear of loss or miscarriage, which carry a (c) condition with them that only one shall be paid.

Molloy, 276. (b) An usance is said to be regularly a month. Molloy, 277; *Show*. 317; *Holt*, 113, pl. 4; 12 Mod. 15.—But yet varies according to the custom of particular countries; and therefore, where the plaintiff declared on a bill of exchange drawn at Amsterdam, payable at London, at two usances, and did not show what the two usances were, judgment was given for the defendant; for the court could not take notice of foreign usances which varied, being longer in one place than in another. *Salk*. 131, pl. 18, *Buckley v. Campbell*.—[Here it may be proper to mention, that usance between London and any part of France is thirty days after date.—Between London and the following places: *Hamburg*, *Amsterdam*, *Rotterdam*, *Middleburg*, *Antwerp*, *Brabant*, *Zealand*, and *Flanders*, is one calendar month after the date of the bill.—Between *London* and *Spain* and *Portugal*, two calendar months.—Between *London* and *Genoa*, *Leghorn*, *Milan*, *Venice*, and *Rome*, three calendar months.—The usance of *Amsterdam*, on *Italy*, *Spain*, and *Portugal*, is two months.—On *France*, *Flanders*, *Brabant*, and on any place in *Holland* or *Zealand*, is one month. On *Frankfort*, *Nuremberg*, *Vienna*, and other places in *Germany*, on *Hamburg* and *Breslau*, fourteen days after sight, two usances twenty-eight days, and half usance seven.—Half usance when the usance is one month shall contain fifteen days, notwithstanding the inequality in the length of the months.] —(c) Therefore, if there are three bills for the same sum, and an action is brought on one of them, and the plaintiff declares, that the money in *billis prædictis mentionatis*, is not paid; this is sufficient without averring, that it was not paid on the other bills, because the sum is the same in all the bills. β The whole of a set of exchange constitutes but one bill, and payment or cancelling of either of the set extinguishes all. *Durkin v. Cranston*, 7 Johns. 442; *Ingraham v. Gibbs*, 2 Dall. 134. g

[Where the time, after the expiration of which a bill is made payable, is limited by months, it must be computed by calendar, not lunar months: thus, on a bill dated the first of January, and payable at one month after date, the month expires on the first of February.

Starke v. Cheesman, Carth. 510; 1 *Salk*. 198, *East v. Effington*; 1 *Salk*. 130; 2 *Ld. Raym.* 810; *Wegersloff v. Keen*, 1 *Stra.* 224; {1 *Johns. Ca.* 99, *Leffingwell v. White*.}

Where a bill is payable at so many days after sight, or from the date, the day of presentment or of the date is excluded. Thus, where a bill, payable ten days after sight, is presented on the first day of a month, the ten days expire on the eleventh; where it is dated the first, and payable twenty days after date, these expire on the twenty-first. Where there is no date, and the payment is directed to be made so many days *after* date, the date is taken to be the day {} on which it issued.

Bellasis v. Hester, *Ld. Raym.* 281; *Coleman v. Sayer*, *Stra.* 829; {*Bayley on Bills*, 202.} {} 2 *Show*. 422, *De la Courtier v. Bellamy*; 3 *Bos. & Pul.* 173, *Hague v. French*.}

{Bills and notes are valid only from the time of their delivery, and are to be considered as made or drawn when they are delivered, though bearing a previous date.

4 *Dall.* 58, n., *M'Kim v. Elton*; *Ibid.* 61, *Ludlow v. Bingham*, 2 *Johns. Rep.* 300; *Lansing v. Gaine and Ten Eyck*.}

A custom has obtained among merchants, that a person to whom a bill is

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addressed shall be allowed a little time for payment, beyond the term mentioned in the bill, called days of grace. But the number of these days varies, according to the custom of different places.

β The allowance of days of grace is now universally understood to enter into every bill or note of a mercantile character; and so forms a part of the contract, that the bill does not become due until the last day of grace. The Bank of Washington v. Triplett & Neale, 1 Peters, 30. The number of these in the United States is generally three, and when the last happens to fall on Sunday, 2 Caines, R. 343; 7 Wend. 460; Offert v. Stout, 4 J. J. Marsh. 332, or the 4th of July, 2 Caines' Cas. Er. 195, the demand must be made the day before. In Louisiana, the days of grace are no obstacle to a set-off, the bill being due for this purpose before the expiration of those days. Louis. Code, art. 2206.γ

Great Britain, Ireland, Bergamo, and Vienna, three days.

Frankfort, out of the time of the fair, four days.

Leipsic, Naumburg, and Augsburg, five days.

Venice, Amsterdam, Rotterdam, Middleburg, Antwerp, Cologn, Breslau, Nuremburg, and Portugal, six days.

Dantzic, Koningsberg, and France, ten days.

Hamburg (a) and Stockholm, twelve days.

||(a) But see Goldsmith v. Shee; Goldsmith v. Bland, Bayley, 199.||

Naples eight, Spain fourteen, Rome fifteen, and Genoa thirty days.

Leghorn, Milan, and some other places in Italy, no fixed number.

Sundays and holidays are included in the respite days at London, Naples, Amsterdam, Rotterdam, Antwerp, Middleburg, Dantzic, Koningsberg, and France; but not at Venice, Cologn, Breslau, and Nuremburg. At Hamburg, the day on which the bill falls due makes one of the days of grace, but it is not so elsewhere.

In England, if the last of the three days happens to be Sunday, the bill is to be paid on Saturday.(b)

||(b) Or if the last of the three days happens to be Good Friday, Christmas-day, or a fast-day, on the day next preceding each of those days. See 39 & 40 G. 3, c. 42, and 7 & 8 G. 4, c. 15.|| β Payment of a bill or note cannot be demanded on the fourth of July, so as to charge the drawer or endorser; but if that be the last day of grace, demand should be made on the third. Ransom & Ransom v. Mack, 2 Hill, 587; Sheldon v. Benham, 4 Hill, 129.γ

· But bills payable at sight are to be paid without any days of grace.(c)

||(c) It seems, however, to be the practice to allow three days of grace on both foreign and inland bills of exchange, whether payable upon sight or at certain days after sight. See Colman v. Sayer, 1 Barnard. B. R. 303; J'Anson v. Thomas, B. R. Tr. 24 G. 3; Bayley on Bills, 197; and see Chitt. on Bills, 268, 269. β So this order, "No. — Nashville, December 13, 1827. Cashier of the office of discount, &c. United States Bank at Nashville, pay N. Pope or bearer, \$100 on the 14th of January, 1828. M. W. Brown," was held to be an inland bill and entitled to grace. Brown v. Lusk, 4 Yerg. 210.γ But on checks, bills, or notes payable on demand, no days of grace are allowed. Bayley on Bills, (4th ed.) 189, 190; Chitt. on Bills, (7th ed.) 269;|| β Smith v. Bythewood, 1 Rice 245.γ

1. Of Inland Bills.

Inland bills of exchange are those drawn by one merchant residing in one part of the kingdom, on another residing in some city or town within the same kingdom; (d) and these also, being found useful to trade and commerce, have been established on the same foot with foreign bills. But at common law they differed from them in this, that there was no custom of protesting them, so as to subject the drawer to interest and damages in case of non-payment, as there was on foreign bills.

6 Mod. 29, 80, Salk. 131, pl. 17. β (d) A bill drawn by a person residing in one

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state of the Union upon a person residing in another state, is a foreign bill. *Buckner v. Finley*, 2 Pet. 586; *Lonsdale v. Brown*, Ibid. 688; 4 Wash. C. C. R. 87, 153; *Cape Fear Bank v. Stinemetz*, 1 Hill, 44; *Wells v. Whitehead*, 15 Wend. 527; *Phoenix Bank v. Hussey*, 12 Pick. 483. *Vide Offitt v. Vick, Walker*, 99, 104, n.; *contra Miller v. Hackley*, 5 Johns. 375. An inland bill discounted by a bank in Kentucky is by a statute placed on the footing of a foreign bill, though all the parties reside within the state. *Bank v. Brooking*, 2 Litt. 43; *Bank v. Turner*, Ibid. 16; *Battertons v. Porter*, Ibid. 388; *Tuggles v. Adams*, 3 Marsh. 430.*g*

To remedy this inconvenience, by the 9 & 10 W. 3, c. 17, reciting, that great damages and other inconveniences do frequently happen in the course of trade and commerce, by reason of delays of payment and other neglects on inland bills of exchange, it is enacted, "That all and every bill or bills of exchange, drawn in or dated at and from any trading city or town, or any other place in the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, of the sum of 5*l.* or upwards, upon any person or persons of or in London, or any other trading city, town, or any other place, (in which said bill or bills of exchange shall be acknowledged and expressed the said value to be received,) and is and shall be drawn payable at a certain number of days, weeks, or months after date thereof; that from and after presentation and acceptance of the said bill or bills of exchange, (which acceptance shall be by the underwriting the same under the party's hand so accepting,) and after the expiration of three days after the said bill or bills shall become due, the party to whom the said bill or bills are made payable, his servant, agent, or assigns, may and shall cause the said bill or bills to be protested by a notary public, and in default of such notary public, by any other substantial person of the city, town, or place, in the presence of two or more credible witnesses; refusal or neglect being first made of due payment of the same; which protest shall be made and written under a fair written copy of the said bill of exchange, in the words or form following:—*Know all men, that I, A B, on the — day of —, at the usual place of abode of the said —, have demanded payment of the bill, of which the above is the copy, which the said — did not pay; wherefore I the said — do hereby protest the said bill, dated at — this — day of —.* Which protest, so made as aforesaid, shall, within fourteen days after making thereof, be sent, or otherwise due notice shall be given thereof to the party from whom the said bill or bills were received, who is, upon producing such protest, to repay the said bill or bills, together with all interest and charges from the day such bill or bills were protested, for which protest shall be paid a sum not exceeding the sum of sixpence; and in default or neglect of such protest made and sent, or due notice given within the days before limited, the person so failing or neglecting thereof is and shall be liable to all costs, damages, and interest, which do and shall accrue thereby.

||As to protesting bills, see *infra*, p. 807, and Bayley, 210, *et seq.*||

"Provided nevertheless, that in case any such inland bill or bills of exchange shall happen to be lost or miscarried within the time before limited for payment of the same, then the drawer of the said bill or bills is and shall be obliged to give another bill or bills of the same tenor with those first given, the person or persons to whom they are and shall be so delivered giving security, if demanded, to the said drawer, to indemnify him against all persons whatsoever, in case the said bill or bills of exchange, so alleged to be lost or miscarried, shall be found again."

(M) Bills of Exchange, &c. (*Promissory Notes.*)

But this statute was deficient, in that it had no effect unless the party on whom the bill was drawn accepted it by underwriting the same, which few or none cared to do.

To remedy which, by the 3 & 4 Ann. c. 9, it is enacted, "That in case, upon presenting any such bill or bills of exchange, the party or parties, on whom the said bills shall be drawn, shall refuse to accept the same by underwriting the same as aforesaid, the party to whom the said bill or bills are made payable, his servant, agent, or assigns, may and shall cause the said bill or bills to be protested for non-acceptance, as in case of foreign bills of exchange, any thing in the said act or any other law to the contrary notwithstanding, for which protest there shall be paid 2s. and no more.

"Provided, that no acceptance of any such inland bill of exchange shall be sufficient to charge any person whatsoever, unless the same be underwritten or endorsed in writing thereupon; and if such bill be not accepted by such underwriting or endorsement in writing, no drawer of any such inland bill shall be liable to pay any costs, damages, or interest thereupon, unless such protest be made for non-acceptance thereof, and within fourteen days after such protest, the same be sent, or otherwise notice thereof be given to the party from whom the bill was received, or left in writing at the place of his or her usual abode; and if such bill be accepted, and not paid before the expiration of three days after the said bill shall become due and payable, then no drawer of such bill shall be compellable to pay any costs, damages, or interest thereupon, unless a protest be made and sent, or notice thereof be given in manner and form above mentioned; nevertheless, every drawer of such bill shall be liable to make payment of costs, damages, and interest upon such inland bill, if any one protest be made for non-acceptance or non-payment thereof, or notice thereof be sent, given, or left as aforesaid.

"Provided, that no such protest shall be necessary, either for non-acceptance or non-payment of any inland bill of exchange, unless the value be acknowledged and expressed on such bill to be received; and unless such bill be drawn for the payment of 20*l.* or upwards, and that the protest hereby required for non-acceptance shall be made by such persons as are appointed by the above statute 9 & 10 W. 3, c. 17.

"And it is further enacted by the said statute 3 & 4 Ann. c. 9, that if any person doth accept any such bill of exchange, for and in satisfaction of any former debt, or sum of money formerly due to him, the same shall be accounted and esteemed a full and complete payment of such debt; if such person, accepting of any such bill for his debt, doth not take his due course to obtain payment thereof, by endeavouring to get the same accepted and paid, and make his protest as aforesaid, either for non-acceptance or non-payment thereof.

"Provided, that nothing herein contained shall extend to discharge any remedy that any person may have against the drawer, acceptor, or endorser of such bill."

2. Of Promissory and Negotiable Notes.

The increase of trade, and necessity of paper credit, put bankers and others upon an expedient of bringing promissory notes within the custom of merchants, and making them negotiable, as inland bills of exchange; but this the judges would not admit of, promissory notes being only considered

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by the common law as evidences of a debt, and not assignable or negotiable in their own nature.

Salk. 24, pl. 8; 129, pl. 12; 2 Ld. Raym. 757; 6 Mod. 29.

But it being found necessary to make use of this kind of credit, by the 3 & 4 Ann. c. 9,(a) reciting, that whereas it hath been held, that notes in writing signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or endorsable over within the custom of merchants to any other person; and that such person to whom the sum of money mentioned in such note is payable cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note should be assigned, endorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same; therefore to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, it is enacted, "That all notes in writing, that shall be made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually intrusted by him, her, or them, to sign such promissory notes for him, her, or them, whereby such person or persons, body politic and corporate, his, her, or their servant or agent as aforesaid, doth, do, or shall promise to pay to any other person or persons, body politic and corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politic and corporate, to whom the same is made payable; and also every such note payable to any person or persons, body politic and corporate, his, her, or their order, shall be assignable or endorsable over, in the same manner as inland bills of exchange are or may be according to the custom of merchants; and that the person or persons, body politic and corporate, to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same in such manner as he, she, or they might do upon an inland bill of exchange, made or drawn according to the custom of merchants, against the person or persons, body politic and corporate, who, or whose servant or agent, as aforesaid, signed the same; and that any person or persons, body politic and corporate, to whom such note that is payable to any person or persons, body politic and corporate, his, her, or their order, is endorsed or assigned, or the money therein mentioned ordered to be paid by endorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person or persons, body politic and corporate, who, or whose servant or agent as aforesaid, signed such note, or against any of the persons that endorsed the same, in like manner as in case of inland bills of exchange; and in every such action, the plaintiff or plaintiffs shall recover his, her, or their damages and costs of suit; and if such plaintiff or plaintiffs shall be nonsuited, or a verdict be given against him, her, or them, the defendant or defendants shall recover, his, her, or their costs against the plaintiff or plaintiffs; and every such plaintiff or plaintiffs, defendant or defendants respectively recovering, may sue out execution for such damages and costs, by *capias, fieri facias, or elegit*."

(a) Made perpetual by the 7 Ann. c. 25, § 3; and held to extend to promissory

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notes drawn in Scotland, by Lord Tenterden, C. J., in *Bentley v. Northhouse*, East Term, 8 Geo. 4, K. B.; and that it extends to notes made abroad, see *Pollard v. Herries*, 3 Bos. & Pul. 335; *Splitgerber v. Kohn*, 1 Stark. Ca. 125.]]

And it is further enacted by the said statute, That all and every such actions shall be commenced, sued, and brought within such time, as is appointed for commencing or suing actions upon the case, by the statute 21 Jac. 1, c. 16, § 3, of *Limitations*.

“Provided, That no body politic or corporate shall have power, by virtue of this act, to issue or give out any notes by themselves or their servants, other than such as they might have issued, if this act had never been made.”

It hath been adjudged, that a note written by the plaintiff, and subscribed by the defendant, is a note *made and signed* by the defendant within this act; for the signing or subscribing is the lien, and the writing or making is only the mechanical part of it.(a)

Trin. 6 Ann., *Ash v. Baron*, in B. R. [(a) And it is sufficient if the maker's name be written in any part of the note, provided it be in his own handwriting. See *Taylor v. Dobbins*, 1 Stra. 339.]]

[A promissory note, in its original form of a promise from one man to pay a sum of money to another, bears no resemblance to a bill of exchange. When it is endorsed, the resemblance begins, for then it is an order by the endorser to the maker of the note, who, by his promise, is his debtor, to pay the money to the endorsee. This is the exact definition of a bill of exchange.

Per Lord Mansfield, in *Heylin v. Adamson*, Burr. 676; [and see *Brown v. Harraiden*, 4 Term R. 148; *Carlos v. Fancourt*, 5 Term R. 482; *Edie v. East India Company*, Burr. 1224.]]

The endorser of the note corresponds to the drawer of the bill; the maker to the drawee or acceptor; and the endorsee to the payee, or party to whom the bill is made payable.

When this point of resemblance is once fixed, the law is fully settled to be exactly the same in bills of exchange and promissory notes: and as some confusion has arisen in the books from an inattention to the real analogy between them, it may be proper to observe, that whenever the law is reported to have been settled with respect to the acceptor of a bill, it is to be considered as applicable to the drawer, or, as he may, with more propriety, be called, the maker of a note; when with respect to the drawer of a bill, then to the first endorser of the note: the subsequent endorsers and endorsees bear an exact resemblance to one another.

Till the twenty-third of George III. these notes and bills were written on a plain piece of paper unstamped: by a statute made in that year, certain duties were imposed on every piece of vellum, parchment, or paper, on which bills and notes, falling under certain descriptions, should be written, engrossed, or printed.

Vide 23 Geo. 3, c. 49.

[[Subsequent statutes have increased or modified these duties, the provisions of which are consolidated in the 55 G. 3, c. 184, which latter statute imposes the following increased duties on bills of exchange and promissory notes.

31 G. 3, c. 25; 48 G. 3, c. 149. See schedule, part 1.

Inland bill of exchange, draft, or order to the bearer, or to order, either

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on demand or otherwise, not exceeding two months after date, or sixty days after sight, of any sum of money.(a)

	£	s.	d.
Amounting to 40s. and not exceeding 5l. 5s. - - - - -	0	1	0
Exceeding 5l. 5s. and not exceeding 20l. - - - - -	0	1	6
Exceeding 20l. and not exceeding 30l. - - - - -	0	2	0
Exceeding 30l. and not exceeding 50l. - - - - -	0	2	6
Exceeding 50l. and not exceeding 100l. - - - - -	0	3	6
Exceeding 100l. and not exceeding 200l. - - - - -	0	4	6
Exceeding 200l. and not exceeding 300l. - - - - -	0	5	0
Exceeding 300l. and not exceeding 500l. - - - - -	0	6	0
Exceeding 500l. and not exceeding 1000l. - - - - -	0	8	6
Exceeding 1000l. and not exceeding 2000l. - - - - -	0	12	6
Exceeding 2000l. and not exceeding 3000l. - - - - -	0	15	0
Exceeding 3000l. - - - - -	1	5	0

(a) Reserving interest from the date of a bill or note will not render an increased stamp necessary; the stamp is to be according to the sum due at the time the bill or note is given. *Pruessing v. Ing*, 4 Barn. & A. 204.

Inland bills of exchange, draft, or order for the payment to the bearer or to order, at any time exceeding two months after date, or sixty days after sight,(b) of any sum of money,

Amounting to 40s. and not exceeding 5l. 5s. - - - - -	0	1	6
Exceeding 5l. 5s. and not exceeding 20l. - - - - -	0	2	0
Exceeding 20l. and not exceeding 30l. - - - - -	0	2	6
Exceeding 30l. and not exceeding 50l. - - - - -	0	3	6
Exceeding 50l. and not exceeding 100l. - - - - -	0	4	6
Exceeding 100l. and not exceeding 200l. - - - - -	0	5	0
Exceeding 200l. and not exceeding 300l. - - - - -	0	6	0
Exceeding 300l. and not exceeding 500l. - - - - -	0	8	6
Exceeding 500l. and not exceeding 1000l. - - - - -	0	12	6
Exceeding 1000l. and not exceeding 2000l. - - - - -	0	15	0
Exceeding 2000l. and not exceeding 3000l. - - - - -	1	5	0
Exceeding 3000l. - - - - -	1	10	0

(b) A note payable two months after sight, if those two months, exclusive of the days of grace, exceed sixty days, requires the same stamp as a bill exceeding sixty days after sight, date and sight not being in this case synonymous. *Sturdy v. Henderson*, 5 Barn. & A. 592.

An inland bill, draft, or order for the payment of any sum of money, though not made payable to the bearer or to order, if the same shall be delivered to the payee, or some person on his or her behalf, has the same duty imposed on it as have bills of exchange for the like sum payable to bearer or order.

So an inland bill, draft, or order for the payment of any sum of money, weekly, monthly, or at any other stated periods, if made payable to the bearer or to order, or if delivered to the payee, or some person on his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom, has the same duty as a bill payable to bearer or order on demand for a sum equal to such total amount.

And where the total amount of the money thereby made payable shall be indefinite, the same duty as on a bill on demand for the sum therein expressed only.

And the following instruments are deemed and taken to be inland bills,

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drafts, or orders for the payment of money, within the intent and meaning of the schedule annexed to the said act; *videlicet*: All drafts or orders for the payment of any sum of money by a bill or promissory note, or for the delivery of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders shall require the payment or delivery to be made to the bearer or to order, or shall be delivered to the payee, or some person on his or her behalf.

All receipts given by any banker or bankers, or other person or persons for money received, which shall entitle or be intended to entitle the person or persons paying the money, or the bearer of such receipts, to receive the like sum from any third person or persons.

And all bills, drafts, or orders for the payment of any sum of money out of any particular fund (a) which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, if the same shall be made payable to the bearer or to order, or if the same shall be delivered to the payee, or some person on his or her behalf.

(a) See *Emly v. Collins*, 6 Maul. & S. 144; *Butts v. Swan*, 2 Brod. & B. 78; *Firbank v. Bell*, 1 Barn. & A. 36.

A foreign bill of exchange, (or bill of exchange drawn in, but payable out of Great Britain,) if drawn singly and not in a set, is subject to the same duty as is imposed on an inland bill of the same amount and tenor.

Foreign bills of exchange drawn in sets according to the custom of merchants, for every bill of each set, where the sum made payable thereby shall not exceed 100*l*. - - - - - £0 1 6

Where it shall exceed 100*l*., and not exceed 200*l*. - - - - - 0 3 0

Where it shall exceed 200*l*., and not exceed 500*l*. - - - - - 0 4 0

Where it shall exceed 500*l*., and not exceed 1,000*l*. - - - - - 0 5 0

Where it shall exceed 1,000*l*., and not exceed 2,000*l*. - - - - - 0 7 6

Where it shall exceed 2,000*l*., and not exceed 3,000*l*. - - - - - 0 10 0

Where it shall exceed 3,000*l*. - - - - - 0 15 0

The following are exemptions from the preceding and all other stamp duties.

§ 20. All bills of exchange, or bank post bills, issued by the Governor and Company of the Bank of England.

All bills, orders, remittance bills, and remittance certificates, drawn by commissioned officers, masters, and surgeons in the navy, or by any commissioner or commissioners of the navy, under the authority of the act passed in the 35th year of Geo. 3, for the more expeditious payment of the wages and pay of certain officers belonging to the navy.

All bills drawn pursuant to any former act or acts of parliament by the commissioners of the navy, or by the commissioners for victualling the navy, or by the commissioners for managing the transport service, and for taking care of sick and wounded seamen, upon and payable by the treasurer of the navy.

All drafts or orders for the payment of any sum of money to the bearer on demand, and drawn upon any banker or bankers, or any person or persons acting as a banker, who shall reside or transact the business of a banker within ten miles of the place where such drafts or orders shall be issued, provided such place shall be specified in such drafts or orders; and provided the same shall bear date on or before the day on which the same shall be issued; and provided the same do not direct the payment to be made by bills or promissory notes.

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All bills, for the pay and allowances of his majesty's land forces, or for other expenditures liable to be charged in the public regimental or district accounts, which shall be drawn according to the forms now prescribed, or hereafter to be prescribed by his majesty's orders, by the paymasters of regiments or corps, or by the chief paymaster, or deputy paymaster, and accountant of the army dépôt, or by the paymasters of recruiting districts, or by the paymasters of detachments, or by the officer or officers authorized to perform the duties of the paymastership during a vacancy, or the absence, suspension, or incapacity of any such paymaster as aforesaid; *save and except such bills as shall be drawn in favour of contractors or others who furnish bread or forage to his majesty's troops, and who by their contracts or agreements shall be liable to pay the stamp duties on the bills given in payment for the articles supplied by them.*

The duties on promissory notes are on the following scale:—

Promissory note for the payment to the *bearer on demand* of any sum of money,

	£	s.	d.
Not exceeding one pound and one shilling - - - - -	0	0	5
Exceeding 1 <i>l.</i> 1 <i>s.</i> , and not exceeding 2 <i>l.</i> 2 <i>s.</i> - - - - -	0	0	10
Exceeding 2 <i>l.</i> 2 <i>s.</i> , and not exceeding 5 <i>l.</i> 5 <i>s.</i> - - - - -	0	1	3
Exceeding 5 <i>l.</i> 5 <i>s.</i> , and not exceeding 10 <i>l.</i> - - - - -	0	1	9
Exceeding 10 <i>l.</i> , and not exceeding 20 <i>l.</i> (a) - - - - -	0	2	0
Exceeding 20 <i>l.</i> , and not exceeding 30 <i>l.</i> - - - - -	0	3	0
Exceeding 30 <i>l.</i> , and not exceeding 50 <i>l.</i> - - - - -	0	5	0
Exceeding 50 <i>l.</i> , and not exceeding 100 <i>l.</i> - - - - -	0	8	6

Which said notes may be re-issued after payment thereof, as often as shall be thought fit.

(a) A note for 11*l.* payable to A B on demand, is a promissory note payable to bearer on demand within the meaning of this clause, and requires a stamp of 2*s.* *Keates v. Whieldon*, 8 Barn. & C. 7; but if payable to A B or order on demand, it falls within the clause next following. *Armitage v. Berry*, 5 Bing. 501.

Promissory note for the payment *in any other manner than to the bearer on demand*, but not exceeding two months after date, or sixty days after sight, of any sum of money,

Amounting to 40 <i>s.</i> and not exceeding 5 <i>l.</i> 5 <i>s.</i> - - - - -	0	1	0
Exceeding 5 <i>l.</i> 5 <i>s.</i> and not exceeding 20 <i>l.</i> - - - - -	0	1	6
Exceeding 20 <i>l.</i> and not exceeding 30 <i>l.</i> - - - - -	0	2	0
Exceeding 30 <i>l.</i> and not exceeding 50 <i>l.</i> - - - - -	0	2	6
Exceeding 50 <i>l.</i> and not exceeding 100 <i>l.</i> - - - - -	0	3	6

These notes are not to be re-issued after being once paid.

Promissory note for the payment *either to the bearer on demand, or in any other manner than to the bearer on demand*, but not exceeding two months after date, or sixty days after sight, of any sum of money,

Exceeding 100 <i>l.</i> and not exceeding 200 <i>l.</i> - - - - -	0	4	6
Exceeding 200 <i>l.</i> and not exceeding 300 <i>l.</i> - - - - -	0	5	0
Exceeding 300 <i>l.</i> and not exceeding 500 <i>l.</i> - - - - -	0	6	0
Exceeding 500 <i>l.</i> and not exceeding 1,000 <i>l.</i> - - - - -	0	8	6
Exceeding 1,000 <i>l.</i> and not exceeding 2,000 <i>l.</i> - - - - -	0	12	6
Exceeding 2,000 <i>l.</i> and not exceeding 3,000 <i>l.</i> - - - - -	0	15	0
Exceeding 3,000 <i>l.</i> - - - - -	1	5	0

These notes are not to be re-issued after being once paid.

(M) Bills of Exchange, &c. (Stamp.)

Promissory note for the payment to the bearer or otherwise, at any time not exceeding two months after date, or sixty days after sight, of any sum of money,

	£	s.	d.
Amounting to 40s. and not exceeding 5l. 5s.	-	0	1 6
Exceeding 5l. 5s. and not exceeding 20l.	-	0	2 0
Exceeding 20l. and not exceeding 30l.	-	0	2 6
Exceeding 30l. and not exceeding 50l.	-	0	3 6
Exceeding 50l. and not exceeding 100l.	-	0	4 6
Exceeding 100l. and not exceeding 200l.	-	0	5 0
Exceeding 200l. and not exceeding 300l.	-	0	6 0
Exceeding 300l. and not exceeding 500l.	-	0	8 6
Exceeding 500l. and not exceeding 1,000l.	-	0	12 6
Exceeding 1,000l. and not exceeding 2,000l.	-	0	15 0
Exceeding 2,000l. and not exceeding 3,000l.	-	1	5 0
Exceeding 3,000l.	-	1	10 0

These notes are not to be re-issued after being once paid.

Promissory notes for the payment of any sum of money by instalments, or for the payment of several sums of money at different days or times, so that the whole of the money to be paid shall be definite and certain, are liable to the same duty as promissory notes payable in less than two months after date, for a sum equal to the whole amount of the money to be paid.

And the following instruments shall be deemed and taken to be promissory notes, within the intent and meaning of this schedule, viz. :

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; if the same shall be made payable to the bearer or to order, and if the same shall be definite and certain, and not amount in the whole to twenty pounds.

And all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum importing that interest shall be paid for the money so deposited.

The following are exemptions from the duties on promissory notes:—

All notes promising the payment of any sum or sums of money out of any particular fund, which may or may not be available; or upon any condition or contingency, which may or may not be performed or happen; where the same shall not be made payable to the bearer or to order, and also where the same shall be made payable to the bearer or to order, if the same shall amount to twenty pounds, or be indefinite.

And all other instruments bearing in any degree the form or style of promissory notes, but which in law shall be deemed special agreements, except those hereby expressly directed to be deemed promissory notes.

But such of the notes and instruments here exempted from the duty on promissory notes shall, nevertheless, be liable to the duty which may attach thereon as agreements or otherwise.

§ 20. All promissory notes for the payment of money issued by the Bank of England are exempted from the preceding and all other stamp duties, in consideration of the governor and company paying into the hands of the receiver-general of the stamp duties in Great Britain, as a composition for the duties which would otherwise have been payable for their promissory notes and bank post bills, the sum of 3,500l. for every million, and after that rate for every half a million.

(M) Bills of Exchange, &c. (Stamp.)

And it is enacted, § 11, that if any person shall make, sign, or issue, or shall accept or pay any bill of exchange, draft, or order, or promissory note for the payment of money, liable to any of the duties imposed by this act, without the same being duly stamped for denoting the duty hereby charged thereon, he shall for every such bill, draft, order, or note, forfeit the sum of 50*l*.

§ 12. A penalty of 100*l*. is also imposed on any person who shall post-date any bill of exchange, draft, or order, or promissory note for the payment of money at any time after date or sight.(a)

(a) But a bill of exchange may be post-dated, if the payment is not thereby postponed for more than two months or sixty days from the time it is issued. *Passmore v. North*, 13 East, 517.

§ 13. And a penalty of 100*l*. is imposed upon any person who shall issue an unstamped draft on a banker without specifying the place where it was issued; a penalty of 20*l*. upon the person receiving such draft, and on a banker for paying it a penalty of 100*l*.

§ 18. A penalty of 50*l*. is also imposed on any banker or other person who shall, after the passing of the act, issue notes with printed dates.

§ 19. And a penalty of 50*l*. is imposed on any person re-issuing promissory notes, &c., contrary to law, and for not cancelling them; and upon the person taking them a penalty of 20*l*.

§ 23. The Bank and Royal Bank of Scotland, and British Linen Company, are empowered by the said act to issue small notes on unstamped paper, in the same manner as they were authorized to do before the passing of the act, accounting for the duties payable in respect of such notes in the manner prescribed by the 48 G. 3, c. 149.

By § 24 of this act, re-issuable notes are not to be issued by bankers or others (except the Governor and Company of the Bank of England) without a license for that purpose.

§ 29. And promissory notes for the payment of money to the bearer on demand, made out of Great Britain, (unless made and payable only in Ireland,) are not negotiable unless stamped; and persons circulating such notes are liable to a penalty of 20*l*. for each note circulated.

If upon a bill dated abroad the defence is that it was made in England, and has not an English stamp, that defence must be made out by distinct evidence, since such conduct to evade the stamp duties would be a very serious offence.

Abraham v. Dubois, 4 Camp. 269.

Provided a bill or note bear a stamp of a proper denomination, it is now no ground of objection that it is of greater value than that required by law; nor is it since 55 G. 3, c. 184, § 10, that it bear a stamp of a different denomination, unless such stamp is specially appropriated to some other instrument, by having its name on the face of it. And where a bill or note is upon a stamp so specially appropriated, it may, perhaps, be stamped under 37 G. 3, c. 136, § 5, on payment of the duty and 40*s*. penalty, before it has become payable, and on payment of the duty and 10*l*. afterwards. But this statute only applies to notes with a stamp of *proper amount*, though of wrong denomination. If the stamp is of improper amount, the note cannot be re-stamped.

43 G. 3, c. 137, § 6; the objections taken in 1 East, 55; 2 East, 414, are thus removed. See *Bayley*, 81, (4th edit.); *Green v. Davies*, 4 Barn. & C. 235.]

(M) Bills of Exchange, &c. (*What is a good Bill, &c.*)

2. *What shall be said a Bill of Exchange, or Negotiable Note, within the Custom of Merchants.*

As the custom of merchants hath established these bills and notes, so hath it prescribed their form, and required that the same should be in writing, and drawn by the party, or those having legal authority from him; and such drawing raises a contract to pay the money without any express promise.

Carth. 510; Salk. 128, pl. 10; Ld. Raym. 538, *Starky v. Cheeseman*.

β A bill is an assignment to the payee of the debt due from the drawee to the drawer.

Corser v. Craig, 1 Wash. C. C. 424; *Mandeville v. Welch*, 5 Wheat. 277; *Debesse v. Napier*, 1 M'Cord, 106. Where a writing purporting to be a certificate that B had deposited a sum of money in the Chelsea Bank, July 6, 1839, and payable the 1st of December then next, to the order of B, was assigned to C for value received, by an endorsement thereon subscribed by B, it was held, that such endorsement was a bill of exchange, imposing on the parties the ordinary liabilities attached to that kind of paper. *Kilgore v. Bulkley*, 14 Day, 363.g

As to the form of the bill, it is said, that the same strictness and nicety are not required in the penning of bills current between merchant and merchant, as in deeds, wills, &c.; on the other hand, it may happen, that a writing may have the form of a bill of exchange, and yet be otherwise.

10 Mod. 287. See 2 Ld. Raym. 1397; *Gilb. Cas.* 94. β An endorsement on a bond, ordering the contents to be paid to order, for value received, is a good bill of exchange, for the purpose of charging the endorser. *Bay v. Frazer*, 1 Bay, 66. So of a request to pay a promissory note written under the note by the promisor; and the drawee, after acceptance, is liable to an action. *Leonard v. Mason*, 1 Wend. 522. If it be ambiguous, whether the instrument be a bill of exchange or a promissory note, the person who receives it may treat it as either. *Edis v. Bury*, 6 B. & C. 433; S. C. 2 C. & P. 559; *Ibid.* 239.g

As, if A draw a bill upon B, in this form, *Sir you are to pay S S, so much of the money belonging to the governors and company of Devonshire miners, &c.*; this is no such bill of exchange as will entitle S S, to an action against the drawer on the custom of merchants; for it is only a direction or appointment to the cashier to pay the money, and that out of a particular fund, and doth not answer the necessity of trade, not being a negotiable bill, or made endorsible over; and charging the drawer on such a note would be liable to this further inconveniency, that hereby every one who gives his steward an order or authority to pay money might be charged for non-payment.

Pasch. 10 G. *Jenny v. Herle*, in B. R. adjudged; *Stra.* 591, S. C.; 2 Ld. Raym. 1361, S. C.; and see *Hill v. Halford*, 2 Bos. & Pul. 413, *Smith v. Nightingale*, 2 Stark. 375.β It is essential to a bill, that it be payable in money only, at all events, and not out of a particular fund. *Cook v. Satterlee*, 6 Cow. 108; *Atkinson v. Mank*, 1 Cow. 691; *Waters v. Carleton*, 4 Porter, 205; *Nichols v. Davis*, 1 Bibb, 490; *Mershaw v. Withers*, 1 Bibb, 503; *Smurr v. Forman*, 1 Ham. 272; *Wooley v. Sergeant*, 3 Halst. 262; *Coyle v. Satterwaite*, 4 Monr. 124; *Carlisle v. Dulra*, 3 J. J. Marsh. 542; *May v. Lansdown*, 6 J. J. Marsh. 170; *Mills v. Kuy Kendall*, 2 Blackf. 47. But if the drawer of an order, payable out of a particular fund purporting to belong to the payee, refuse to pay it, the payee may recover of the drawer. *Jolliffe v. Higgins*, 6 Mun. 3; *S. P. Knox & Reeside*, 1 Miles, 294. But a statement of a particular fund in a draft or bill of exchange, if inserted merely as a direction to the drawee how to reimburse himself, will not vitiate it. *Kelly v. The Mayor, &c. of Brooklyn*, 4 Hill, 263.g

So, a bill drawn by A upon B, requiring him to pay C 7l. every month out of the annuity, or growing fund of the drawer, is no bill of exchange, nor the drawee liable, though he accept such bill; for it concerns neither trade nor credit, but is to be paid out of the growing subsistence of the

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drawer; so that if the party die, or the fund be taken away, the payment is to cease and determine.

Pasch. 1 G. 1, *Josselyn v. Lacier*, in B. R. adjudged; *Fortesc.* 281, S. C.

[The Earl of Delorane drew a bill on Brecknock, requesting him to pay to Miss Read thirty-two pounds and seventeen shillings out of W. Steward's money, as soon as he should receive it; which bill Brecknock accepted generally.

Upon Brecknock's refusing to pay, an action was brought against the drawer as on a bill of exchange, but judgment was given against the plaintiff, for this among other reasons, that it was payable out of a particular fund; and it being objected at the bar, that this bill was accepted by Brecknock generally, and in an unlimited manner, it was answered by the court, that if the bill had been drawn accordingly in a general and unlimited way, both the bill and the acceptance would have been good, but the acceptance here must mean that Brecknock accepts it to pay out of Steward's money, not out of the drawer's.

Dawkes & Ux. v. Delorane, 3 Wils. 207; 2 Bl. Rep. 782; [*Yates v. Groves*, 1 Ves. jun. 280; *Carlos v. Fancourt*, 5 Term R. 482.]

And on the same principle which governed these cases, an order from the owner of a ship to the freighter, to pay money *on account of freight*, has been held to be no bill of exchange.

Banbury v. Lisset, 2 Str. 1211. β So of an order payable on a sale of certain goods. *De Forest v. Frarey*, 6 Cow. 151; 1 Cow. 691. γ

However, such a bill from the freighters of a ship to the person to whom the freight is due, if good in other respects, would certainly not be bad because it was made payable *on account of freight*, because indisputably there is a *personal* credit given to the drawer, the words *on account of freight* only expressing the consideration for which the bill was given.

Pierson v. Dunlop, Dougl. 571.

And there may be cases where the instrument may appear at first sight to be payable out of a particular fund, and in reality be otherwise, of which description the following case is one: A B, drew a bill of exchange, dated 25th of May, by which he requested M'Leod "one month after date to pay to Snee, or order, 9*l.* 10*s.* as his quarterly half-pay, to become due from the 24th of June to the 29th of September next by advance." M'Leod accepted it, and on his refusal to pay was sued in the Common Pleas, where judgment being given against him, he brought a writ of error in the King's Bench, and objected to the judgment that this case resembled the former cases, being payable out of a particular fund; but the court held that this bill was drawn on the particular credit of the drawer, not on that of the half-pay, for it was to be paid as soon as the quarter began, and whether that should ever become due or not; and the mention of the quarterly half-pay was only a direction how the drawee was to reimburse himself.

M'Leod v. Snee, 2 Ld. Raym. 1481; 2 Stra. 762; *Barnard*. 19, K. B.; β *Bank, &c. v. Sanders*, 3 Marsh. 184; *Varnu v. Nobleborough*, 2 Greenl. 123. γ

Of the distinction taken between bills and notes in this respect the following is an illustration:—"I promise to pay to William Burchell the sum of 10*l.* 12*s.* three months after date, for value received out of the premises in Rosemary Lane, late in the possession of Thomas Rower Sherwin." was held a good note under the statute.

Burchell v. Slocock, 2 Ld. Raym. 1545; [*Haussoullier v. Hartainck*, 7 Term R. 733.]

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{So is a note by which A promises to pay to the bearer 50*l.*, "being a portion of a value as under, deposited in security for payment hereof."

7 Term, 733, *Haussoullier v. Hartsinck*.}

But a bill or note must be absolutely payable at all events, and not depend on any particular circumstances which may or may not happen in the common course of things.

3 Wils. 213; 1 Burr. 325. β A bill of exchange drawn on a contingency is absolutely void. *Palmer v. Pratt*, 9 Moore, 358; S. C. 2 Bing. 185.*g*

{Thus, a promise to pay "on the sale, or produce immediately when sold, of the White Hart Inn, St. Alban's, and the goods, &c.," is no promissory note, although it be averred in the declaration that the White Hart and goods were sold before the action commenced.

Hill v. Halford, 2 Bos. & Pul. 413.

So, an instrument in form of a note, but with a memorandum written upon it, stating that it is taken for securing the payment of all such balances as shall be due from one of the makers to the payee to the extent of the sum mentioned therein, or that if any dispute shall arise respecting the subject which is the consideration of it, it shall be void, is no note.*(a)*

Hartley v. Wilkinson, 4 Camp. 127; 4 Maul. & S. 25. *(a)* But if the memorandum endorsed merely import a *wish*, it will not affect the validity of the note. *Stone v. Metcalf*, 4 Camp. 217; 1 Stark. 53. And no *parol* evidence of an agreement at the time to renew or give indulgence is admissible to defeat an action on a bill or note. *Hoare v. Graham*, 3 Camp. 57; *Bowerbank v. Monteiro*, 4 Taunt. 846; *Dukes v. Dow*, Sittings after East. term, 1817, *coram* Gibbs, C. J.; *Rawson v. Walker*, 1 Stark. 361; *Chit. on Bills*, 47, (7th ed.)

So, an instrument acknowledging the receipt of drafts for payment of money, and promising to pay the money specified in the drafts, is not a promissory note, for the payment of the money depends upon the drafts being honoured.

Williamson v. Bennett, 2 Camp. 417.]

Thomas Rogers made a bill of exchange, by which he requested Roger Lynch to pay to Henry Haydock, or order, the sum of 14*l.* 13*s.* out of a fifth payment, when it should become due: this was held not to be a good bill of exchange, on account of the uncertainty whether any fifth payment might ever become due, as well as on account of its being payable out of a particular fund.

Haydock v. Lynch, 2 Ld. Raym. 1563.

So, an order to pay money, "provided the terms mentioned in certain letters written by the drawer were complied with," is not a good bill, though the acceptance admit a compliance with those terms, for it was no bill until after such compliance, and if it was not a bill when drawn, it could never afterwards become one.

Kingston v. Long, B. R. M. 25 G. 3, *Bayley on Bills*, 12, (4th ed.)

Its uncertainty in this respect was one reason of the determination in the case of *Dawkes* against *Delorane*, it being an order to pay out of *Steward's* money when received, which might never happen.

Suprà, 778.

{So a note payable out of money arising from certain property when sold is not a promissory note within the statute; and cannot be declared on as such, though it be averred that the property was sold before the commencement of the action.

5 Term, 482, *Carlos v. Fancourt*; 2 Bos. & Pul. 413, *Hill v. Halford*.}

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So, a note "to pay a certain sum of money, or to render the body of J S to prison by such a day," is not a note on which an action will lie by the statute, after failure of rendering the body to prison, because it was not necessarily and originally for payment of money, but only became so by matter *ex post facto*.

Smith v. Boheme, cited 2 Ld. Raym. 1362, 1396; [Alves v. Hodgson, 7 Term R. 242.]

So, neither is a note "promising to pay money, if another do not pay it within a limited time;" for this is only an eventual promise.

Appleby v. Biddulph, cited 8 Mod. 363; 4 Vin. 240, pl. 16.]

{Nor a note payable when the circumstances of the maker will admit, without detriment to himself or family. An action will not lie on it without proving him in good circumstances.

4 Ves. J. 372, *Ex parte Tootell*.

Nor a note to bearer payable *in goods*.

2 Mass. T. Rep. 524, Clark v. King. See 1 Mass. T. Rep. 61.]

Also it hath been resolved, that if A give a note to B for the payment of a sum of money when he the said A should marry such a one; B cannot bring an action on such note, and declare as on a bill of exchange, setting forth the custom of merchants, &c., for that in truth there is no such custom, being only an agreement founded on a marriage brokerage, and to pay money on a collateral contingency; which contingency cannot be called trading, so as to come within the custom of merchants.

4 Mod. 242; Comb. 227, S. C.; Pearson v. Garret, [Beardersley v. Baldwin, 2 Stra. 1151, S. P.]

[So, a note "promising to pay to A B a sum of money, value received, on the death of a particular person, *provided* he leave me a sufficient sum to pay the same, *or if* I shall be otherwise able to pay it," is not good within the statute, because it is not absolutely payable at all events, but depends on two contingencies, neither of which may ever happen.

Roberts v. Peake, 1 Burr. 323.

In the case of notes, however, it is not necessary that the time of payment should be absolutely fixed; it is sufficient if, from the nature of the thing, the time must certainly arrive on which their payment is to depend.

Thus, a note "to pay to A or order, six weeks after the death of the defendant's father, for value received," was held to be negotiable within the statute; for there was no contingency by which it might never become payable, but it was only uncertain as to the time, which, it was said, was the case of all bills payable after sight.

Cooke v. Colehan, 1 Stra. 1217; {Willes, 393, S. C.;} [Hill v. Halford, 2 Bos. & Pul. 414.]

So, a note "payable to an infant, when he, the infant, should come of age," and specifying the time when that was to be, "*viz.*, on the 12th June, 1750," was held to be negotiable within the statute; for it would have been clearly good, if it had been made payable on the 12th of June, 1750, which is a day certain, without mentioning that the plaintiff was then to come of age, and it is not the less certain from the addition of that circumstance.

Per Lord Mansfield, Goss v. Nelson, 1 Burr. 227.

Thus, "a promise to pay within two months after such a ship shall be

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paid off," will make a good note : for the paying off of the ship is a thing of a public nature, and morally certain.

Andrews v. Franklin, 1 Stra. 24. [*Qu.* If a private ship ?]

So, "I promise to pay to George Pratt, or order, 8*l.*, on the receipt of his the said George Pratt's wages, due from his majesty's ship the *Suffolk*, it being in full for his wages, and prize-money, and short-allowance-money for the said ship," was held a good note on the authority of the last case ; and there being an averment that the wages were received, the plaintiff recovered.

Evans v. Underwood, 1 Wils. 262, 263.]

But it hath been held, that a note drawn in these words, *I promise to account with J S, or his order, for 50*l.* value received by me, &c.*, is a good negotiable note, within the statute 3 & 4 Ann. c. 9, and that the word *account* shall be construed the same as to *pay*, and not to render an account as factor or bailiff ; and the rather, because he is not only accountable to J S, but likewise to his *order* ; which he cannot be as factor or bailiff, and therefore it must be to pay the money to the endorsee, or order of J S.

Pasch. 11 G. 1, *Morris v. Lea*, Stra. 629 ; 2 Ld. Raym. 1396.

[Neither will the addition of extraneous circumstances vitiate a note. Thus, "I do acknowledge that Sir Andrew Chadwick has delivered me all the bonds and notes for which 400*l.* where paid him on account of Colonel Syнге, and that Sir Andrew delivered me Major Graham's receipt and bill on me for 10*l.*, which 10*l.*, and 15*l.* 5*s.* balance due to Sir Andrew, I am still indebted for, and do promise to pay ;" is good.

Chadwick v. Allen, 1 Stra. 706 ; [*Green v. Davies*, 4 Barn. & C. 235.]

The words "value received" being in general inserted in bills and notes, there seems to have been some doubt, whether they were essential : in one case, where the want of these words was objected, a verdict was given on that account against the instrument, but that case seems to be of very doubtful authority : in a subsequent case the same objection was made, but as the instrument was clearly defective on another ground, the court gave no opinion as to this point.

Banbury v. Lisset, 2 Stra. 1212 ; *Dawkes v. Delorane*, 3 Wils. 207.

On several occasions it appears to have been said incidentally by the court, and at the bar, that these words are unnecessary.

Fort. 282, *Barnard.* K. B. 88 ; 8 Mod. 267 ; 1 Show. 5, 497 ; 2 Ld. Raym. 1481, 1556 ; *Lutw.* 889 ; 1 Mod. Ent. 310.

And the point is now fully settled, that they are not necessary ; for as these instruments are always presumed to have been made on a valuable consideration, words which import no more cannot be essential.(a)

White v. Ledwick, B. R. H. 25 Geo. 3, Bayley, 34. {See 3 Cain. 286, *Lansing v. M'Killip*;} [*Grant v. Da Costa*, 3 Maul. & S. 352. (a) It is advisable, however, in all cases to insert the words *value received*, for unless an inland bill or note for the payment of 20*l.* or upwards contain them, the holder cannot recover interest and damages against the drawer and endorser, in default of acceptance or payment ; see 9 & 10 W. 3, c. 17 ; 3 & 4 Ann. c. 9, § 4. And if a bill or note contain these words, an action of debt may be sustained by the payee against the maker of each. *Bishop v. Young*, 2 Bos. & Pul. 78, 81 ; 1 Chit. on Bills, 67 ; and by the drawer against the acceptor, where the bill is payable to the drawer, or his order. *Priddy v. Henbrey*, 1 Barn. & C. 674. In a note it is decided that the words *value received* import *received from the payee*. *Clayton v. Gosling*, 5 Barn. & C. 360.]

Whether it be essential to the constitution of a bill of exchange, that it

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should contain words which render it negotiable, as "to order," or "to bearer," seems not, hitherto, to have received a direct judicial decision.^(a) There are two cases in which the want of such words was taken as an exception, but as there were other objections on which the bill was in both cases held to be bad, it was not thought necessary to decide on that point.

Banbury v. Lisset, 2 Stra. 1212; *Dawkes v. Delorane*, 2 Wils. 212. [(a) It is now settled that these words are not essential. *Smith v. Kendall*, 6 Term R. 123; *Rex v. Box*, 6 Taunt. 325; *Lord Raym.* 1545; *Bayley*, 29.]

In another case the same exception was taken and overruled, but under such circumstances as that the point was not generally determined. The defendant had given the plaintiff a draft on one Heddy, for the payment of a sum of money for work done by the plaintiff for the defendant: the plaintiff had neglected to demand payment for a considerable time after the draft was due; and in the mean time Heddy became insolvent. The plaintiff brought his action for work and labour, and the defendant at the trial proved his having given this draft to the plaintiff in payment. But not being payable to the plaintiff or order, the jury considered it as not being a bill of exchange, and gave a verdict for the plaintiff. On an application for a new trial, the court thought it unnecessary to decide on the general question, whether the words importing negotiability were essential to the constitution of a bill of exchange, because they were of opinion that by accepting the draft, and keeping it so long after it became payable, the plaintiff had given credit to Heddy, and discharged the defendant.

Chamberlyne v. Delarive, 2 Wils. 353.

Yet it has been ruled that such words are not necessary in notes, and that the person to whom they are made payable may maintain an action on them, within the statute, against the maker. And there are several cases in the books of reports where such words were omitted, and no exception taken on that account. The reason of this indulgence to notes may be, that they have less reference to trade and distant commerce, being properly no more than engagements between party and party; and the statute being remedial, the benefit of it has been extended beyond the literal words.

Per Lord Hardwicke, *Moore v. Paine*; Ca. temp. Hardw. 288; {3 Cain. 137, *Downing v. Backenstoos*.}

{But to make either a note or a bill negotiable, it is necessary that such words should be inserted.

1 Dall. 194, *Gerard v. La Cote*; 2 Dall. 249, *Barriere v. Nairac*; *Chitty*, 59.}

||Where the bill or note is payable otherwise than to bearer, it must contain the name of the payee. Uncertainty as to the person to whom the payment is to be made will prevent an instrument from being a bill or note; as where it is made payable to A or B.

Blankenhagen v. Blundell, 2 Barn. & A. 417; *Cruchley v. Clarence*, 2 Maul. & S. 90; *Cruchley v. Mann*, 5 Taunt. 529. ¶ A promissory note made payable to the order of the person who should thereafter endorse the same, is negotiable. *The United States v. White & Hungerford*, 2 Hill, 59.g

If a bill or note is issued with a blank for the payee's name, any *bond fide* holder may insert his own name as payee; but until the blank is filled up it is not a bill or note.

||*Rex v. Randall*, *Bayley*, 31, (4th ed.)||

It must also be observed, that in most of the cases where the several instruments have been denied the privilege of bills and notes, it is not, for that

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reason, to be concluded that they are of no force: when the fund from which they are to be paid can be proved to have been productive, or the contingency on which they depend has happened, they may be used as evidence of a contract, according to the circumstances of the case, or according to the relation in which the parties stand to one another.

{Vide 1 Bay, 368, *Scarborough v. Geiger*.}

William Watts, a merchant, who traded to Gibraltar, employed Moses Massias as his factor there, who used to consign Watts's goods to certain agents in Barbary for sale. Massias used to keep an account with the agents, and another with Watts, but Watts had no communication with the agents. On the 21st of May, 1772, Watts drew a bill in the following terms, for the balance of an account that day stated between him and Maber and Kentish, merchants with whom he had dealings:—

“Sir,—Please to pay to Messrs. Maber and Kentish, or order, 195*l.* 14*s.* 10*d.* out of the produce of goods you have of mine, now lying at Gibraltar, Barbary, and Leghorn, as soon as the same shall come into your hands, after discharging the present acceptances.

“WILLIAM WATTS.

“To Mr. Moses Massias, No. 63, Prescott Street.”

Which bill Massias accepted in the following words underwritten,

“I agree to conform to this order,

MOSES MASSIAS.”

Before this bill was paid, Watts became a bankrupt, and Massias refusing payment, an action was brought against him for “money had and received to the use of the plaintiff.” On the trial it appeared that Massias had large quantities of goods of Watts's in his hands, in 1773, to the amount of 1657*l.*, and more in 1772; that he had paid large sums for Watts, but whether for engagements prior to 1772, or not, did not appear.

The defendant gave evidence of several prior engagements, but these did not cover the whole account; and also that there was, at the time of acceptance, and still remained, a balance due to Massias himself of 870*l.* There was a verdict for the plaintiff; and an application being made by the defendant for a new trial, the court observed that the question was, Whether the defendant had in his hands 195*l.* for the use of the plaintiff? He was proved to have had goods to the amount of 1657*l.*, and that his acceptances, in the common and technical sense of the words, as applied to bills of exchange, together with certain other endorsements by which he had engaged himself to pay money for Watts, left a balance in his hands more than sufficient to pay the plaintiffs; if the balance of 870*l.* due to Massias himself be excluded. For this balance, then unliquidated, it never could have been meant to provide, nor was it meant that the bill or its acceptance should be subject to it, for then there would have been fraud in the drawer, and also in the acceptor; both knew, or must be supposed to have known, at least Massias knew, how the balance then stood. If he meant to have reserved his own balance he should have made a special acceptance; but having accepted it generally in the terms of the draft, subject only to prior acceptances, he shall not shelter himself by this concealed balance due to himself in the course of a running account.

Maber v. Massias, Bl. Rep. 1072.

It having been found by experience, that trade and commerce suffered materially from the circulation of bills, notes, and drafts for very small sums, which passed as cash, and many of them being made payable under certain

(M) Bills of Exchange, &c. (*What is a good Bill, &c.*)¹

terms and restrictions with which the poorer sort of manufacturers, artificers, labourers, and others could not comply, without subjecting themselves to great extortion and abuse, the legislature has thought proper to lay certain restraints on bills or notes under a limited sum.

Vide preamble to statute 15 G. 3, c. 51. [The 48 Geo. 3, c. 88, repeals this statute, but re-enacts these sections, and makes further provision for enforcing them. See § 4.]

15 Geo. 3, c. 51, § 8. All notes and bills for the payment of any sum under twenty shillings, which had been issued *before* the 24th of June, 1775, were made payable on demand.

§ 1. Notes and bills for less than twenty shillings, issued *after* the 24th of June, 1775, are declared void. § 2. And any person publishing or uttering such bills or notes, or in any manner engaged in the negotiation of them, is liable to a penalty of not more than 20*l.* nor less than 5*l.*, to be recovered and applied in the manner pointed out by the act, which was to continue for five years, § 13.

The good effects of this act, 17 G. 3, c. 30, being found, further provisions for the same purpose were made by another two years after.

All promissory or other notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferable, for the payment of 20*s.*, or for any sum of money above that sum and less than 5*l.*, or on which 20*s.*, or above that sum, and less than 5*l.*, shall remain undischarged, issued after the first of January, 1778, shall specify the names and places of abode of the persons respectively to whom or to whose order they shall be made payable; shall bear date before or at the time of drawing or issuing them, and not on any subsequent day; shall be made payable within the space of twenty-one days next after the day of the date; and shall not be transferable or negotiable after the time limited for the payment: and every endorsement shall be made before the expiration of that time, and bear date at or before the time of making it, and shall specify the name and place of abode of the person or persons to whom or to whose order the money is to be paid: and the signing of every such note, &c., and also every endorsement, shall be attested by one subscribing witness at the least; and all notes, &c., of the above description not having these requisites shall be utterly void.

§ 2. The same penalties, recoverable in the same way as in the former act, are imposed on every one uttering, publishing, or negotiating such notes, &c., without the requisites prescribed.

§ 3. And all negotiable notes, &c., issued before the 1st of January, for any sum between the sum of 20*s.* and 5*l.*, or on which 20*s.* or less than 5*l.* remain undischarged, are made payable on demand.

§ 4. And this act and the former act are continued not only for the residue of the five years of the former, but also for other five years.

And by a subsequent statute, 27 G. 3, c. 16, both the former are made perpetual.]

[By 7 Geo. 4, c. 6, banking companies are prohibited, under a penalty, from signing, issuing, or re-issuing, after April 1st, 1829, any promissory notes, under 5*l.*, and from signing and issuing any *new* notes under 5*l.*, immediately from the passing of the act.]

It hath been resolved, that a bill of exchange drawn by a gentleman, who is no trader, shall notwithstanding make him responsible within the custom of merchants; for otherwise persons of distinction travelling abroad would suffer in their credit; and it might bring a general inconveniency on trade itself, when it came to be known to foreign merchants, that there were some

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who, though they took upon themselves to draw bills of exchange, yet were not liable to the payment thereof.

Carth. 82; Show. 125; Witherley v. Sarsfield, Comb. 45; 152, S. C. ill reported.

{An endorsement by the obligee on the back of the bond directing its contents to be paid "to J H or order, value received," is a good bill of exchange within the custom of merchants; and the obligee is responsible, though the bond is not in its nature negotiable.

1 Bay, 66, Bay v. Freazer.}

¶By the stat. 6 Ann. c. 22, § 9, and 15 Geo. 2, c. 13, § 5,(a) it is enacted, "that no partnership exceeding six persons shall borrow, owe, or take up any more money on their bills or notes payable on demand, or at any less time than six months, during the continuance of the privilege of exclusive banking granted to the Bank of England;" but this provision in favour of the Bank of England, except as to sixty-five miles round London, has been repealed by the late statute 7 Geo. 4, c. 46, § 1, 2.

(a) This enactment does not extend to the East India Company, by 33 Geo. 3, c. 59, § 106, 109, 110.¶

3. *Who shall be said liable to the Payment thereof: and therein of suing the Drawer, Endorser, or Acceptor.*

It is clear, that(b) every drawer of a bill is liable to the payment thereof, as is every(c) acceptor and endorser: also,(d) if there are several endorsers of the same bill, the last endorsee may bring his action against the first endorser, or any of them; for the endorsement is *quasi* a new bill, or at least a warranty, as some books express it, by the endorser, that the bill shall be paid.

(b) That if several drawers subscribe, all are liable. Molloy, 278. (c) And having once accepted, it cannot afterwards revoke it. Molloy, 283. ¶If for the mere purpose of raising funds, one of two joint owners of a vessel draws a bill, and the other endorsed it, neither is liable to the other on the bill. Gardner v. Cleveland, 9 Pick. 336. The endorser is not liable for the costs of a suit commenced by the holder against the acceptor, nor for commissions paid on collection of part of the money from him. Bangor Bank v. Hook, 5 Greenl. 174. See as to acceptor's liability to costs incurred by endorser, Steele v. Sawyer, 2 M'Cord, 459; Barnwell v. Mitchell, 3 Conn. 101. A subsequent endorser of a bill, discounted for the drawer's accommodation, can recover of a prior endorser the whole amount recovered against him by the holder, or paid by him to the holder. Wood v. Repold, 3 Har. & J. 125.g (d) Skin. 343, pl. 11; Ld. Raym. 181; Stra. 479. ¶But the *bona fide* holder of a bill of exchange endorsed in blank, does not become an endorser, by writing a direction to pay to a particular person over such blank endorsement. Evans v. Gee, 11 Peters, 80. Where a bill is drawn in a foreign country, and endorsed by one who resides there, the endorser is answerable to the holder only according to the laws of that country. Powers v. Lynch, 3 Mass. 77. See 12 Wend. 439.g

¶The drawer and the endorser are liable to an action by the holder, immediately after the bill is refused acceptance, and before it is payable, on giving due notice of non-acceptance.

Wallace v. Agry, 4 Mason, 336; Corser v. Craig, 1 Wash. C. C. 424; Evans v. Gee, 11 Pet. 80; Weldon v. Buck, 4 Johns. 144; Miller v. Hackley, 5 Johns. 375; Taan v. Le Gaux, 1 Yeates, 204; Watson v. Loring, 3 Mass. 557; Lenox v. Cook, 8 Mass. 460; Sterry v. Robinson, 1 Day, 11; Winthrop v. Pepon, 1 Bay, 468; Evans v. Bridges, 4 Porter, 348; Suydam et al. v. Westfall, 4 Hill. 211. And this liability is not discharged by the holder's subsequently protesting, &c., the bill for non-payment. 8 Mass. 460; 3 Johns. 202; 4 Mason, 336. Nor by the holder's delay to return the bill and demand payment of the endorser, though the drawer may have failed in the mean time. Wild v. Passamaquoddy Bank, 3 Mason, 505. If the drawer has no funds in the payee's hands, the payee may sue immediately after non-payment, without

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giving notice, &c. *Baker v. Gallaher*, 1 Wash. C. C. 461; *Read v. Wilkinson*, 3 Wash. C. C. 514.^g

So, if a bill be drawn upon A, and he accept it, and afterwards refuse payment, upon which the bill is protested, the person to whom it is payable may bring several actions against the acceptor and the drawer; for the protest is no discharge of the acceptor.

Molloy, 273.

But though the drawer, acceptor, and endorser are all liable, yet the party can have but one satisfaction: but, until such satisfaction is actually had, he may sue all, or any of them; and accordingly it was adjudged in the Exchequer Chamber, where the case was, An endorsee sued the drawer, and had judgment against him; and he also brought an action against the endorser, to which the endorser pleaded the judgment against the drawer, but the plea was held ill; for that the judgment was no satisfaction, without which the party could not be barred of the remedy which he had against the other.

3 Mod. 86; *Latw.* 880, 882; *Skin.* 255, pl. 3; Co. 4, 32, S. C., *Claxton v. Swift*. {In Virginia, an endorsee of a promissory note cannot recover in an action at law against a remote endorser, but he may in equity. He may have an action at law against his immediate endorser. The statute 3 and 4 Ann. c. 9, is not in force in that state. 1 Cranch, 290, *Mandeville v. Riddle*; *Ibid.* 367; 3 Cran. 311, *Harris v. Johnston*. And see 1 Cran. 181, *Clark v. Young*.}

[Neither is the engagement of an endorser discharged by an ineffectual execution against the drawer, or any prior or subsequent endorser.

A bill was endorsed by Sheridan, and afterwards by one Boon, and came into the hands of Hayling, who sued Boon, and took him in execution, and afterwards let him out on a letter of license without paying the debt. He then sued Sheridan, and held him to bail: Sheridan not paying the bill, Hayling brought a third action against Mulhall, one of the bail, who insisted that the debt was satisfied by the imprisonment of Boon. But it was observed by the court, that each endorser is independent of the rest, and that the bill-holder had a right to sue all the endorsers till the bill was satisfied: the law indeed so highly regards the liberty of the subject, that the taking of his body in execution is, with respect to him, a full satisfaction of the debt. But it only operates as a discharge to the identical person so imprisoned; it does not discharge even his goods after his death, since the statute of James the First. The remedy still remains, after the death or discharge, against every other endorser.

Hayling v. Mulhall, 2 Bl. Rep. 1235;] {and see *M'Donald v. Bovington*, 4 Term R. 825; *Bayley*, 268, 269, (4th ed.)} {But had the plaintiff first sued a prior endorser and discharged him from execution, he could not support an action against a subsequent endorser. 2 Bos. & Pul. 62, per Lord Eldon, in *English v. Darley*; 4 Dall. 275, *M'Fadden v. Parker*.}

{The endorser is not responsible if he endorse the note specially thus, "for value received I order the contents of this note to be paid to A B at his own risk." But by such endorsement the note becomes the absolute property of the endorsee, and remains negotiable in his hands.

3 Mass. T. Rep. 225, *Rice v. Stearns*.

An endorsee for a valuable consideration, of a note not negotiable, may write over the name of the endorser, a promise to pay the contents of the note to the endorsee, who may maintain an action upon such promise.

3 Mass. T. Rep. 274, *Josselyn v. Ames*.}

And not only the drawer, acceptor, and endorser are liable, but also, by

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the custom of merchants, if one merchant draw a bill which is protested, and another hearing thereof, declare that he, for the honour of the (a) drawer, will pay the contents; and thereupon subscribes in these or the like words, *I, the undersigned, do bind myself as principal, according to the custom of merchants, for the sum mentioned in the bill of exchange, whereupon this protest is made, &c.*, this shall as effectually bind him, as if he had been the original drawer; and by this the person to whom the bill is payable hath his remedy, both against such person, as surety, and also against the principal. (b) But the principal, or original drawer, is liable to him who thus subscribes for his honour.

Molloy, 281, 285. (a) So, if one subscribe for the honour of him who subscribes for the honour of the drawer. Carth. 129; Lut. 196. [(b) But if he only *accept supra protest*, it is a conditional engagement, and to render such acceptor absolutely liable, the bill must be duly presented to the drawee for payment, and protested in case of refusal. Hoare v. Cazenove, 16 East, 391. And presentment to the drawee for payment must be averred in the declaration, or the judgment may be arrested. Williams v. Germaine, 7 Barn. & C. 468.]

If A draws a bill on B, who has effects of his in his hands, and B accept the bill, which is afterwards protested for non-payment, and the bill be afterwards endorsed to A, the drawer, he may maintain an action as endorser against B; but if there has been no effects of A's in the hands of B, so that the acceptance was only for the honour of A, the drawer, he could have no action; for thereby the money would be recovered only to be repaid again.

10 Mod. 36, 37. β A bill which has been paid by the drawer in default of payment by the acceptor, may afterwards be re-issued by the drawer, and the acceptor will be still liable to pay it. Hubbard v. Jackson, 1 M. & P. 11; S. C. 3 C. & P. 134. And see Callow v. Lawrence, 3 M. & S. 95; and Beck v. Robley, 1 H. Black. 89, n.g

It hath been held by some opinions, that though an endorser be liable, that yet in an action against him, it must be alleged in the declaration, that the money was demanded of the drawer, he being the principal debtor, and the endorser only a surety, warranting payment in case the drawer made default: but the better opinion seems to be, that this is not material, every endorser being to be considered as making a new bill, or note, on whose credit alone perhaps the money was given, and the drawer not at all known to the endorsee. It seems, however, to be more advisable to give it in evidence, that there was a demand on the drawer, or an endeavour to find him out; but this also hath been thought by (c) some not to be necessary.

Salk. 126, pl. 6; *cont.* Salk. 133, pl. 10. (c) The Chief Justices Holt, Raymond, and Eyre, held, that a demand on the drawer was requisite to be given in evidence, the endorser's engagement being only conditional.—But Parker, Pratt, and King held it not to be necessary; said by Lord Hardwicke, Mich. 10 Geo. 2, to have been so ruled by them at the sittings; and of the latter opinion he seemed to be himself; and held it clearly not to be necessary to allege it in pleading. [And it is now settled, that to entitle the endorsee to recover against the endorser of an *inland* bill of exchange, it is not necessary to demand the money of the first drawer. Heylin v. Adamson, 2 Burr. 669.] β It is no excuse for not making a demand of payment of a note, that the maker of the note is absent on a voyage at sea, the maker having a domicile within the state. When no demand was made of the maker, in such case, the endorser was holden not liable. Dennie v. Walker, 7 N. H. 199.g

β Underneath the signature of the payee of a negotiable note endorsed by him in blank, were written the following words signed by the defendant: "I guaranty the payment of semi-annual interest on this note as well as the principal." It was held, that such guarantee was not negotiable, in itself, nor made so by being written upon a negotiable instrument; and

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therefore that no action could be maintained on such guarantee by one who subsequently became the holder of the note.

True v. Fuller, 21 Pick. 140. But see *contra* Watson's Ex'rs v. M'Laren, 19 Wend. 557.*g*

4. *Who shall be said entitled to the Money.*

The money is to be paid to him in whose favour the bill is drawn, or to the endorsee, in case it be endorsed over; of which endorsement it seems the drawer, acceptor, and drawee must take notice at their peril; also, if there are several endorsers and endorsees, the last endorsee is entitled to the money.

Carth. 130.

If a bill of exchange is made payable to A, who endorses it to B, who endorses it to C, and it is protested for non-payment; B may bring an action on this bill, notwithstanding his endorsement.

Show. 163, Dekers v. Harriat.

If A draw a bill of exchange, payable to B, for the use of C, and B for valuable consideration endorse it over to D, D may bring an action against A, the drawer; and he cannot plead that the money was extended in his hands at the suit of the king for a debt due from C, for C being only *cestui que trust*, had only an equitable interest, and no (a) legal remedy for the money; and B is only responsible in equity to C for the breach of trust.

Carth. 5; Skin. 264, pl. 2; Show. 5, S. C.; Evans v. Cramlington, adjudged, and affirmed in the Exchequer Chamber; 2 Vent. 309, S. C. adjudged; it appearing that the bill was endorsed before any seizure, or writ of extent issued out, and that an endorsement on such bill was good by the custom of merchants. (a) So, in debt on a single bill made to A, to the use of him and B, the defendant pleads a release made to him by B, and on demurrer it was adjudged for the plaintiff without difficulty; for B is no party to the deed, and therefore can neither sue nor release it; but it is an equitable trust for him, and suable in the Chancery, if A will not let him have part of the money; and the book of E. 4, cited, that he might release in such case, was denied to be law. Lev. 235, Offy v. Ward.

5. *Of the Endorsement; and of its Effect in transferring the Property to the Holder.*

Endorsement is a term known in law, which, by the custom of merchants, transfers the property of the bill or note to the endorsee; and is usually made on the back of the bill, and must^{1} be in writing: (b) but the law hath not appropriated any set (c) form of words, as necessary to this ceremony; and therefore it hath been held, that if a man write on the back of a bill of exchange, *This is to be paid to J S, or The content of this bill is to be paid to J S*, and set his hand to it, this is a good endorsement.

Molloy, 281; 7 Mod. 86, 87. *β* By the law, merchant bills can be transferred only by endorsement. Instine v. Williamson, 2 Bibb, 83; and a bill of exchange is negotiable *ad infinitum*, until it has been paid by or discharged on behalf of the acceptor. Callous v. Laurence, 3 M. & S. 95, Ellenborough.*g* ^{1} A sale and delivery of a promissory note payable to order, by the payee, without any endorsement or assignment, is not of itself a legal ground of an assumpsit, to enable the purchaser, in his own name, to sue the maker. 1 Dall. 369, Waters v. Millar.} *¶*(b) An endorsement with a pencil is a valid endorsement within the custom of merchants. Geary v. Physic, 5 Barn. & C. 234; and although an endorsement is usually made on the back of a bill, yet it may be made by writing on the face of it, for the writing on the face of a note is of the same effect as an endorsement, and is always accepted and taken as such by the courts of law. *Per Cur.* Yarborough v. Bank of England, 16 East, 12. *¶* *β* And an endorsement on a bill purporting to transfer it, will be presumed *prima facie* to be genuine. Blair v. Pollock, 6 Lit. 208.*g* (c) An endorsement set forth in these words, *indorsavit super billam illam contenti. billas illius solvend.*, is sufficient after verdict, with-

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outshowing that it was subscribed. Salk. 130, pl. 14. [A blank endorsement will transfer the property, and is more frequent than an endorsement in full. Its effect is to render the bill or note afterwards transferable by delivery only as if it were payable to bearer, for by only writing his name the endorser shows his intention that the instrument should have a general currency, and be transferred by every possessor. Dougl. 633, 639.] β A deed conveying bills, notes, &c., does not transfer them so as to authorize the holder to sue in his own name. *Hopkirk v. Page*, 2 Brock. 20. γ

So, if A, having a bill of exchange, writes his name on the back of it, and sends it to J S his friend to get it accepted, which is done accordingly; A, notwithstanding his name, may bring an action against the acceptor; although objected, that the property was transferred to J S, for J S had it in his power either to act as servant or assignee; and if he had filled up the blank space, making the bill payable to him, that would have witnessed his election to have received it as endorsee; but that being omitted, his intention is presumed to act only as servant to A, whose name he would use only in order to write the acquittance over it.

Salk. 126, pl. 4, *Clerk v. Pigot*; *Molloy*, 281, S. P.; and said to be an usual practice among merchants. β If an endorsee hold a bill merely as the payee's agent, his agency may be annulled at the payee's pleasure; and on a suit by such endorser against the drawer, the nature of his agency may be shown by parol, after notice from the payee to the drawer not to pay the endorsee. *Barker v. Prentiss*, 6 Mass. 430. See also *Lonsdale v. Brown*, 3 Wash. C. C. 404; *Morris v. Foreman*, 1 Dall. 193; 2 Dall. 147; 1 Yeates, 99. γ [Hence, a man to whom a bill was delivered with a blank endorsement, and who carried it for acceptance, was admitted, in an action of trover for the bill against the drawee, to prove the delivery of it to the latter. *Lucas v. Haynes*, 1 Salk. 130; 2 Ld. Raym. 871.] β An endorsement in blank, on a promissory note or bill of exchange, authorizes the filling it up, either before or after action brought, with the name of the party for whose use the suit may be brought. *Evans v. Gee*, 11 Pet. 80. γ

A bill payable to a man's order is payable to himself, and he may bring an action thereon, averring that he made no order, &c.

Salk. 130, pl. 16; *Comb.* 401; {5 East, 476, *Smith v. McClure*.}

So, where a bill of exchange was endorsed in this manner, *Pay the contents of this bill unto the order of J S*, who brought his action as endorsee, averring he had made no order to anybody to receive the money; and on demurrer it was urged, that J S could not maintain an action, because the endorsement was not to him, but to his order: the court held the action well brought against the endorser; and that among tradesmen this form of endorsement is commonly used, although it is intended to be made payable to the person whose order is mentioned.

Carth. 493, *Fisher v. Pomfret*. β But an order in this form "On 1st January, 1836, pay to my order \$5000 for value received, and charge the same to my account for transporting the United States mail," is not negotiable so as to entitle the holder to sue in his own name. *Reese v. Knox*, 2 Whar. 233. γ

β An endorsement of a bill to the treasurer of the United States—it having been purchased with their funds and for their account—passes an interest therein to the United States, and authorizes a suit thereon in their name.

Dugan v. United States, 3 Wheat. 172; *United States v. Barker, Paine*, 156. γ

As to the endorsing of bills, a difference has been taken between a bill payable to J S or bearer, and J S or order; that the first is not assignable by the contract, so as to enable the endorsee (*a*) to bring an action, if the drawer refuse to pay; because there is no such authority given to the party by the first contract; and the effect of it is only to discharge the drawee, if he pays it to the bearer, though he comes to it by trover, theft, or other-

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wise; but when the bill is payable to J S, or order, there an express power is given to the party to assign, and the endorsee may maintain an action.

Salk. 125, pl. 2; 3 Lev. 299; Salk. 133; Skin. 343, pl. 11; Comb. 204, 466. [(c)] It is absurd to endorse them: they pass merely by transfer. *Vide infra*. β By an endorsement in full, all the legal interest is transferred to the endorsee, who alone can maintain an action on the bill. *Bower v. Duval*, 1 Gill & Johns. 179. But when a bill is returned to the last endorser after protest, he may strike out his endorsement, though it be in full, and maintain an action in his own name. *Dugan v. United States*, 3 Wheat. 183; *United States v. Barker, Paine*, 156; *Picquet v. Curtis*, 1 Sumner, 480. See also *Morris v. Foreman*, 1 Dall. 193; 2 Dall. 147; 1 Yeates, 99; 4 Johns. 31. And a holder of a bill with several endorsements in blank, may strike out all the endorsers' names after the first, and write over the first endorser's name an assignment to himself. *Ritchie v. Moore*, 5 Munf. 388; *S. P. Craig v. Broun*, Pet. C. C. 171; *Bell v. Moorehead*, 3 Marsh. 158. See *Cock v. Fellows*, 1 Johns. 143.γ

Also, though an assignment of a bill, payable to J S or bearer, be no good assignment to charge the drawer with an action on the bill, yet it is a good bill between the endorser and endorsee, and the endorser is liable to an action for the money; for the endorsement is in nature of a new bill.

Salk. 125, pl. 2, 133; Skin. 343, pl. 11, 411. β Every endorsement of a bill may be regarded as a new bill drawn by the endorser on the acceptor in favour of the endorsee; and the endorsee may sue the acceptor, though the bill be not payable to order, and even though no payee is mentioned in the bill. *Van Staphorst v. Pearce*, 4 Mass. 258. The endorsement of a note not negotiable, is not an original undertaking between the endorser and endorsee; but it is collateral, and payment must be demanded, and notice given to the endorser, as upon negotiable paper. The endorsement of such a note, by a person not a party to it, is a guarantee. *Parker v. Riddle*, 11 Stanton, 102.γ

So, it hath been adjudged, that an endorsee of a bill, payable to J S or bearer, may maintain an action against the drawer, on alleging a special custom, that such bill should bind him; which custom is so found or confessed by the defendant.

Salk. 125, pl. 2; 3 Lev. 299.

Also, in cases of bills purchased at a discount, there is said to be this difference, that if it be a bill payable to A or bearer, it is an absolute purchase; but if to A or order, and it is endorsed blank, and filled up with an assignment, the endorser must warrant it as much as if there had been no discount.

Salk. 128.

β Every endorsement of a bill in blank transfers the interest therein to the endorsee, discharged from all obligations between the original parties, which do not appear on the bill itself, or of which he has no notice.

Winkinson v. Nicklin, 2 Dall. 398; *S. P. Perry v. Crammond*, 1 Wash. C. C. 100; 1 Wash. C. C. 44; *Humphries v. Blight*, 4 Dall. 370.γ

A bank bill payable to A or bearer, being given to A and lost, was found by a stranger, who transferred it to C for a valuable consideration; C got a new bill in his own name; and *per Holt, C. J.*,—A may have trover against the stranger who found the bill, for he had no title; though payment to him would have indemnified the bank; but A cannot maintain trover against C, by reason of the course of trade, which creates a property in the assignee, or bearer.

Salk. 126, pl. 5; [but see *post*, *contra*.]

[A bank note for 21*l.* 10*s.* payable to one William Finney, or bearer, on demand, was sent by Finney under cover by the general post to his correspondent in Oxfordshire; the mail on the same night was robbed, and this note among others taken and carried away by the robber; it afterwards came

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into the possession of one Miller, an innkeeper, for a full and valuable consideration, in the usual course of his business, without any notice or knowledge of its having been taken out of the mail. Finney hearing of the robbery, applied to the bank to stop the payment of this note, which was ordered, on his entering into security to indemnify the bank; Miller afterwards presented the note for payment, and delivered it to Race, a clerk of the bank, who refused either to pay it or re-deliver it. Miller brought an action of trover against Race, for the recovery of the note; and a case stating these circumstances coming before the court, it was held, that the plaintiff was entitled to recover; because there appeared no circumstance of collusion in him; he had taken the note in the usual course of his business, for a valuable consideration, and the currency of these notes and the nature of trade required that the fair holder should be protected even against the true owner, who could only recover them back from the finder, or any other person who had given no value for them.

Miller v. Race, 1 Burr. 452. [See Lawson v. Weston, 4 Esp. Ca. 56, which is in effect overruled by Gill v. Cubit, *infra*.]

Vaughan, a merchant in London, gave to Bicknell, one of his ship's husbands, a draft on his banker, Sir Charles Asgill, payable to ship Fortune, or bearer; Bicknell lost the draft; the person who found it, or at least was in possession, however he might have obtained that possession, went four days after the note was payable to the shop of Grant, a tradesman at Portsmouth, and having bought some tea, gave him the note in payment, and desired to have the balance. Grant stepped out to make inquiry who Vaughan might be, and being informed he was a responsible man, and that the note was in his handwriting, gave the change out of the note, retaining the price of the tea. Vaughan being apprized that Bicknell had lost the note, sent notice to Sir Charles Asgill not to pay it. Payment being accordingly refused, Grant brought his action against Vaughan as the drawer. The cause was tried by a special jury of merchants, who found for the defendant. On an application for a new trial, the court held, that these notes were transferable by mere delivery, and however the true owner may have lost them, the fair possessor for a valuable consideration was entitled to the money, and therefore granted a new trial.

Grant v. Vaughan, 3 Burr. 1516; 1 Bl. Rep. 485.

The same principle applies to the case of a bill negotiated with a blank endorsement.

A bill was drawn at Halifax, by Rhodes and another, on Smith, Payne, and Smith, bankers in London, payable to William Ingham, or order, thirty-one days after date, for value received. Ingham endorsed it in blank; John Daltry received it from him, and endorsed it in the same manner, and delivered it to Joseph Fisher; it was stolen from Fisher, at York, without any endorsement by him; Peacock, a mercer at Scarborough, afterwards received it from a man unknown, who called himself William Brown, and by that name endorsed it to Peacock, of whom he bought cloth and other articles in the way of his trade as a mercer, and gave him that bill in payment, receiving the balance in cash and small bills: it appeared that Peacock did not know the drawers, but had, several times before that, received bills drawn by them, which were duly paid. Peacock tendered this bill for acceptance and payment to the drawees, who refused; on which he brought an action as the endorsee of Ingham against the drawers. A verdict by

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consent was found for the plaintiff, subject to the opinion of the Court of King's Bench, on a special case stating the preceding facts. The court held, that there was no difference between a bill or note endorsed blank, and one payable to bearer. They both pass by delivery, and possession proves property in both cases. The holder of either cannot with propriety be considered as assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject: if this rule were applied to bills and notes, it would stop their currency: it would render it necessary for every endorsee to inquire into all the circumstances, and the manner in which the bill came to the endorser: but the law is now clearly settled, that a holder coming fairly by a bill or note is not to be affected with the transaction between the original parties, except in such cases as depend on particular acts of parliament.

Peacock v. Rhodes et al., Dougl. 613.

|| But the authority of these last three cases has been shaken by recent decisions; and it is now held, that a party taking a bill which has been stolen or lost, cannot recover upon it, if he took it under circumstances which ought to have excited the suspicions of a prudent and a careful man.

Gill v. Cubitt, 3 Barn. & C. 466; Down v. Halling, 4 Barn. & C. 330; Snow v. Peacock, 3 Bing. 406. *β* But *semble*, that the old established rule of law, "That the holder of bills of exchange endorsed in blank, or other negotiable securities transferable by delivery, can give a title which he does not himself possess, to a person taking them *bonâ fide* for value," is not to be qualified by treating it as essential that the person should take them with due care and caution, but that the person taking them *bonâ fide* for value has a good title, though he take them without care or caution, except so far as the want of such care and caution may affect the *bonâ fides* and honesty of the transaction. Foster v. Pearson, 1 C. M. & R. 849; 5 Tyr. 255.*g*

If a bill or note, transferable by delivery, be lost, the loser should give immediate notice to the drawer or persons who are to pay it. And if such persons afterwards pay it to a person who has not taken it *bonâ fide*, or paid value for it, they will be responsible to the loser.

Lovell v. Martin, 4 Taunt. 799.||

But a transfer by endorsement, where that is necessary, can only be made by him who has a right to make it, and that is strictly only the payee, or the person to whom he or his endorsee have transferred it, or some one claiming in the right of some of these parties.

Where a bill or note is drawn in favour of two or more in partnership with one another, an endorsement by one will bind both, if the instrument concern their joint trade; so where it is in favour of them or either of them, an endorsement by one is a sufficient transfer, though they be not in partnership.

β One of several joint holders of a bill may transfer the whole interest therein by his endorsement. Snelling v. Boyd, 5 Monr. 172. And one partner may endorse a note in the name of the firm, and sue the maker in his individual capacity as endorsee. Kirby v. Cogswell, 1 Caines, 505.*g*

So, where a bill drawn by two is made payable to them or their order, it would seem from principle that either might transfer without the other; for when two persons join in the same bill, they hold themselves out to the world as partners, and, for that purpose, are to be treated as such; and when a bill goes out into the world, the persons to whom it is negotiated are to collect the state and relation of the parties from the bill itself. If they appear on the bill as partners, it may be of less public detriment to subject

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them to the inconvenience of being treated as such, than to permit them to deny that they are so. But there is an universal usage among all the bankers and merchants in London, that in such a case, an endorsement by one of the payees only is void.

Carvick v. Vickery, Dougl. 653, in the notes.]

A note payable to a feme sole, or order, who afterwards marries, can only be endorsed by the husband.

10 Mod. 246; *Stra.* 516; *Theo. Evid.* 81; [3 Wils. 5.]

β A note made payable to a married woman, is, in law, a note to the husband, and becomes instantly his property; and her endorsement transfers no property in the note.

Savage v. King, 5 Shepley, 301. And such note passes by the endorsement of the husband alone, during coverture. *Mason v. Morgan*, 2 Adol. & Ellis, 30; 4 Nev. & M. 46.g

[If a man become bankrupt, the property of bills and notes of which he is the payee or endorsee vests in his assignees, and the right to transfer is in them. And if in fact he endorse a bill or note after his bankruptcy, and that be discovered before it be paid, the assignees may recover it back from his endorsee in an action of trover; and if the money be received, they may recover the money in an action for so much money paid to their use.

[*McNeillage v. Holloway*, 1 Barn. & A. 218; || *Beawes*, 469, 470; || *Thomason v. Frere*, 10 East, 418; *Ramsbottom v. Lewis*, 1 Camp. 279; *Ramsbottom v. Cator*, 1 Stark. Ca. 228.]

If he die, it devolves to his personal representatives, his executors, or administrators; and they may endorse it, and their endorsee maintain an action, in the same manner as if the endorsement had been by the testator or intestate. But on their endorsement they are liable personally to the subsequent parties, and not as executors; for they cannot charge the effects of the testator.

Rawlinson v. Stone, 3 Wils. 1; 1 *Stra.* 1260; 2 *Barnes*, 137, cited 1 *Burr.* 1225; 1 *Term R.* 487; || 1 *Hen. Bla.* 622. || β *Flower v. Swift*, 5 N. S. La. Rep. 530; 8 N. S. La. Rep. 451.g

They may also be the *endorsees* of a bill or note in their quality of executors or administrators; as, where they receive one from their testator or intestate, and in that character they may bring an action on it against the acceptor or any of the other parties.

King, Ex. v. Thom, 1 *Term R.* 487. Vide also 10 Mod. 315.]

It hath been adjudged, that a bill of exchange, or promissory note, cannot be endorsed over for part, so as to subject the party to several actions; as, if A having a bill of exchange upon B, endorses part of it to J S, J S cannot bring an action for his part, although he allege a custom among merchants for such kind of endorsements; for the contract being entire, and subjecting him only to one man's action, no custom can make him liable to two or more actions for the same debt.

Carth. 466, *Hawkins v. Cardy*; *Salk.* 65, pl. 2, S. C.; || *Hawkins v. Gardner*, 12 Mod. 213, || where it is said, that the plaintiff should have acknowledged satisfaction for the rest.

[A bill or note may be endorsed at any time after it has issued, even after the day of payment. However, the endorsement of a note after it is due throws a degree of suspicion upon it, and in an action against the maker by the endorsee, the former is in such case entitled to go into evidence to show that the note has been paid as between him and the endorser.

1 *Ld. Raym.* 575; 3 *Term R.* 80; β *Nevins v. Townsend*, 6 Conn. 5; *Andrews v.*

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Pond et al., 13 Pet. 65. In the case of a note endorsed after it has become due, the endorser is not liable unless payment be demanded of the maker, and notice of the non-payment given to the endorser; and as such note has become payable on demand, the demand on the maker must be made within a reasonable time, and immediate notice of non-payment given to the endorser. *Colt v. Barnard*, 18 Pick. 260. The endorser of an over-due bill or note is affected by all equities attaching to the bill or note; but not by a set-off, which would have been available against the endorser. *Borough v. Moss*, 5 M. & R. 296. A bill does not cease to be negotiable by being protested. *Richie v. Moore*, 5 Munf. 388. When a note has been once paid it ceases to be negotiable, except as against those by whom a new endorsement has been made, and such parties as are not prejudiced by the transfer. *Cochran v. Wheeler*, 7 N. H. 203.g

In an action by an endorsee of a promissory note, payable on demand, against the maker, the defendant was admitted to give evidence that the note had been endorsed to the plaintiff a year and a half afterwards; and to impeach the consideration, by showing that it had originally been given for smuggled goods, and that payments had been made upon it at several times. There was no privity brought home to the plaintiff, but Mr. J. Buller was of opinion, that he ought to be nonsuited; for he said, it had been repeatedly ruled at Guildhall, that wherever it appears that a bill or note has been endorsed over some time after it is due, which is out of the usual course of trade, that circumstance throws such a suspicion on it, that the endorsee must take it on the credit of the endorser, and must stand in the situation of the person to whom it was payable; and here, the consideration was illegal. He therefore nonsuited the plaintiff.

Banks v. Colwell, at Launceston Spring Assizes, 1788; [cited 3 Term R. 81.]

In an action by an endorsee of a promissory note against the maker, it appeared that the note was endorsed some time after it was due, and there were many circumstances which led the court and jury to conclude that it was fraudulently obtained; whereupon a verdict was found for the defendant. Upon a motion for a new trial, it was refused on the merits, and Buller, J., at the same time said, it has never been determined that a bill or note is not negotiable after it becomes due; but if there are any circumstances of fraud, and it comes into the hands of a plaintiff by endorsement after it is due, I have always left it to the jury upon the slightest circumstance to presume, that the endorsee was acquainted with the fraud. The rest of the court concurred in this opinion.

Taylor v. Mather, East. 27 G. 3, B. R. 3 Term R. 83, note.

In an action by an endorsee of a promissory note against the maker, the plaintiff rested his case upon the proof of the maker's and payee's handwriting. The note appeared on the face of it to have been drawn on the 6th of October, 1788, payable to Sandal or order, and to have become due on the 13th of November: it had Sandal's endorsement upon it, and had been noted for non-payment. Whereupon the defendant's counsel offered to prove these facts: that Sandal, having endorsed it in blank, delivered it to Taddy, by whom it had been noted for non-payment; that on the 6th of December, Sandal, having been paid by the defendant, the maker of the note, took it up from Taddy, and afterwards, without the knowledge or consent of the defendant, negotiated it to the plaintiff. But Lord Kenyon, being of opinion that, unless knowledge was brought home to this plaintiff, it would make no difference between these parties, rejected the evidence, and the plaintiff had a verdict. Upon a motion for a new trial, his lordship concurred with the rest of the court in granting it, confining himself, however, to this

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ground, that the note appeared to be noted for non-payment at the time the plaintiff received it.

Brown v. Davies, 3 Term R. 80; [and see *Brown v. Turner*, 7 Term R. 630; *Tinson v. Francis*, 1 Camp. 19; *Boehm v. Sterling*, 7 Term R. 427; *Roberts v. Eden*, 1 Bos. & Pul. 399; *Chalmers v. Lanion*, 1 Camp. 383.] {The principle that when a note or bill is endorsed after it has become due and been dishonoured, the endorsee takes it subject to all the equity and to every defence which existed against it in the hands of the original payee—has been recognised in many other cases, 7 Term, 630, *Brown v. Turner*; 5 Bos. & Pul. 170, *Goggerly v. Cuthbert*; 1 Mass. T. Rep. 1, *Gold v. Eddy*; 3 Mass. T. Rep. 11, *Wilson v. Clements*; 1 Johns. Ca. 51, *Johnson v. Bloodgood*; 2 Cain. Er. 303, S. C.; 1 Johns. Ca. 169, *Prior v. Jacocks*; *Ibid.* 331, *Sebring v. Rathbun*; 1 Cain. 265, *Baker v. Arnold*; 1 Johns. Rep. 319, *Hendrick v. Judah*; 2 Johns. Rep. 300, *Lansing v. Gaine & Ten Eyck*; 5 John. Rep. 118, *O'Callaghan v. Sawyer*; 4 Dall. 370, *Humphries v. Blight's Assignees*; 1 Bay, 249, *Bell v. Admrs. of Wood*; *Ibid.* 330, *Hall v. Smith*; and it applies equally to one payable *on demand* and negotiated long after it is drawn. *Supra*, p. 794, *Banks v. Colwell*; 7 Term, 430, *Boehm v. Sterling*; 2 Cain. 369, *Furman v. Haskins*; 4 Johns. Rep. 224, *Sanford v. Mickles & Forman*. But if the drawers of a bank-check payable to bearer issue it themselves long after it bears date, and it is negotiated, the drawers cannot rely, against the subsequent holder, on a defence which they might have made against the person to whom they first delivered it. 7 Term, 423, *Boehm v. Sterling*. A note endorsed to a third person in trust for the benefit of some relative of the endorser's, is, in an action by the endorsee against the maker, open to the same objections as if the suit had been by the endorser. 3 Cain. 213, *Payne v. Eden*. And if a note is not regularly negotiated to the endorsee so as to give him an absolute property in it, but is only deposited as a pledge to secure a debt due to him, it remains in his hands subject to the same equity as if it were in the hands of the original payee. 1 Bos. & Pul. 398, *Roberts v. Eden*. Notes given on gaming and usurious contracts being made *void* by statute, are so in the hands of an innocent endorsee. 2 Str. 1155, *Bowyer v. Bampton*; *Doug.* 736, *Lowe v. Waller*. Vide 1 Bay, 113, *Brisbane v. Lestajette*; *Ibid.* 249, *Bell v. Admrs. of Wood*; 2 Dall. 99, *Wycoff v. Longhead*. But in general an endorsee of a negotiable instrument *bonâ fide* and for value holds it discharged from any equity between the original parties. And it is presumed he holds it for value until the contrary appears. If it can be proved that the holder gave no value for it, then indeed he is in privity with the first holder, and will be affected by every thing which would affect the first holder. 1 Bos. & Pul. 648, *Collins v. Martin*; 2 Dall. 396, *Wilkinson v. Nicklin*; 4 Dall. 47, *Ludlow v. Bingham*; 1 Johns. Ca. 169, *Prior v. Jacocks*; 3 Cain. 279, *Baker v. Arnold*; 5 John. Rep. 239, *Warren v. Lynch*. In Pennsylvania the law is otherwise with regard to promissory notes, by the construction given to a particular statute. The endorsee of a note takes it subject to all equities between the original parties, whether endorsed before or after it became due. 1 Dall. 441, *McCullough v. Houston*. But by a subsequent statute it is provided, that notes bearing date in the city or county of Philadelphia, payable to the order of the payee, for value in account or for value received, and in the body of which the words *without defalcation* or *without set-off* are inserted, shall be held by the endorsees discharged from any claim of defalcation or set-off by the drawer or endorsers thereof; and the endorsees shall be entitled to recover against the drawer and endorsers such sums as on the face of the notes, or by endorsements thereon, appear to be due. Act of 27th February 1797, 4 Laws Penn. (Dallas's ed.) 102.}

{Where a note was made payable to order, and the payee, before it became due, made a special endorsement, by which he was not to be made liable, and declaring that he did not know on what consideration the note was made; in an action by an endorsee against the makers, it was held, that such a special endorsement did not render it necessary for the plaintiff to show that he gave a consideration for the note, nor did it authorize the defendants to impeach the note for want of consideration or fraud.

2 Johns. Rep. 50, *Russell v. Ball and Cook*.}

It is no objection to the claim of an endorsee, that the endorsement to him does not contain the words "to order."

Manning had given a promissory note to Statham or order; Statham assigned it to Witherhead, and Witherhead to More, who, on non-payment at

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the time, brought an action against Manning: on a demurrer to the declaration, exception was taken, that the assignment to Witherhead was made without saying to him or order, and that therefore he could not assign it over to More. But it was held by the whole court that the endorsement was sufficient; for if the original note be assignable, then, to whomsoever it may be assigned, he has the whole interest in it, and may assign it as he pleases; an assignment to him comprehends his assigns.

More v. Manning, Comyns, 311, in C. B. Hil. 6 G. 1, cited 2 Burr. 1222.

In another case the plaintiff had declared on an endorsement made by William Abercrombie, by which he appointed the payment to be to Louisa Acheson, "or order;" on the bill being produced in evidence, it appeared to be originally made payable to Abercrombie, or order, but Abercrombie's endorsement was only this:—"Pray pay the contents to Louisa Acheson." It was objected, "that the endorsement did not agree with the declaration." The court, however, gave judgment, on the ground of a general proposition in law, that a bill is negotiable without the addition of those words to the endorsement; the legal import of such endorsement being, that the bill was payable to order, and that the plaintiff might on this have endorsed it over to another, who would have been the proper order of the first endorser.

Acheson v. Fountain, Mich. 9 G. 1, B. R.; 1 Stra. 457, cited 2 Burr. 1223.

Colonel Clivé drew a bill, payable to Mr. Cambell, or order, on the East India Company, who accepted it. Mr. Cambell endorsed it to Mr. Robert Ogilby, but the words "or order" being originally omitted, were afterwards inserted by another hand before the trial; Ogilby endorsed it over to Messrs. Edie and Laird, or order, and afterwards, before the payment, became insolvent: Edie and Laird brought an action against the Company as acceptors, who refused payment, on pretence that Ogilby had no right to assign to the plaintiffs: the real question was, Who should bear the loss, Mr. Cambell or the plaintiffs? for the East India Company, if they did not pay to the plaintiffs, must pay to Mr. Cambell. The court were clearly of opinion, that the plaintiffs had a right to recover; that the law was settled by the two last cases; that such an endorsement as that to Ogilby was good, and gave the endorsee a right of endorsing over.

Edie v. East India Company, 2 Burr. 1216; 1 Bl. Rep. 295.

Yet an endorsement may be restrictive, and then it operates to preclude the person to whom it is made from transferring the instrument to another, so as to give him a right of action, either against the person imposing the restriction, or against any of the preceding parties: it may give a bare authority to the endorsee to receive the money for the endorser; as if to say, "Pray pay the money to such a one for my use," or use such other expressions as necessarily import that he does not mean to transfer his interest in the bill or note, but merely to give a power of receiving the money. In such a case it would be clear that no valuable consideration had been paid; but the intention of restraint must appear on the face of the endorsement.

2 Burr. 1227; Dougl. 639; and see *Robertson v. Kensington*, 4 Taunt. 30; *Treatel v. Barandon*, 8 Taunt. 100; *Potts v. Reed*, 6 Esp. Ca. 57; *Brown v. Jackson*, 1 Wash. C. C. 512; *Drew v. Jacock*, 2 Murph. 138; *Erskine v. M'Lendon*, 1 Stew. 30. See *Blakeley v. Grant*, 6 Mass. 386; *Cabot v. De Grand*, cited 15 Mass. 437; *Nevins v. De Grand*, 15 Mass. 436.

So, if the payee direct by endorsement, that "the within must be credited to the account of a third person." This is not a transfer of the bill to that

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third person, but only an authority to the drawees to give him credit for so much; the payee does not mean to make himself liable as endorser, or to enable the other to raise money on the bill.

Dougl. 640.

And, if in such a case the drawee accept the bill, instead of cancelling it, and an endorsement be forged and the bill negotiated, the party who shall advance money on it must sustain the loss; and if afterwards a friend of the drawer, by mistake, pay the bill for his honour, the drawer may recover back the money, in an action for money had and received to his use; for it was the duty of the party advancing the money on the bill to read the special endorsement, and he must suffer for his negligence.

Thus, where a bill was drawn by a house in Denmark on a house in London, payable to a person residing in Denmark, or his order, and the payee made such a special endorsement; the drawees accepted and gave notice to the drawers and to the person in whose favour the endorsement was made, that they had received the bill, and placed it to the account of the latter; the clerk of the acceptors forged an endorsement to himself or order, from the person to whose account the money was to be credited, and discounted it at the bank; the acceptors failed before the day of payment, and a friend of the drawers went to the bank and paid the bill for their honour; the drawers afterwards recovered back the money from the bank, on the ground that this special endorsement restrained the negotiability of the bill, and that the money was paid by mistake.

Ancher v. Bank of England, Dougl. 637.

§ If a bill be sent to the drawee, and he be directed to pass it to the credit of the holder, and do so credit it, the bill is *functus officio*, and cannot be further negotiated.

Savage v. Merle, 5 Pick. 85. §

An endorsement may be made on a blank note, before the insertion of any date or sum of money, in which case the endorser is liable for any sum, (a) at any time of payment that may afterwards be inserted; and it is immaterial whether the person taking the note on the credit of the endorsement knew whether it was made before the drawing of the note or not; for in such a case the endorsement is equivalent to a letter of credit for any indefinite sum.

||(a) Which is warranted by the stamp on the note. Collis v. Emmett, 1 H. Bl. 313; and see Cruchley v. Mann, 5 Taunt. 529; Cruchley v. Clarence, 2 Maul. & S. 90. ||

One Galley having had frequent money transactions with Russel, a banker, and having overdrawn his cash account, Russel, suspecting his credit, refused to advance him any more money, without the addition of the name of some endorser of whom he should approve: on this Galley applied to Langstaffe, who endorsed his name on five copperplate checks, made in the form of promissory notes, but in blank, that is, without any sum, date, or time of payment mentioned in the body of the notes. Galley afterwards filled up the blanks with different sums and dates, and Russel discounted the notes. Galley became a bankrupt, and Russel demanded payment of Langstaffe, and, on his refusal, brought an action, in which the court thought he was entitled to recover, though it appeared that he knew the notes were blank at the time of the endorsement.

Russel v. Langstaffe, Dougl. 514. {See 2 Wash. 164, Jordan v. Neilson; 3 Mass. T. Rep. 274, Josselyn v. Ames; 1 H. Black. 313, Collis v. Emmett.}

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It is said, that on a transfer by delivery, the person making it ceases to be a party to the bill or note; that such a transfer is a sale; and that he who sells it does not become a new security, and is not liable to refund the money if the bill should not be paid.

Bank of England v. Newman, 1 Ld. Raym. 442; 12 Mod. 241; Lambert v. Pack, 1 Salk. 128, 7th resolution; [Fyde v. Clark, 1 Esp. 447; Owenson v. Morse, 7 Term R. 65, 66; Emly v. Lye, 15 East, 7, 12; and see Chit. on Bills, 145, 146, 7th edit.]

But this can only be true to its full extent when applied to the case of a demand by a subsequent party, when one or more have intervened between him and the party against whom he makes the demand: as between the immediate parties to the transfer, this distinction must be taken, that when the bill or note has been given in payment of a precedent debt, or for a valuable consideration at the time of the transfer, without being discounted; then, though the person who has given the money for the bill or note cannot recover against the person who received it, as endorser, yet he may certainly recover in an action for money had and received for his use, as the transferrer must be understood to undertake that the bill shall be duly paid. But if the bill or note be *discounted* for the accommodation of the transferrer, then the transfer is a sale, and the doctrine here laid down will apply.

Kyd on Bills of Exchange, 90;] {3 Ves. J. 368, *Ex parte*, Shuttleworth.}

6. Of the Acceptance: And herein,

1. What shall be said a good Acceptance.

It hath been already observed, that an acceptance, by the custom of merchants, as effectually binds the acceptor as if he had been the original drawer; and that having once accepted it, he cannot afterwards revoke it; so that herein only we are to see, what act of his will amount to an acceptance.

Cro. Ja. 308; Hard. 487.

And herein it is said, that a very small matter will amount to an acceptance; and that any words will be sufficient for that purpose which show the party's assent or agreement to pay the bill; as if, upon the tender thereof to him, he subscribes, *accepted*; or, *accepted by me, A B*; or, *I accept the bill, and will pay it according to the contents*; these clearly amount to an acceptance.

Molloy, 278.

Or if the party underwrites the bill presented such a day, or only the day of the month; this is such an acknowledgment of the bill as amounts to an acceptance.

Comb. 401.

¶ Before the statute 1 & 2 G. 4, c. 78, the acceptances, both of inland and foreign bills of exchange, might have been in writing, on the bill itself, or on other paper, or they might have been verbal; but by § 2 of this statute it is enacted, "that from and after the 1st day of August, 1821, no acceptance of any *inland* bill of exchange shall be sufficient to charge *any* person, unless such acceptance shall be in *writing on such bill*; or if there be more than one part of such bill, on one of the said parts." As this statute only relates to *inland* bills, it is necessary to consider the decisions as to *parol* acceptances; as they still affect *foreign* bills.

A promise to accept an existing bill if made upon an executed consideration, or if it influence any person to take or retain the bill, is, where 1 & 2

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G. 4, c. 78, § 2, does not apply, a complete acceptance as to the person to whom the promise is made in the one case, and the person influenced in the other, and as to all the subsequent parties in each.

Bayley on Bills, 143, (4th ed.) and cases there cited.¶

White, a merchant in Ireland, desired to draw on the plaintiffs, Pillans and Rose, merchants at Rotterdam, for 800*l.* payable to one Clifford, and proposed to give them credit on a good house in London for their reimbursement, or any other mode of reimbursement: the plaintiffs, in answer, desired a confirmed credit on a house of rank in London, as the condition of their accepting the bill: White named the house of the defendants as that house of rank: the plaintiffs honoured the draft, and paid the money, and then wrote to the defendants, Van Mierop and Hopkins, merchants in London, desiring to know whether they would accept such bills as the plaintiffs should in about a month's time draw on their house for 800*l.* on the credit of White: the defendants agreed to honour the bill; but, before it was drawn, White failed, and then the defendants wrote to the plaintiffs, informing them that White had stopped payment, and desiring them not to draw, as they could not accept their draft. The plaintiffs, however, drew, holding the defendants not at liberty to retract their engagement. And so held the Court of King's Bench.

Pillans v. Van Mierop, 3 Burr. 1663; ¶and see Johnson v. Collings, 1 East, 103; Clarke v. Cock, 4 East, 67; Wynne v. Raikes, 5 East, 514; Fairlie v. Herring, 3 Bing. 625.¶

Where a bill was drawn payable at sight, and when presented, the drawee said he did not think the money was due to the drawer, but he would answer it in sixty days. The holder said he would return the bill to the drawer. In about ninety days the holder called again for payment, which was refused. Held that the drawee was not liable as on an acceptance, and that evidence that he was in funds when the bill was first presented, was irrelevant and inadmissible.

Peck v. Cochran, 7 Peck. 34.¶

If a party says, *Leave your bill with me, and I will accept it*; or, *Call for it to-morrow, and it shall be accepted*; these words, according to the custom of merchants, as effectually bind as if he had actually signed or subscribed his name according to the usual manner.

Molloy, 280.

But if a man says, *Leave your bill with me; I will look over my accounts and books between the drawer and me, and call to-morrow, and accordingly the bill shall be accepted*; this does not amount to a complete acceptance; for the mention of his books and accounts shows plainly that he intended only to accept the bill in case he had effects of the drawer's in his hands.

Molloy, 279, 280, said to have been ruled by Hale, C. J.

But where the drawer wrote a letter to the person, in whose favour the bill was drawn, to this purport, *That if he would let him write to Ireland first, he would pay him*; this was held a good acceptance.

Mich. 12 G. 1, Wilkinson v. Lutwich, 1 Stra. 648; cor. Raymond, C. J., at *Nisi Prius*, 1 *Ld. Raym.* 444; 1 Stra. 648.

So, where a foreign bill was drawn on the defendant, and being returned for want of acceptance, defendant said, that if the bill came back again, he would pay it; this was ruled a good acceptance.

Mich. 6 G. 1, Car v. Coleman, in B. R.

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§ One who has agreed generally to accept bills for a foreign correspondent, is bound until he gives notice not to draw, although he has no funds of the drawer.

De Tastett v. Crousillat, 2 Wash. C. C. 132. But a promise to accept generally, without pointing at any specific bill, will not sustain a suit as on an acceptance, though an action may lie for breach of the promise. *Boyce v. Edwards*, 4 Pet. 111. See also *Riggs v. Lindsay*, 7 Cranch, 500. But the endorser of a bill who does not take it on the credit of the drawee's promise to accept, cannot maintain an action against him on such implied acceptance. *M'Evers v. Mason*, 10 Johns. 207; S. P. 15 Johns. 6. See also *Martin v. Bacon*, 2 Rep. Con. Ct. 132.*g*

It seems clear, that a parol acceptance is sufficient at common law to charge the acceptor; also it hath been adjudged, since the statute 3 & 4 Ann. c. 9, *suprà*, that an endorsee of an inland bill of exchange may maintain an action against the acceptor, on a parol acceptance (*a*) as to the principal sum, though not as to interest and costs; for the act being made to give a further remedy for interest, damages, and costs, against the drawer, cannot be supposed to take any advantage from the payee which he had before; and therefore the true construction of the (*b*) act is, that to charge the drawer with interest and costs, the drawee must refuse to accept it in writing; nevertheless, if he accepts the bill by parol, he is liable to the principal sum in the bill, as he would have been before the act.

Mich. 8 G. 2, *Lumley v. Palmer*, in B. R.; 2 Stra. 1000, S. C.; § *Lemar v. Mason*, 1 Wend. 523; 9 Mass. 60; 5 Day, 515; *William v. Winans*, 2 Green. 339.*g* [See *acc.* *Julian v. Shobrooke*, 2 Wils. 9; in *Pillans v. Van Mierop*, *per* Lord Mansfield, 3 Burr. 1672; *Sproat v. Matthews*, 1 Term Rep. 182.] ¶ (*a*) This must be understood of an inland bill of exchange, before the stat. 1 & 2 Geo. 4, c. 78. ¶ (*b*) So, on the statute of 9 & 10 W. 3, c. 17, which gives damages and costs in case of a protest, it hath been held, that that statute did not take away the party's remedy against the drawer, if there was no protest, as to the principal sum, but only as to the damages and costs. 6 Mod. 80, 81; *Salk.* 131, pl. 17, *Brough v. Perkins*. ¶ And it is now held, that a protest is not necessary to the recovery of interest. *Windle v. Andrews*, 2 Barn. & A. 696.¶

[A drawee of a bill underwrote it thus: "Mr. Jackson, please to pay this bill, and charge it to Mr. Newton's account." It was contended, that this was not an acceptance, for that the party did not mean to become the principal debtor; it was only a direction to Jackson to pay out of a particular fund. But the court held, that the underwriting being a direction to pay the sum, it was of no importance to what account it was to be placed when paid: that was a transaction between the parties themselves, and this was a sufficient acceptance.

Moor v. Withy, Tr. 10 G. 3, B. R. Bull. N. P. 270.

A bill was sent to the drawee for acceptance; he kept it for ten days before it became due without any objection; and whilst it continued in his hands, he entered it in his bill-book under a particular number, and wrote the number on the bill, and at the bottom the day when it would become due, and then sent it back, refusing to accept it: it was proved, that it was the common practice of the drawee to enter and mark all bills in the same manner, whether he intended to accept them or not: the court seemed to think that these circumstances alone did not amount to an acceptance.

Powell v. Monnier, 1 Atk. 611.

If a merchant be desired to accept a bill on the account of another, and to draw on a third, in order to reimburse himself, and in consequence he draw a bill on that third person; the bare act of drawing this bill will not amount to an acceptance of the other, for the party evidently shows he

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meant only to make himself liable in case the bill drawn by him should be accepted and paid.

Smith v. Nissen, 1 Term Rep. 269; [Anderson v. Heath, 4 Maul. & S. 303; Rees v. Warwick, 2 Barn. & A. 113.]

§ The act of drawing a bill by one partner, in his own name, on the firm of which he is a member, for the use of the partnership, is in law an acceptance by the drawer in behalf of the firm; and an action may be maintained against the firm as on an accepted bill.

Dougal v. Cowies, 5 Day, 511.

A bill drawn by one upon himself is to be regarded as an accepted bill.

Cunningham v. Wardwell, 3 Fair, 466.¶

An agreement to accept or honour a bill will, in many cases, be equivalent to an acceptance, and whether that agreement be merely verbal or in writing is immaterial: if A, having given or intending to give credit to B, write to C to know whether he will accept such bills as shall be drawn on him on B's account, and C return for answer that he will accept them; this is equivalent to an acceptance, and a subsequent prohibition to draw on him on B's account will be of no avail, if, in fact, previous to that prohibition, the credit has been given.

Beawes, 466; § Van Reimsdyk v. Kane, 1 Gallis. 630; Banergoe v. Hovey, 5 Mass. 23, 29, 38; S. P. Mayhew v. Prince, 11 Mass. 55; Wallace v. Agry, 4 Mason, 336; see Hooe v. Oxley, 1 Wash. 19. Whether a parol promise to accept a non-existing bill amounts to an acceptance. 2 Pet. 182, 183. Such promise is binding on the drawee. Havens v. Griffin & Chip. 42. But see Wildes v. Savage, 1 Story, 22, and see further as to what is equivalent to acceptance. Fairlee v. Herring, 3 Bing. 625; Mendizabal v. Machado, 3 M. & Scott, 841; 6 C. & P. 218, 490.¶

· The mere answer of a merchant to the drawer that he will "duly honour his bill," is not of itself an acceptance, unless accompanied with circumstances which may induce a third person to take the bill by endorsement: but if there be any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer.

Beawes, 454; Pearson v. Dunlop, Cowp. 572, 574; 1 Atk. 711, Powell v. Monnier. § A letter written within a reasonable time before or after the date of a bill, intelligibly describing it and promising to accept it, is, if shown to one who takes it on the credit of the letter, a virtual acceptance, binding on the promissor. Payson v. Coolidge, 2 Gallis. 233; 2 Wheat. 66; Goodrich v. Gordon, 15 Johns. 6; Schimmelpennich v. Bayard, 1 Pet. 265; Townsley v. Sumrall, 2 Pet. 181; Wilson v. Clements, 3 Mass. 1; Storer v. Logan, 9 Mass. 55; M'Kim v. Smith, 1 Hall's L. Journal, 486; 2 Greenl. 203; Parker v. Greele, 2 Wend. 545; 5 Wend. 414; Boya v. Edwards, 4 Pet. 111; Williams v. Winans, 2 Green. 339. But see 3 Mass. 1; Parsons v. Armor, 3 Pet. 413. Though in a letter the drawee says "I shall accept," yet this is not an acceptance, if from the whole letter it appears that an acceptance was not intended. Musgrove v. Hudson, 2 Stew. 464.¶

· And an agreement to accept may be expressed in such terms as to put a third person in a better condition than the drawer. If one man, to give credit to another, make an absolute promise to accept his bill, the drawer, or any other person, may show such promise on the exchange, to procure credit, and a third person advancing his money on it, has nothing to do with the equitable circumstances which may subsist between the drawer and acceptor.

Mason v. Hunt, Doug. 286, 299;] [and see Johnson v. Collings, 1 East, 98; Clarke v. Cock, 4 East, 57.]

{ A promise by letter to the drawer to accept or to pay an *existing* bill is
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an acceptance, though the holder was ignorant of the promise, and consequently could not have been thereby {1} induced to take the bill.

6 Ves. J. 9, *Ex parte Dyer*; 4 East, 57, *Clarke v. Cock*. {1} 5 East, 514, *Wynne v. Raikes*.

But a mere verbal promise by a debtor to his creditor, that if he would draw a bill upon him at a certain date for the amount of his demand, he should then have the money and would pay it, does not amount to an acceptance of the bill when drawn: and an endorsee for valuable consideration, between whom and the drawee no communication passed at the time of his taking the bill, can neither recover upon a count as for an acceptance, nor upon the general counts for money had and received, &c.

1 East, 98, *Johnson v. Collings*. See 3 Mass. T. Rep. 1, *Wilson v. Clements*.

An acceptance after the time appointed for payment of the bill is good; and the acceptor is then liable to pay it on demand.

1 Ld. Ray. 364, *Jackson v. Piggot*; Salk. 127, S. C.; 1 Ld. Ray. 574, *Mugford v. Walcott*; Salk. 129, S. C.; 5 East, 521, *Wynne v. Raikes*.

Whether or not an acceptance of a bill once made by the drawee may be cancelled or recalled by him {2} before the bill be delivered back to the holder, at all events if the acceptance be so cancelled, and the holder cause the bill to be noted for non-acceptance, he cannot afterwards sue upon it as an acceptance.

6 East, 199, *Bentinck v. Dorrien*. {2} See 5 East, 476, *Smith v. M'Clure*.

2. Whose Acceptance shall bind.

A bill drawn on two, must regularly have a joint acceptance; but if there are two joint traders, and one accepts a bill drawn on both, for him and partner, this shall bind both, if it concerns the trade; otherwise, if it concerns the acceptor only in a distinct interest and respect.

Molloy, 279, 284; Salk. 126, pl. 3; Ld. Raym. 175, *Pinkney v. Hall*; [Mason v. Rumsey, 1 Camp. 384.] A partner can only bind the firm by accepting in the name and style of the firm. *Kirk v. Blurton*, 9 Mees. & W. (Ex.) 284.g

If a book-keeper or servant having authority, or usually transacting business of this nature for his master, accept a bill of exchange, this shall bind his master.

Molloy, 282. But for this vide tit. *Master and Servant*. A person may draw, accept, or endorse a bill by his agent, but the agent must either sign the name of his principal, or it must appear on the face of the bill, that it was done for the principal, or he will not be bound. *Pentz v. Stanton*, 10 Wend. 271. See *Boockway v. Allen*, 17 Wendell, 40, as to *prima facie* liability of agents. A supercargo cannot bind his principals as acceptors of a bill drawn by himself, without express authority to that effect communicated to and relied on by the person who receives the bill. *Scott v. M'Lellan*, 2 Greenl. 199.g

A bill of exchange was drawn by A, agent to the York Buildings Company in Scotland, on B, their cashier, in London, in the words following:—
To *Cashier to the Honourable Governor and Assistants of the York Buildings Company, at their house in Winchester Street: Sir, Pray pay to J S. or his order, 200l., and place it to the account of the Company, for value received, as per advice from your humble servant.* The letter of advice referred to was directed to the governor and company, informing them of the draft made upon B in favour of J S, but it did not appear that this was the usual method of drawing bills on the company: B accepted the bill generally; and this bill having been endorsed over, and an action

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thereon brought by the endorsee against B, the question was, Whether this acceptance should charge him in his own right, or not? And, it was held, that it should; this being in every respect a good bill of exchange, and only the drawer, payee, and acceptor concerned in it, as far as appears on the face of the bill; for though it may be for the advantage of the company, yet they are not liable to the payment of it; nor is the person in whose favour it was drawn, or the endorsee, obliged to take notice of such advantage, or of any transactions between them and their cashier, or how they stand liable to each; for were it allowed, that an endorsee must be put to seek a paymaster that bears no visible part in the transaction, this would be such a prejudice to trade, and paper-credit made so blind and hazardous a thing, that no man in his senses would ever be engaged in it: and as to the letter of advice, this was held to be only a private transaction between the drawer and a stranger; which it is not to be imagined the payee or endorsee could be privy to, and therefore cannot be any prejudice to them; nor a circumstance fit for the consideration of a jury, before whom nothing ought to be laid, in cases of this kind, but what all persons concerned in the transaction may be reasonably supposed to know; and those are, all things visible on the bill, but no circumstance extrinsic to it.

Mich. 7 G. 2, *Thomas v. Bishop*, in B. R.; 2 Stra. 955, S. C.; 2 Kel. 136, pl. 16, S. C.; 2 Barnard. K. B. 320, S. C. ¶ See *Lefevre v. Lloyd*, 5 Taunt. 749; *Goupy v. Harden*, 7 Taunt. 159; 2 Marsh. 404.¶

3. Whether an Acceptance may be qualified; ¶ and herein of the Statute 1 & 2 G. 4, c. 78.¶

It is held, that an acceptance may be qualified, as thus: I accept this bill, half to be paid in money, and half in bills; and this is good by the custom of merchants; for he, who may refuse the bill totally, may accept it in part; but he to whom the bill is due may refuse such acceptance, (a) and protest it so as to charge the drawer. Also it is said, that after such acceptance and refusal of payment, he hath the same liberty of charging the drawer which he had in case the bill had been accepted absolutely, and payment refused.

Comb. 452, *Petit v. Benson*. ¶ (a) *Per Bayley, J.*, in *Sebag v. Abithol*, 4 Maul. & S. 466; and *per Lord Ellenborough* in *Boehm v. Garcias*, 1 Camp. 425; see also *Gammon v. Schmoll*, 5 Taunt. 344.¶ A conditional or restricted acceptance does not affect the drawer's liability to the holder. *Knox v. Reeside*, 1 Miles, 294.¶

So, the drawee may accept the bill, to pay it at a longer day than that on which it is made payable, and this shall bind him; but herein care must be taken that the drawee, by such acceptance or agreement, be not a sufferer. *Molloy*, 283.

A bill was drawn payable the first of January; the person on whom the bill was drawn accepts the bill, to be paid the first of March; the servant brings back the bill; the master, perceiving this enlarged acceptance, strikes out the first of March, and puts in the first of January, and then sends the bill to be paid; the acceptor then refuses; whereupon the person to whom the moneys were to be paid strikes out the first of January, and puts in the first of March again. In an action brought on this bill, the question was, Whether these alterations did not destroy the bill? and ruled it did not.

Molloy, 285, *per Pemberton C. J.*; ¶ and see *Paton v. Winter*, 1 Taunt. 420.¶

If A draw a bill payable such a day, and the drawee accept it some time after, he is liable; and in an action against him the plaintiff may declare,

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that *secundum tenorem et effectum billæ* he did not pay, &c. ; for the effect of the bill is the payment, and not the day of payment.

Carth. 459, 460 ; Salk. 127, pl. 8, 129, pl. 11 ; Ld. Raym. 364 ; Lutw. 233, Jackson v. Pigot ; see Comyns, 75, pl. 49 ; 12 Mod. 212, 410. β The effect of acceptance after dishonour is to make the bill payable on request ; where, therefore, the declaration by endorsee against acceptor alleged the presentment and non-payment, and that, afterwards, the defendant promised to pay according to the tenor of his acceptance ; held, on general demurrer, to amount to a promise to pay on request. Christie v. Peart, 7 Mees. & W. (Ex.) 491.*g*

[The acceptance may direct the payment to be made at a place different from that mentioned in the bill ; as, at the house of a banker : in which case, if the holder neglect to demand payment within a reasonable time, and the banker afterwards fail, he must stand to the loss.

Bishop v. Chitty, 2 Stra. 1195 ; [and see Rowe v. Young, 2 Brod. & Bing. 165.] {The payee is not bound to take such a special acceptance ; but if he does take it, he impliedly agrees to present the bill for payment within the usual banking hours at the place where it is payable ; and if he do not ; the non-payment of it is no evidence of the dishonour of the bill so as to charge the drawer. 7 East, 385, Parker v. Gordon.}

But if the banker continue solvent, the holder is not bound to prove a demand on the banker in an action against the acceptor.

Smith v. Delafontaine, B. R. Trin. 25 G. 3, Bayley, App. No. 5.

[Since the statute 1 & 2 Geo. 4, c. 78, if the drawee determine that the bill shall be payable only at a particular place, he must in his acceptance express that he accepts the bill "payable at a banker's house or other place only, and not otherwise or elsewhere." If he accept "payable at a banker's," without further words, it is a general acceptance ; and an omission to present the bill there, though the banker, after it is due, fail with funds of the acceptor's in his hands, will not discharge the acceptor.

Turner v. Hayden, 4 Barn. & C. 1.

And it makes no difference that the bill is made by the drawer payable at a particular place ; still, unless the acceptor introduce into the acceptance negative words to the effect mentioned in the statute, it is a general acceptance, and presentment at the particular place is unnecessary.

[Fayle v. Bird, 6 Barn. & C. 531 ; Selby v. Eden, 3 Bing. 611.] β If a bill is accepted payable at a particular place, and such acceptance is acquiesced in by the holder, he must demand payment at such place, in order to charge the drawer. Tuckerman v. Hartwell, 3 Greenl. 147.*g*

An acceptance may also be "to pay when certain goods consigned to the acceptor, and for which the bill is drawn, shall be sold ;" for it would affect trade if factors were not allowed to use this caution when bills are drawn on them, before they have an opportunity to dispose of the goods.

Smith v. Abbot, 2 Stra. 1152 ; [and see Clarke v. Cock, 4 East, 73.] β A drawee who has accepted a bill on condition that he can sell the drawer's goods before the bill becomes due, is not bound thereby, if, before that time, the drawer's goods are attached by his creditors. Brown v. Coit, 1 M'Cord, 408.*g*

So, an acceptance "on account of the ship Thetis, when in cash for the said vessel's cargo," is sufficient to bind the acceptor.

Julian v. Shobrooke, 2 Wils. 9.

On the same principle, an acceptance "to pay as remitted from the place where the person on whose account the acceptance is made resides," seems binding after the remittance made.

Banbury v. Lissett, 2 Str. 1212. β If a bill is accepted "to be paid when in funds," and the drawer does not object to such acceptance, he cannot resort to the drawer till

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the acceptor refuses to pay, after he has funds. *Andrews v. Baggs*, Minor, 173; *Campbell v. Pettengill*, 7 Greenl. 126.

But what shall be considered as an absolute or conditional acceptance, is a question of law to be determined by the court, and is not to be left to the jury.

1 Term R. 182.

A bill was drawn in New England for a sum of money advanced there, for the repairs of a ship, of which Lutwidge, the drawee, residing at Whitehaven, was the freighter. Wilkinson, the holder of the bill, applied to a merchant in London, to send the bill to Lutwidge for acceptance; the merchant sent it enclosed to the drawee, who by letter acknowledged the receipt, and wrote thus: "The bill which you sent me I will pay, in case the owners of the *Queen Ann* do not: and they living in Dublin, I must first apply to them; I hope to have their answer in a week or ten days: I do not expect they will pay it, but I judge it proper to take their advice before I do, with which I request you will acquaint Mr. Wilkinson, and that he may rest satisfied of the payment." In another letter he wrote, "I have not had an opportunity of sending the bill to Ireland, but will take the first opportunity, and then will remit to the gentlemen concerned, according to my promise." The bill not being paid, an action was brought against Lutwidge, as acceptor, in which he insisted that these letters did not amount to an absolute acceptance, but were only conditional, to pay in case the owners of the *Queen Ann* did not; and that his promise to procure payment from them was in favour of the plaintiff; but Chief Justice Raymond thought it was rather in favour of himself; that the letters were a complete acceptance, and amounted to this: that he wished the holder of the bill to give him time to write to Ireland, but assured him that at all events the money should be secured, whether the owners of the *Queen Ann* paid it or not.

Wilkinson v. Lutwidge, 1 Str. 648.

A bill was drawn on Mathews, payable to one Lenox, or order, and by endorsement came into the hands of Sproat: Sproat's clerk presented the bill for acceptance to Mathews, who lived in London, and who told him, "that the drawer had consigned a ship and cargo to him and another person in Bristol; but as he could not tell whether the ship would arrive at London or Bristol, he could not accept at that time:" the clerk, by the consent of Mathews, left the bill, and afterwards called, in company with his master, to know whether Mathews would accept the bill or not, who, on being pressed, declared "the bill was a good one, and would be paid, even if the ship were lost."

The court held that this was only a conditional, not an absolute acceptance. Mathews had three events in contemplation; the arrival of the ship at Bristol, her arrival in London, or her being lost: if the ship arrived in London, the cargo being consigned to him, he would have effects to reimburse himself; if she were lost, he had the policy of insurance, by which he could indemnify himself by recovering against the underwriters; but if she arrived in Bristol, the cargo was consigned to another, he would have no effects: in either of the former events he meant to accept the bill, in the latter he did not.

Sproat v. Mathews, 1 Term R. 182. [See *Swan v. Cox*, 1 Marsh. 177; *Clarke v. Cock*, 4 East, 73.]

If the acceptance be in writing, and the drawee intend that it should be

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only conditional, he must be careful to express the condition in writing as well as the acceptance; for if the acceptance should, on the face of it, appear to be absolute, he cannot take advantage of any verbal condition annexed to it, if the bill should be negotiated and come to the hands of a person unacquainted with the condition, and even against the person to whom the verbal condition was expressed, the burden of proof will be on the acceptor.

Vide Dougl. 286; *Bowerbank v. Monteiro*, 4 Taunt. 844; and see Chit. on Bills, 180, 181, (7th ed.)] *β* But where a promise to accept a non-existing bill was absolute in its terms, but was known to the drawee to be conditional, and to depend wholly on certain shipments being made to him by the drawer, and those conditions were made known to the payee when he received the bill, the drawee was held not liable to the payee, the shipment of the drawer having failed. *Storer v. Logan*, 9 Mass. 55. In an action on a bill, absolute in its terms, parol evidence is not admissible to show that it was to be paid only on a contingency. *Cunningham v. Wardwell*, 3 Fairf. 466. A promise in these terms: "I have no objection to accepting for you at three and four months on the terms you propose," contained in a letter, is an absolute and not a conditional promise, and warrants a single draft at four months. *Parker v. Greele*, 2 Wend. 545; 5 *Ibid.* 414.*g*

A conditional acceptance, when the conditions on which it depends are performed, becomes absolute.

Nichol was the captain of a ship of which Pierson was the owner. The ship was freighted with naval stores by M'Lintot, who, being unable to discharge the freight, drew a bill on Dunlop and Co. payable fifteen days after sight to the order of Nichol, and gave Nichol a certificate or navy-bill, assigned to Dunlop and Co., as a security till the bill of exchange should be accepted: Nichol endorsed the bill, and sent it to Pierson, together with a letter from M'Lintot to Dunlop and Co., in which was enclosed the certificate which M'Lintot desired them to tender at the Navy-office, and at the same time he advised them that he had drawn on them as above. On the 2d of October, 1776, Pierson sent this letter, with the certificate enclosed, and also the bill of exchange, to Dunlop and Co.; when the bill was demanded again the next day, the defendants delivered it up, saying, "it would not be accepted till the navy-bill was paid; but they refused to deliver the navy-bill, saying, they would receive the money themselves. It was held, that this was a conditional acceptance, which on the receipt of the money became absolute. Nichol, the captain, had a lien on the naval stores for his freight; the certificate was a security for that freight; it was given into his possession as a pledge for the money till the bill should be paid. It was not sent to Dunlop and Co. by the post in the usual course, but was enclosed to Pierson as his security. He was therefore not bound to part with it till the bill was accepted. Dunlop and Co. by detaining it, and saying that the bill would not be accepted till the navy-bill should be paid, undertook, on that event, to accept and pay the bill of exchange.

Pierson v. Dunlop, Cowp. 571. *β* But a conditional acceptance must be so stated in declaration, with an averment that the condition has been performed. *Langton v. Corney*, 4 Camp. 176.]

But if the conditions, on which the agreement to accept a bill is made, be not complied with, that agreement will be discharged.

As, if a merchant undertake to accept bills to a certain amount, on condition that a cargo of an equal value be consigned to him, and an order given for insurance; if the cargo consigned do not equal the value, he is not bound to accept.

Mason v. Hunt, Dougl. 297.

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A promise to accept on certain conditions will hold the drawee, as on an acceptance when the conditions are fulfilled.

Grant v. Shaw, 16 Mass. 341; S. P. Read v. Wilkinson, 2 Wash. C. C. 514; 7 Greenl. 139; 7 Pick. 35. See Taft v. Aylwin, 14 Pick. 336.g

When a bill is drawn for the account of a third person, and is accepted according to its tenor for his account, and he fails without making provision for its payment, the acceptor must discharge the bill, and can have no redress against the drawer.

Beawes, 456.

But if the drawee do not choose to accept on the account of him for whose account he is advised the bill is drawn, he may accept for the account and honour of the drawer.

Beawes, 456.

Or, if a bill, made payable to order, be endorsed by a substantial man before acceptance be demanded, the drawee, if he have any doubt about the drawer, or of him on whose account it is drawn, may accept it for the honour of the endorser; but in this case he must first have a formal protest made for non-acceptance, and should send it without delay to the endorser for whose honour he has accepted it.

Beawes, 456.

Such acceptances as these are called acceptances *supra* protest; and have this effect with respect to the security of the acceptor, that they give him a right to call on the party for whose honour he accepts; and in the case of an acceptance for the honour of the endorser, on him and all the parties before him: whereas a simple acceptance, according to the tenor of the bill, gives him a remedy only against the drawer, or against him on whose account the bill is drawn, as the case may be.

Beawes, 458; ||Smith v. Nissen, 1 Term R. 269.]]

The method of accepting *supra* protest is this: the acceptor must personally appear with witnesses before a notary, (whether the same who protested the bill or not is of no importance,) and declare that he accepts such protested bill in honour of the drawer or endorser, &c., and that he will satisfy the same at the appointed time; and then he must subscribe the bill thus: "Accepted *supra* protest, in honour of T B," &c.

But this acceptance *supra* protest may be so worded, that though it be intended for the honour of the drawer, yet it may equally bind the endorser, and in such a case it must be sent to the latter.

Beawes, 457.

If the person on whom the bill is drawn refuse to accept it, any *third* person, after protest for non-acceptance, may accept *supra* protest for the honour of the bill or of the drawer, or of any particular endorser: if he accept for the honour of the bill or of the drawer, he is bound to all the endorsees as well as to the holder; if in honour of a particular endorser, then to all subsequent endorsees.

Beawes, 457.

β An acceptor *supra* protest, for the honour of the first endorser, may require, as a condition of payment, that the holder shall endorse the bill to him.

Freeman v. Perot, 2 Wash. C. C. 485.g

Any one accepting a bill *supra* protest, though without the orders or know-

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ledge of the person for whose honour he accepted it, has a remedy against that person, who is bound to satisfy him as if he had acted entirely by his directions, for his commission, postage, and other charges.

Beawes, 457, 458. β A stranger to the drawer and endorser of a bill may intervene *suprà* protest, and accept, &c. And it is no objection to such intervention, (and does not impair such acceptor's remedy against the party for whom he intervenes,) that it is done at the request and under the guarantee of the drawee. *Konig v. Bayard*, 1 Pet. 250. γ

If a bill be protested for non-acceptance, and after it has been accepted *suprà* protest by a third person, the drawee, on receiving fresh advice and orders, determine to accept and pay it, the acceptor *suprà* protest may permit him, though the holder cannot be obliged to free him from his acceptance; and if the two acceptors agree, the drawee must pay the other his commission, charges, &c., as it was by his acceptance that the bill was prevented from being returned protested.

Beawes, 457.

If the acceptor of a bill for the honour of the drawer or endorser receive his approbation of the acceptance, then he may safely pay the bill without any protest for non-payment. But if the person for whose honour the bill was accepted, either return no answer to the advice, or express a disapprobation of the acceptance, then the acceptor *suprà* protest must cause a formal protest to be drawn up for non-payment against him to whom the bill was directed, and on his continuing to refuse payment, must pay it for him.

Beawes, 458. β The acceptor of a bill of exchange for the honour of the drawer cannot maintain an action thereon against him, without proof of its presentment to the drawee, and non-acceptance or non-payment by him, and notice thereof to the drawer. *Baring v. Clark*, 19 Pick. 220. γ

|| An acceptance *suprà* protest is only a conditional engagement; and to render the acceptor absolutely liable, the bill must be duly presented for payment to the drawee, and protested in case of refusal.

Hoare v. Cazenove, 16 East, 391; *Williams v. Germaine*, 7 Barn. & C. 468; β *Schofield v. Bayard*, 3 Wend. 491; and the holder in such case cannot recover of the drawer without such demand and notice. γ

A bill was drawn in America on C and Co., of Liverpool, directed to them at Liverpool, requesting them to pay 500*l.* to L and Co., or order, in London, and endorsed by L and Co., to plaintiffs. The bill, on presentment to the drawees at Liverpool, was refused acceptance, whereupon the defendants accepted it for honour of L and Co., the payees in this form: "Accepted under protest, for honour of L and Co., and will be paid for their account, if regularly protested, *and refused when due.*" The bill, when it became due, was presented at the house of the drawees for payment, and refused; whereupon it was protested at Liverpool, and by the next post it was forwarded to London, and two days after it became due it was presented for payment to the defendants, who refused to pay it, on the ground that it should have been presented and protested in London on the day when due. At the trial at Guildhall, several merchants of eminence, and also notaries, proved that it was usual to protest such a bill in London, where it was made payable, and not at the residence of the drawees: and two notaries for the plaintiff also proved, that such bills were sometimes protested at Liverpool, where the drawee resided.—Held by Lord Tenterden, C. J., and afterwards by the Court of K. B., on a motion for a new trial, that it was not necessary to decide whether the protest at Liverpool would have been sufficient, if the defendants' acceptance had been general, though they

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seemed to think it would. But, at all events, the defendant, by stipulating in the acceptance that the bill must be duly "protested and *refused* when due," had rendered it necessary that the bill should be presented on the day when due to the drawees at Liverpool; since it could only be *refused* where there was some person to whom to present it, and in London there was no such person.

Mitchell v. Baring, October Sittings, London, 1829, before Lord Tenterden, C. J., and special jury.]

β Where one who, at the request of the drawee, pays a bill *suprà* protest, for the honour of the endorser, the same defence may be made by the party who is sued for the amount so paid, which might be made if the bill had been so paid and the suit brought by the drawee himself.

König v. Bayard, 1 Pet. 250.β

When a bill is protested for non-payment, any man may pay it under protest, for the drawer's or endorser's honour, even he who made or he who suffered the protest; but he must previously declare before a notary for whose honour he discharges it; and of this the notary must give an account to the parties concerned, either jointly with the protest, or in a separate instrument.

Beawes, 458.

He who discharges a bill protested for non-payment in honour of the drawer, has his remedy against the latter, but not against the endorsers; (α) but he who discharges a bill protested for non-payment in honour of an endorser, has his remedy not only against that endorser, but against all that were before him, including the drawer: but he has no right against subsequent endorsers.

Beawes, 459. [(α) And if the bill has been accepted by the drawee, he may sue such acceptor; *Ex parte* Wackerbath, 3 Ves. 574; but it is otherwise if the acceptance was for the accommodation of the drawer. *Ex parte* Lambert, 13 Ves. 179; Mertens v. Winnington, 1 Esp. Ca. 112.]

A man, after having given a simple acceptance to a bill, cannot satisfy it under protest, in honour of an endorser, because, as acceptor, he has already bound himself to that endorser; but a drawee, not yet having accepted the bill, may discharge it for the honour of the endorser or drawee, as if he were a third person unconcerned.

Beawes, 458.

Yet it is said that the possessor of a bill, protested for non-payment, is not bound to admit of its discharge from a third person under protest, either in honour of the drawee or of any endorser, unless he declare and prove that the honour of that bill was particularly recommended to him; and if the protested bill be endorsed by the possessor's correspondent, and were remitted by him, then the possessor ought not to admit of any payment in honour of the endorsements, but under the express condition that the payer shall have no redress against the said correspondent.

Beawes, 458.

4. Of the Effect of an Acceptance.

The effect of the acceptance is to give credit to the bill, and to render the acceptor liable according to the tenor of his acceptance; the very act of accepting implies an acknowledgment that he has effects of the drawer in his hands.

Beawes, 455; β Jordan v. Tarkington, 4 Dev. 358. In a suit by the drawer of a bill

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on a sheriff, payable out of the proceeds of lands sold in the execution of his office, six years before, the defendant having accepted the bill with full information, was not permitted to deny that he had funds. *Scarborough v. Geiger*, 1 Bay, 368. An acceptance is *prima facie* evidence that the acceptor has funds of the drawer in his hands, and is an express appropriation of such funds to the holder's use. 2 Wheat. 385.*g*

If, therefore, the drawee accept a bill generally, and by reason of his non-payment the drawer is obliged to pay it, the latter, as drawer, may maintain an action against him, not only for the principal sum, but, in case of a protest, for damages, interest,*(a)* and costs.

Symonds v. Parminter, 1 Wils. 185. *¶*(a) A protest is no longer necessary on an inland bill, to entitle the party suing to interest. *Windle v. Andrews*, 2 Barn. & A. 696. *¶* Where the drawer is indebted to the acceptor in a sum equal to the amount of the bill, and on protest for non-payment, takes up the bill, he cannot by suing the acceptor in the payee's name, prevent an offset, and recover the contents of the bill. *Smith v. Foltz*, 1 Bay, 280.*g*

If, indeed, the drawee have no effects of the drawer in his hands, and notwithstanding accept the bill, he has his remedy, if he pay it, against the drawer; but with regard to everybody besides, the acceptor is considered as the original debtor, and, to be entitled to have recourse against him, it is not necessary for the holder to show notice given to him of non-payment by any other person.

Dougl. 249; *¶* *Arden v. Watkins*, 3 East, 325; *Darnell v. Williams*, 2 Stark. 166. *¶* If a bill be drawn by A, with directions to charge the amount to B, and it is accepted generally and paid, the drawer is not liable to the drawee, unless it appear that B was the agent of A, and the direction to charge the bill to him was only to point out the fund from which the bill was to be paid. *Bell v. Davidson*, 3 Wash. C. C. 329.*g*

¶ An acceptance of a bill is not a collateral engagement to pay another's debt, and is therefore not within the statute of frauds; and when made without conditions, it is an absolute engagement to pay the money to the holder.

Raborg v. Peyton, 2 Wheat. 385; *Storor v. Logan*, 9 Mass. 60.*g*

{If the name of the drawer is forged, and the bill is accepted, and paid to an innocent endorsee for valuable consideration, the acceptor cannot recover the money back from him.

3 Burr. 1354, *Price v. Neal*.

The entry of a check as cash, made by a bank in the private bank book of the holder, is equivalent to payment; and if the check is a forgery, of which the holder was ignorant, the bank must support the loss. And if the holder afterwards, on being informed of the forgery, and under a mistake of his rights, agrees that if the check is really a forgery it is no deposit, he is not bound by the agreement.

1 Bin. 27, *Levy v. Bank of the United States*; 4 Dall. 234, S. C.}

When a bill is once accepted absolutely, it cannot in any case be revoked, and the acceptor is at all events bound, though he hear of the drawer's having failed the next moment, even if the failure was before the acceptance.

Mar. 17; *Beawes*, 454; *¶* *Robertson v. Kensington*, 4 Taunt. 30. *¶* {Vide 6 East, 199, *Bentlnck v. Dorrien*.} *¶* If a drawee, having funds of the drawer, accept unconditionally, he cannot avoid payment on the ground that the drawer had before assigned the funds, if the payee did not know of the assignment, when he received the bill, though the acceptor did know it, but did not inform the payee thereof. *Tucker v. Welsh*, 17 Mass. 168. And acceptance after time of payment is binding. *Williams v. Winans*, 2 Green. 339; *Corbin's Admr. v. Southgate*, 3 H. & M. 319.*g*

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^B And a bill drawn on a firm, in anticipation of its formation, if accepted by the partnership, binds them.

Westcott v. Price, Wright, 220. A bill drawn on a firm but not accepted till after a dissolution of the partnership, publicly announced, binds only the partner who accepts. *Tombekbee Bank v. Dumell, 5 Mason, 56.g*

|| And it has formerly been held, (a) that if the drawee of a bill put his name on it as acceptor, he cannot afterwards, even before it has been delivered to the payee, discharge his acceptance by erasing his name; but it is now settled, that if the drawee, having once written his acceptance with intention of accepting the bill, changes his mind, and before it is communicated to the holder, or the bill delivered back to him, obliterates his acceptance, he is not bound as acceptor. (b)

(a) *Thornton v. Dick, 4 Esp. Ca. 270; Trimmer v. Oddy, cited Bentinck v. Dorrien, 6 East, 200; Roper v. Birbeck, 15 East, 17; Bentinck v. Dorrien, 6 East, 199.* (b) *Cox v. Troy, 5 Barn. & A. 474.*||

But the acceptor may be discharged by an express declaration of the holder, or by something equivalent to such declaration.

{4 East, 57, *Clarke v. Cock.*}

Black held, as endorsee, a bill drawn by one Dallas, and accepted by Peele. Black arrested Peele, but finding that no consideration had been given for the acceptance, his attorney took security from Dallas, and sent word to Peele, "that he had settled with Dallas, and he needed not to trouble himself any further." (c) Dallas afterwards became bankrupt, and then Black demanded payment of Peele. The cause was tried first before Lord Mansfield, and afterwards by Chief Justice De Grey, who both held that the acceptor was discharged.

Black v. Peele, cited Dougl. 49. || (c) It must amount to an unconditional renunciation of all claim upon the acceptor, in order to discharge him. See *Whalley v. Tricker, 1 Campb. 35; Parker v. Leigh, 2 Stark. Ca. 228.*||

In another case a book of the plaintiff's was produced, in which the bill was entered, and over against it this memorial, "Mr. Pulteney's acceptance annulled." The jury, however, gave a verdict for the plaintiff; but the Court of Exchequer granted a new trial, on the ground that this was an implied discharge; and on the second trial before Chief Baron Skinner, one Alexander, who had endorsed the bill to the plaintiff, was produced as a witness on the part of the defendant, and swore that Walpole had positively agreed to consider Pulteney's acceptance as at an end; on which the jury found for the defendant. Walpole had kept the bill from 1772 to 1775 without calling on Pulteney.

Walpole v. Pulteney, cited Dougl. 249.

But no circumstances of indulgence shown to the acceptor by the holder, nor any attempt by him to recover of the drawer, will amount to an express declaration of discharge.

Dunster accepted a bill merely to lend his credit, and to accommodate Wheate, the drawer. Fitzgerald, the payee, endorsed it to Dingwall, and delivered it to him in payment for jewels. After it became due, the plaintiff, understanding that the acceptor never had any consideration for it, and that Wheate was the real debtor, wrote to one Ready, Wheate's attorney, on the 6th of February, and on the 4th of November, 1775, pressing him for payment. Dunster, on the 13th of February, 1775, wrote a letter to Dingwall, thanking him in strong terms for not proceeding against him, but mentioning in the same letter, that he had been informed by a person who

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had been sent from him to Dingwall on the business, that Wheate had taken up the bill, and given another to Dingwall's satisfaction. It did not appear that Dingwall took any notice of that letter. But he for some time received interest on the bill from Wheate, and also the principal due by another bill, made at the same time, and drawn and accepted by the same parties, and under like circumstances. The plaintiff suffered several years to elapse without calling on Dunster, or treating him as his debtor. The question was, Whether the plaintiff, by his conduct, had discharged the acceptor? and the court unanimously held, that he had done nothing from which it could be concluded he meant to abandon his claim against him. He had done right in applying to Wheate for payment, as he was apprized that he was in fact the debtor, and Dunster was so far sensible of his kindness, as to thank him for his indulgence in a letter; had the suggestion in that letter been true, relative to the plaintiff's having delivered up the bill to Wheate, that might have made a material difference: but the plaintiff having returned no answer to the letter, and the fact not having been attempted to be proved at the trial, it was probable the assertion was not warranted. This case had no resemblance to the two preceding cases which had been cited in argument.

Dingwall v. Dunster, Dougl. 247; ||Anderson v. Cleveland, 13 East, 430; S. C. 1 Esp. Ca. 46.]

Neither will any length of time short of the statute of limitations, nor the receipt of part of the money from the drawer or endorser, nor a promise by endorsement on the bill by the drawer to pay the residue, discharge the holder's remedy against the acceptor.

A bill was drawn by one brother and accepted by another. When it became due, the payee received of the drawer 3*l.* 15*s.* 4*d.*, and at the same time the following endorsement was made on the bill: "Received on account of this bill 3*l.* 15*s.* 4*d.*." "Balance remaining due, 26*l.* 4*s.* 8*d.*, I promise to pay Mr. Thomas Ellis within three months from the date of this." Signed by James Galindo, who was the drawer. The balance was never paid, and at the distance of three years an action was brought against the acceptor; the cause was tried before Lord Mansfield, who thought the acceptor was discharged, and nonsuited the plaintiff. The ground of his lordship's opinion probably was, that the endorsement was as a new bill accepted by the plaintiff in payment of the old; and on an application for a new trial, his lordship said, he did not think that this case at all interfered with the determination in Dingwall and Dunster. The plaintiff's counsel contended that the endorsement was made to prevent an imputation of neglect, because delay in coming against an acceptor may discharge a drawer or endorser. The court all seemed to think that this was a question of intention, and ought therefore to have been left to the jury, but they refused a new trial on account of the smallness of the sum.

Ellis v. Galindo, Dougl. 250, in the notes.

||And in the case of accommodation acceptances it has been decided, that the holder's giving time to or taking a *cognovit* from the drawer, though he have notice that the bill was accepted for the accommodation of such drawer, will not discharge the acceptor.

Fentum v. Pocock, 5 Taunt. 192; S. C. 1 Marsh. 14; Mallett v. Thompson, 5 Esp. Ca. 178; Harrison v. Cooke, 3 Camp. 362. || β The acceptor cannot defend against the payee, on the ground that the acceptance was without consideration, (an accommodation acceptance,) and so known to the payee. Grant v. Ellicott, 7 Wend. 227; S. P.

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Towneley v. Sumrall, 2 Pet. 183; Warder v. Tucker, 7 Mass. 452; Lambert v. Sanford, 2 Blackf. 137.*g*

§ But the holder of a bill, taken for a pre-existing debt, cannot support an action against the acceptor, if there be equities in the case which would prevent a recovery by the drawer.

Ontario Bank v. Worthington, 12 Wend. 593.*g*

But, when the holder of a bill receives part of the money from the drawer, he cannot recover more than the residue from the acceptor; and where the drawer pays the whole, the acceptor is completely discharged.

Bacon v. Searles, 1 H. Bl. 88.

§ So if a bill be accepted and endorsed for the accommodation of the drawer, and he, on failing, make an assignment whereby he fully indemnifies the endorser, the latter, though he has paid the bill, cannot resort to the acceptor.

Bradford v. Hubbard, 8 Pick. 155. And the case is not altered by the acceptor's having recovered in a process of foreign attachment commenced for his indemnity, a sum due to the drawer, but which remains subject, in the acceptor's hands, to the control of a Court of Chancery. *Ibid.**g*

By the law of Leghorn, if a bill had been accepted and the drawer had failed, and the acceptor had not sufficient effects of the drawer in his hands at the time of acceptance, the acceptance became void. This happening to be the case of one Burrowes, he instituted a suit at Leghorn, to discharge himself of his acceptance, which was accordingly vacated by a sentence in the court there. He afterwards returned to England, and was sued here on his acceptance; on which he filed a bill in Chancery for an injunction and relief. Lord Chancellor King was clearly of opinion, that this cause was to be determined according to the laws of the place where the bill was negotiated; and the acceptance having been vacated by a competent jurisdiction, that sentence was conclusive, and bound the court here.

Burrowes v. Jemino, 2 Stra. 733; {3 Mass. T. Rep. 77, Powers v. Lynch; *acc.* as to the endorser.}

If the drawee offer a conditional acceptance, and the holder, instead of acquiescing, do something which shows that he does not admit such acceptance, the drawee is not bound; even if the event afterwards happen on which the acceptance was to depend.

A bill payable to one Lenox, or order, forty days after sight, was drawn on the defendant; Lenox endorsed it to the plaintiff: Allen, the plaintiff's clerk, presented the bill to the defendant, who lived in London, for acceptance: the defendant told him that the drawer had consigned a ship and cargo to him and another person at Bristol, but as he could not then tell whether the ship would arrive at London or Bristol, he could not accept at that time: on which Allen said that he would leave the bill upon this condition, that in the event of the defendant's not accepting it as from the day when it was presented, he should be at liberty to note it for non-acceptance as from that time: to this the defendant assented, and the bill was accordingly left at his house till a future day, when Allen called again, in company with the plaintiff, to know whether the defendant would accept the bill or not, who, on being pressed to accept it, said that the bill was a good one, and would be paid, even if the ship were lost. Allen immediately on this carried the bill to a notary public, and had it noted for non-acceptance from the time when it was first left with the defendant. The ship afterwards arrived safe at the port of London, and the defendant dis-

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posed of the cargo. This being a conditional acceptance, the conduct of the plaintiff was held to have been a waiver of it, and to have precluded him from holding the defendant to his engagement.

Sproat v. Mathews, 1 Term R. 182.

Though an agreement to accept, on condition of a certain fund being consigned to the acceptor for the discharge of the bill, may amount to an acceptance on the performance of the conditions, yet, if the endorsee take the fund out of the hands of the drawee, he discharges him from his engagement.

Rowland Hunt, in Dominica, agreed with a house there, that his partner, Thomas Hunt, in London, should, on a cargo of tobacco being consigned to him, with the bills of lading, and an order for insurance, except such bills as that house should draw on him, at the rate of 80*l.* per hhd., from ninety days to six months' sight: insurance for the sum of 3600*l.* was ordered on forty hhds. of tobacco, which Thomas Hunt procured for a premium of 303*l.* He afterwards received a letter, advising him of six bills of exchange being drawn on him for 3200*l.*, in consequence of Rowland Hunt's agreement, payable to one of the partners of the house, on account of forty hhds. of tobacco, and endorsed by him to Mason. The bills arrived, and were presented for acceptance. Thomas Hunt refused to accept them, on an apprehension that the tobacco was not worth the money at which it was valued. After a negotiation of some days, Mason took the bill of lading for the forty hhds. and the policy of insurance out of the hands of Thomas Hunt. The tobacco afterwards arriving, was received and sold by the plaintiff Mason, and produced only 1400*l.* The occasion of this difference between the real produce and the valued price did not appear. Under the direction of Lord Mansfield, a verdict was given for the defendant; and on an application for a new trial his lordship expressed himself thus:—An agreement to accept may in many instances amount to an acceptance: but an agreement is still but an agreement, and if it be conditional, and a third person, knowing of the conditions annexed to the agreement, take the bill, he takes it subject to such agreement. Here there were many things specified as the conditions of the acceptance—the number of hhds. to be delivered—of a certain value rated by the hhd.—the insurance—the bills of lading—the consignment. On the face of the agreement, I thought at the trial, and still incline to think, that the meaning of the parties was, that tobacco should be consigned which should be worth 80*l.* per hhd.: this fell immensely short of that sum. It is plain the Hunts never *meant* to be in advance, and I think so great a difference in the value such a fraud as to entitle the defendants to relief against the agreement. But as to this, the rest of the court have doubted, chiefly because there is no evidence to show how the decrease in the value arose, whether from the inferiority of the quality, or the fluctuation in the market. But the rest of the court are extremely clear that the subsequent conduct of the plaintiff makes an end of the whole, and I think the reasons are unanswerable. As to that part of the case, it stands thus: the Hunts say, "We are not bound; this is an imposition:—the tobacco is of inferior value. The letter represents it as worth 80*l.*, the insurance makes it 90*l.* per hhd., and it turns out not to be worth 40*l.*" If Mason had meant to say, "You are liable, and shall pay the bills," what would his conduct have been?—He would have left the policy of insurance and the bills of lading in their hands, and sued them upon their acceptance. The temptation to accept was the commission on

(M) Bills of Exchange, &c. (*Satisfaction of Bill, &c.*)

the consignment, and they were to have the security of the goods and the insurance. But the plaintiff undoes all this, and says, "Then I will take all from you, security, commission," &c. This was saying, "I will stand in your place, but not so as to be answerable for more than the produce of the tobacco." It is impossible the defendants could mean to accept without any benefit or security. We are all clear that this made an end of the agreement.

Mason v. Hunt, Dougl. 284, 297; ||*Chitt. on Bills*, 191, (7th ed.)||

Though the receipt of part from the drawer or endorser be no discharge to the acceptor for more than the part received, yet the receipt of part from the acceptor of a bill, or the maker of a note, is a discharge to the drawer and endorsers in the one case, and to the endorsers in the other, unless due notice be given of the non-payment of the residue; for the receipt of part from the maker or acceptor without notice, is construed to be a giving of credit for the remainder, and the undertaking of the preceding parties is only conditional, to pay in default of the original debtor, on due notice given: but where due notice is given that the bill is not duly paid, the receipt of part of the money from an acceptor or maker will not discharge the drawer or endorsers; for it is for their advantage that as much should be received from others as may be.

1 *Ld. Raym.* 744; *Kellock v. Robinson*, 2 *Stra.* 745, cited 1 *Wils.* 48. §A receipt of part of an order from the acceptor, after protest both of acceptor and drawer for non-payment, though without the consent or knowledge of the drawer, is not a discharge of the drawer for the balance. *Kennedy v. Motte*, 3 *M'Cord*, 13; also *Kenworthy v. Hopkins*, 1 *Johns. Cas.* 107; *Lynch v. Reynolds*, 16 *Johns.* 42. *Bull. N. P.* 271, cites *Johnson v. Kenyon*, C. B. *Hil.* 5 G. 3.

The receipt of part from an endorser is no discharge of the drawer or preceding endorser, for more than the part received.

Vide *Johnson v. Kenyon*, 2 *Wils.* 262; ||*Gould v. Robson*, 8 *East*, 580; *Walwyn v. St. Quintin*, 1 *Bos. & Pul.* 652.||

§But the holder's giving new credit to the drawer is a discharge of the endorser.

Scarborough v. Harris, 1 *Bay*, 177. See *Bank of U. S. v. Hatch*, 6 *Pet.* 250. But a mere agreement by the holder with the drawer for delay, without any consideration for it, and without any communication with the endorser, will not discharge the latter from a liability previously fixed upon him. *McLemere v. Powell*, 12 *Wheat.* 554. And mere delay to enforce the collection of a note against the maker, does not discharge an endorser once made liable, where the holder does not so bind himself to give time to the maker, that an action against him on the note cannot be maintained. *Page v. Webster*, 3 *Shepley*, 249.

Where there are three consecutive endorsers to a promissory note, the release by the plaintiff of the first endorser is a bar to an action against the second and third endorsers.

Newcomb v. Rayner, 21 *Wend.* 108. *g*

||Satisfaction of a bill or note as to one of several partners is a satisfaction as to all; and if a person is a partner in two firms, satisfaction as to one firm is so as to both.

Jacaud v. French, 12 *East*, 317. ||*Westcott v. Price*, *Wright*, 220. But a covenant not to sue one of two or more joint and several promissors, who are principals on a note, will not operate as a release to discharge the other promissors. *Durell v. Wendell*, 8 *New Hamp.* 369. *g*

One *Scaiston* drew a note, by which he promised to pay to one *Pitfield*, or order, the sum of 200*l.*, and endorsed it to *Hull*. *Hull* brought an action against *Scaiston*, in which he held him to special bail; *Hull* recovered

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interlocutory judgment against Scaiston, on which his bail paid the debts and costs, amounting to 220*l.* 15*s.* Hull executed an instrument between himself on the one part, and the bail on the other, reciting the note, and that he had recovered interlocutory judgment on it against Scaiston; that the bail had purchased the note, and paid the debt and costs; in consideration of which Hull assigned over to them the note and the interlocutory judgment, with a power of attorney to make use of Hull's name to sue the endorser, and covenanted, in the common manner, not to do any act to hinder the bail from recovering the money on the note. An action was afterwards brought in Hull's name against Pitfield, the endorser, on which these circumstances were stated; and the court held the endorser was discharged by the payment by the bail in the former action, as much as if the drawer had paid the money himself.

Hull v. Pitfield, 1 Wils. 46.]

{If the holders of a bill, after protest for non-payment and notice to the drawer, in answer to a letter representing the probability of the acceptor's being able to pay at a future period, agree not to press him, the drawer is not thereby discharged. So after protest only, if the drawer is not entitled to notice. But it is otherwise if such agreement is made {} before protest; or if the holder take a new security from the acceptor after protest, as that is giving him {} a new credit.

1 Bos. & Pul. 652, Walwyn v. St. Quintin. {} 1 Bay. 466, Shirliffe v. Gilbert, acc. {} 1 Bay, 177, Scarborough v. Harris, acc.

The endorser is discharged by the holder's receiving a part of the money from the acceptor, when the bill is due, and agreeing to take a new acceptance {} from him for the remainder payable at a future day, and that in the mean time the holder shall retain the original bill in his hands as a security; though the drawer may have no effects in the hands of the acceptor. The part-payment could not be objected to, and would not discharge the endorser; but the agreement amounted to giving time and a new credit to the acceptor.

8 East, 576, Gould v. Robson. {} Or take his bond with warrant of attorney for the remainder, (except a nominal sum,) payable by instalments. 2 Bos. & Pul. 61, English v. Darley; 4 Dall. 275, M'Faden v. Parker.

But if the holder inform the drawer of his intention to take security from the acceptor, and the drawer answer, that he may do as he likes, for that he (the drawer) is discharged for want of notice, and it appear that due notice had been given, the holder may recover from the drawer notwithstanding he has taken security from the acceptor; for the drawer, under such circumstances, must be considered as having assented to the taking of the security.

3 Bos. & Pul. 363, Clark v. Devlin.

The holder, after receiving a composition from the acceptor and discharging him, cannot make a demand upon the drawer; for if he could, the drawer could then come upon the acceptor, who would receive no advantage by the composition.

11 Ves. J. 410, *Ex parte* Wilson; 3 Bro. C. C. 1, *Ex parte* Smith; 2 Bos. & Pul. 62.

A release given to one joint-maker of a note, "except from such liability as he may be under to the endorser," will not discharge the endorser.

2 Cain. 121, Stewart v. Eden.

(M) Bills of Exchange, &c. (*Protest.*)

7 a. *Of the Protest: And herein,*

1. Of the Necessity and Validity of the Protest.

[A protest is made for non-acceptance, non-payment, and also for better security. This last is usual when a merchant, who has accepted a bill, happens to become insolvent, or is publicly reported to have failed in his credit, or absents himself from 'Change before the bill he has accepted has become due, or when the holder has any reason to suppose it will not be paid; in such cases he may cause a notary to demand better security, and on that being refused, make protest for want of it; which protest must, as in other cases, be sent away by the next post, that the remitter or drawer may take the proper means to procure better security.]

Mar. 27; 1 Ld. Raym. 743.

In making a protest, there are three things to be done; the noting, demanding, and drawing up the protest: but the noting is unknown in the law, as distinguished from the protest; it is merely a preliminary step, and has grown into practice only in modern times. The party making the demand must have authority to receive the money, and in case that be refused, the drawing up of the protest is mere matter of form, the demand being the material part.

Leftley v. Mills, 4 Term R. 175. [And see *Gale v. Walsh*, 5 Term R. 239; *Orr v. Maginnis*, 7 East, 359.] The noting is a minute made by the officer upon the bill itself, in consequence of the drawee's refusing to accept or pay, as the case may be, consisting of his (the officer's) initials, the month, the day, and the year, with his charges for minuting. The protest itself is a solemn declaration afterwards drawn up by the officer, that the bill has been presented for acceptance or payment, which was refused, and that the holder intends to recover all damages, which he, or the deliverer of the money to the drawer, may sustain on account of the non-acceptance.] *β* A protest for non-payment need not certify the non-acceptance of the bill. *Morris v. Foreman*, 1 Dall. 193.*g*

A protest does not raise any debt, but only serves to give formal notice that the bill is not accepted, or accepted and not paid; and this by the common law was and is still necessary on every foreign bill, before the drawer can be charged; but it was not required on any inland bill before the statute of 9 & 10 W. 3, c. 17; nor does the want of it since that statute destroy the remedy which the party had before against the drawer, but only deprives him of interest and costs against the drawer, unless there be notice by protest, as that statute prescribes.(a)

Molloy, 279; 6 Mod. 80; *Salk*. 131, pl. 17; 2 Ld. Raym. 992. *β* Protest for non-payment of a foreign bill is necessary to charge the drawer or endorser; and also for non-acceptance of such bill, where presentment for acceptance is necessary. 1 *Cranch*, 205, note; *per Chase, J.*, *Payne v. Winn*, 2 Bay, 376; *Union Bank v. Hyde*, 6 Wheat. 572; *Durican v. Course*, 1 Rep. Con. Ct. 100; *Read v. Bank of Kentucky*, 1 Monr. 91; *Cullum v. Casey & Company*, 9 Port. 131. A foreign bill protested does not bind the heir of the drawer. *Alston v. Munford*, 1 Brock. 266.*g* [(a) In practice, however, the plaintiff recovers interest against a drawer or endorser of an inland bill on proof of due notice, without proving a protest; and it has recently been decided, that a protest is not essential to the recovery of interest. *Windle v. Andrews*, 2 Barn. & A. 696; and see *Chitty on Bills*, (7th ed.) 218;] *β* *Ash v. Brewton*, 1 Bay, 243.*g*

He to whom the bill is payable must regularly resort to the drawee, and desire him to accept the bill, before there can be a protest; but if he be dead, or cannot be (b) found, these are good causes for protesting the bill. Also, if after acceptance the drawee die, there is to be a demand of his executors or administrators, and in default of payment, a protest, and in case the

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money become due before an executor or administrator can be appointed, yet this delay is sufficient cause to protest the bill.

Molloy, 285. (b) Alleging, in pleading, that the party on whom the bill was drawn *non fuit inventus*, is sufficient to entitle the party to a protest, without showing that inquiry was made after him; for this shall be intended, being according to the custom of merchants, and is therefore the usual form of pleading in those cases. Carth. 510. ¶ But an allegation of insolvency as an excuse for non-presentment would be impertinent. *Per* Lord Ellenborough, C. J., in *Howe v. Bowes*, 16 East, 112; 1 Maul. & S. 555; and see *Camidge v. Allenby*, 6 Barn. & C. 373. ¶ A bill of exchange, mentioning no place of payment, was drawn upon and accepted by partners as such, one of whom died before it became due; held, that a presentment of it at the surviving partner's place of business was sufficient to charge an endorser, and that no demand need be made of the personal representative of the deceased partner. *The Cayuga County Bank v. Hunt*, 2 Hill, 635.

But if he to whom the money is to be paid dies, there can be no protest before probate of his will or administration granted; for none but his executors or administrators can give a legal discharge or acquittance for the money, and consequently none others can sue for or demand the same; and though security be offered to indemnify the drawee against the executors or administrators, yet is he not obliged to accept thereof, being a matter left entirely to his own discretion, to judge and determine on the sufficiency of such security; and in this case it is said, that if a public notary protest the bill, an action on the case lies against him.

Molloy, 285.

[Where the drawee cannot be found at the place mentioned in the bill, or has absconded, protest is to be made for non-acceptance in the same manner as if acceptance had been refused on presentment.

Mal. 265. ¶ Where a bill is drawn on a person residing in A, payable in B, without designating any place for payment in B, the holder is not bound after protesting for non-acceptance at A, to inquire for the drawee at B; but it is sufficient if he cause the bill to be protested for non-payment at B. *Boot v. Franklin*, 3 Johns. 207. Or if in such a case, the drawee, on presentment at A, refuse to accept, and the bill is thereupon protested, demand of payment and protest may be made at A. *Mason v. Franklin*, 3 Johns. 202.

So also, if the drawee offer an acceptance differing from the tenor of the bill, and the holder be inclined to admit it without giving up his claim on the other parties, he must protest it for that cause; as, if the drawee offer an acceptance for part, the holder may permit him to accept in that way; but then he must cause it to be protested for non-acceptance of the whole, and send the protest to his correspondent, that he may endeavour to procure security for the remaining sum. When the bill becomes due, the holder must present it for payment, and may receive the sum for which it was accepted, and write a receipt for so much on the bill; but he must protest it for non-payment of the rest, and send back the protest with the bill.

Mar. 17, 18.]

{Where a bill was drawn on a person at Liverpool, payable in London, and was presented at Liverpool and protested for non-acceptance, and afterwards protested there for non-payment, it was held that the protest for non-payment was sufficient, as no place of payment was designated in London; and that the holder might, at his election, cause the bill to be protested for non-payment in London, without making any inquiry after the drawee there, or at the place where the drawee resided.

? Johns. Rep. 202, *Mason v. Franklin*; *Ibid.* 207, *Boot v. Franklin*;}

If a bill be left with a merchant to accept, which is (a) lost or mislaid,

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he to whom it is payable is to request the merchant to give him a note for the payment, according to the time limited in the bill; otherwise there must be two protests, the one for non-acceptance, and the other for non-payment; and though such note be given, yet if the merchant happens to fail, there must be a protest for the non-payment, in order to charge the drawer.

Molloy, 281. (a) Where a bill is casually lost, and no new one can be had, and the party on whom it is drawn does not insist on having the original bill, but refuses payment for another reason, a protest made on a copy is sufficient. Show. 164.

The protest is usually made by some public notary, and such protest is *prima facie* good evidence that the bill was not accepted, or, if accepted, that it was not paid, and sufficient to put the proof on the other side.

Molloy, 281; Skin. 273, pl. 1. β The notarial certificate of protest is sufficient proof of the dishonour of a foreign bill. 2 Bay, 411; Bryden v. Taylor, 2 Har. & J. 399; Nicholls v. Webb, 8 Wheat. 333; Tounsey v. Sumrall, 2 Pet. 179; Lonsdale v. Brown, Ibid. 688; Chanoine v. Fowler, 3 Wend. 173; Bank, &c. v. Pursley, 3 Monr. 238. But a protest by a *huissier* (an officer authorized by the French commercial code to make protests) is not evidence without proof of the code. 3 Wend. 173.g

And as, by the custom of merchants, public notaries usually protest bills, it hath been held, that pleading *protestavit seu protestari causavit* is sufficient; and that the party may plead *protestavit*, and give in evidence that the public notary did it.

Comb. 153.

[The demand of payment of a *foreign* bill must be made by the notary public himself, and not by his clerk; and even in the case of an *inland* bill, it is doubtful, whether the demand, as the foundation of the protest made in consequence of the statute of W. 3, above mentioned, can be made by the notary's clerk, or by any other person than the notary himself.

Per Buller, J., in *Leftley v. Mills*, 4 Term R. 170;] [*sed Qu.?*]

||If a man draw or endorse a bill on this country abroad, and afterwards comes here, a notice to him here need not be accompanied by the protest, or any memorial of it:—at least he cannot object to such notice, unless he applied for the protest on receiving the notice.

Cromwell v. Hynson, 2 Esp. 511; *Robins v. Gibson*, 3 Camp. 334; 1 Maul. & S. 288.]

2. At what Time to be made; and therein of giving notice to the Drawer of the Drawee's Refusal, so as to entitle the Party to Principal, Interest, and Costs.

A protest on a foreign bill of exchange is absolutely necessary to entitle the party to recover against the drawer, not only interest and costs, but likewise the principal sum; and for this purpose the bill must be presented in a reasonable time; and in case of refusal of acceptance, or in case the drawee cannot be found, it must be protested in reasonable time, and notice of such protest, as also notice of a protest after acceptance and non-payment, given to the drawer in a reasonable time; for though the drawer is bound to the party to whom the bill is payable, till payment be actually made, yet it is with this condition and proviso, says Molloy, that protest be made in due time, and a lawful and ingenuous diligence used for obtaining payment of the money. And the reason hereof is, that the drawer might have had effects, or other means of his upon whom he drew, to reimburse himself the bill, which since, for want of timely notice, he hath remitted or lost; it were unreasonable he should suffer through the holder's neglect. But as to the exact time herein, the law hath not determined it, but the same is to be left to a jury, who are to govern themselves according to the

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customs of merchants in these cases, and the usages of particular (a) countries.

Molloy, lib. 2, c. 10, § 15, 17, and 31; Vent. 45; Skin. 411; *¶ Gale v. Walsh*, 5 Term R. 239. *¶* Absence of the drawee from home, when called on for acceptance, is not a refusal to accept. *Bank of Washington v. Triplett*, 1 Pet. 35. Want of demand is excused when the party on whom it should be made cannot be found. *Stewart v. Edon*, 2 Caines, 121; *Galpin v. Hard*, 3 McCord, 394. The endorser of a bill, drawn in a French West India island, on a house in Bordeaux, payable a certain number of days after sight, and transferred in New York, need not present it for payment after protest for non-acceptance, notwithstanding the provisions of the French commercial code. *Aymur v. Sheldon*, 12 Wend. 439. But the payee in such case must conform to the French laws, in order to enforce his claim against the drawer. *Ibid.* (a) It is said, that in France, if a bill be not presented in two months, the drawer is not answerable; and in Holland in so many posts. Show. 165.

¶ Protest for non-payment is not necessary to charge the acceptor with the principal sum; but if no other evidence of a demand is given, a protest is necessary to charge him with interest.

Lang v. Brailsford, 1 Bay, 222.

As to inland bills, though a protest was not necessary by the common law, in order to sue the drawer, and is only now necessary by the statute 9 & 10 W. 3, c. 17, and 3 & 4 Ann. c. 9, *ut supra*, to entitle the party to interest and costs, yet convenient notice must be given by the party to whom the bill is payable, to the drawer, of the drawee's refusal of payment; and if any damage accrue to the drawer for want of such notice, it must be borne by the person to whom the bill is payable. But this must also be left to a jury, (b) who are to determine herein, according to the circumstances and the custom of merchants.

6 Mod. 80, 81; Salk. 131, pl. 17; 2 Ld. Raym. 992; Comb. 384; Carth. 510; Show. 318. *¶* A protest of an inland bill (where no statute intervenes) is not necessary, nor evidence of the facts stated in it. *Union Bank v. Hyde*, 6 Wheat. 573; *Miller v. Hackley*, 5 Johns. 375; *Payne v. Wynn*, 2 Bay, 376; *Young v. Bryan*, 6 Wheat. 146; *Chesapeake, &c. Canal Co.*, 1 Harring. 234; *Taylor v. Bank of Illinois*, 7 Monr. 579. *¶* A bill drawn in New York, on Charleston, or any other place in the United States, is an inland bill, on which a protest for non-acceptance or non-payment is not necessary; but a regular notice of non-acceptance is requisite to charge an endorser. 5 Johns. Rep. 375, *Miller v. Hackley*. *[(b) The practice certainly was formerly, as here stated, to leave the reasonableness of time in which payment was to be demanded to the jury. But as this was productive of endless uncertainty, it is now considered as a question of law arising out of the fact. Metcalfe v. Hall, B. R. Trin. 23 G. 3, Bull. N. P. 275; Appleton v. Sweetapple, B. R. Mich. 23 G. 3, Bayley on Bills, 73; Tindal v. Browne, 1 Term R. 167; and see Robson v. Bennett, 2 Taunt. 394; Darbshire v. Parker, 6 East, 11, 12; Parker v. Gordon, 7 East, 386; ¶ 2 Cain. 369, Furman v. Haskin. But see 6 East, 3, Darbshire v. Parker; Ibid. 14, n., Hilton v. Shepherd and Hopes v. Alder; 1 Cranch, 259, Fenwick v. Sear's Adm'rs. In Pennsylvania it is a question of fact to be determined by the jury. 1 Dall. 252, Robertson v. Vogle; 2 Dall. 156, Bank of N. America v. McKnight; Ibid. 192, Mallory v. Kirwan; Ibid. 233, Warder v. Carson's Ex'ors; 4 Dall. 127, Bank of N. America v. Pettit; Ibid. 163, Ball v. Dennison.] The periods of time within which bills are to be presented, are, however, still unfixed. The only rule that can be applied is, that due diligence must be used. Due diligence is the only thing to be looked at, whether the bill be foreign or an inland one, whether it be payable at sight, or so many days after, or in any other manner.] [See the following cases as to what is due diligence. 3 Bos. & Pul. 599, Haynes v. Birks; 6 East, 3, Darbshire v. Parker; 9 East, 347, Scott v. Lifford; 2 Cain. 121, Stewart v. Eden; 1 Johns. Rep. 294, Chapman v. Lipcombe; 2 Johns. Rep. 278, Ogden v. Cowley; 3 Johns. Rep. 230, Brower v. Jones; 1 Dall. 234, 270, Steinmetz v. Currey; 1 Wash. 335, Scott & Donaldson v. Alexander; 1 Bay, 330, Hall v. Smith.] *¶* The mere lapse of three months, before presentment of a bill drawn at New York, on Liverpool, is not evidence of delay, especially during war. *Jacob Barker v. United States*, 1 Paine's C. C. R. 156.*

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A drew a bill on B, payable in three days; B broke; the person to whom the bill was payable kept it by him four years, and then brought *assumpsit* against the drawer; and *per* Treby, C. J.—When one draws a bill of exchange he subjects himself to the payment, if the person on whom it was drawn refuses either to accept or pay; yet that is with this limitation, that if the bill be not paid in convenient time, the person to whom it is payable shall give the drawer notice thereof; for otherwise the law will imply the bill paid, because there is a trust between the parties; and it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time, when in the mean time all reckonings and accounts are adjusted between the drawer and the drawee.

Salk. 127, pl. 7; Allen v. Dockwra, at Guildhall. § But an attorney's receipt for the collection of money is not so like a bill of exchange as to require that the assignee thereof should make demand and give notice to the assignor. Runels v. Spencer, Walker, 362. So an order by a client on his attorney to pay from moneys collected is not such a bill as requires mercantile notice of non-acceptance. Crawford v. Cully, Wright, 253. §

§ It is not merely seeing a bill, or knowing of its existence, that constitutes a legal presentment to the drawee; it must be presented to him for acceptance.

Mitchell v. De Grand, 1 Mason, 176. But when a bill was drawn in Bermuda on South Carolina, and when sent on for payment, money had greatly depreciated in that state, the holder was excused for not presenting it, and recovered the full value of the drawer. Fowl v. Todd, 1 Bay, 176. §

[Where the payment of a bill is limited at a certain time after sight, it is evident that the holder must present it for acceptance, otherwise the time of payment would never come: it does not appear, however, that any precise time within which this presentment must be made has in any case been ascertained: but it must be done as soon as, under all the circumstances of the case, it conveniently can be. (a)]

Kyd on Bills, 117; § Campbell v. French, 6 Term R. 212. (a) See Goupy v. Harden, 7 Taunt. 162; Fry v. Hill, 7 Taunt. 397; and see Chit. on Bills, 162, (7th ed.) § Gowan v. Jackson, 20 Johns. 176. A bill payable so many days after sight means legal sight; and the time of the bill begins to run from the presentment and acceptance, and not from the time of presentment. Mitchell v. De Grand, 1 Mason, 176; and see Shute v. Robins, 3 C. & P. 80, Tenterden; S. C. 1 M. & M. 133; Straker v. Graham, 4 Mees. & W. (Ex.) 721. §

Whether the holder of a bill payable at a certain time after the date be bound to present it for acceptance immediately, or whether he may wait till it become due, and then present it for payment, is a question which seems never to have had a direct judicial determination: (b) in practice, however, it frequently happens that a bill is negotiated and transferred through many hands without acceptance, and not presented to the drawee till the time of payment, and no objection ever made on that account.

Mar. 12. § (b) But see Orr v. Maginnis, 7 East, 262; where Lord Ellenborough, C. J., held, that the holder of a bill of exchange is not bound to present it for acceptance until due; and see Johnson v. Collins, 1 East, 99. § Vide Burr. 2671; 1 Term R. 713; § Townley v. Sumrall, 2 Pet. 178; Bank of Washington v. Triplett, 1 Pet. 25. See 4 Porter, 348. §

Where, indeed, a bill is remitted to a factor or agent to procure acceptance, for the benefit of his principal, it is the duty of the factor to use all diligence to have it accepted, and to give advice to his principal of the event, that he may take the proper steps in case of non-acceptance; and the factor may be liable to make good any loss to his principal arising from his

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negligence: but this does not affect the bill itself, nor the right of the principal on it.

Mar. 12, 13; *Beawes*, 454; *Allen v. Suydam*, 17 Wendell, 368.g

If, however, the holder in fact present the bill for acceptance, and that be refused, he is bound to give regular notice to all the preceding parties to whom he intends to resort for non-payment: to the drawer, that he may know how to regulate his conduct with respect to the drawee, and make other provision for the payment of the bill; and to the endorsers, that they may severally have their remedy in time against the parties on whom they have a right to call: and if, on account of his delay, any loss accrue by the failure of the preceding parties, *he* must bear the loss.

Blesard and Hirst, Burr. 2670; *Goodall v. Dolley*, 1 Term R. 712; [and see *per Lord Ellenborough, C. J.*, in *Orr v. Maginnis*, 7 East, 362.] *Although a demand cannot be made on the drawer, yet notice must be given to the endorser, within the same time as if the demand had been made.* *Price v. Young*, 1 M'Cord, 339. An order, drawn on a town treasurer by selectmen, must be presented to the treasurer for payment, before an action can be maintained on it; but perhaps it is not necessary to give notice of non-payment, &c., to the selectmen. *Varner v. Nobleborough*, 2 Greenl. 125. But a party who purchases a bill, and transmits it on account of goods purchased by him, without endorsing it, is not entitled to notice of its dishonour. *Van Wart v. Smith*, 1 Wend. 219; see also *Hutz v. Carthouse*, 4 Wash. C. C. 1. There is the same necessity for notice of non-acceptance, &c., when a bill is paid for the honour of one of the parties, as in other cases. *Lenox v. Leverett*, 10 Mass. 1. If on protest for non-acceptance of a bill payable at so many days after sight, the drawee accepts the next day, and fails before the day of payment, the drawer is not liable, if he had no notice of the non-acceptance. *Mitchell v. De Grand*, 1 Mason, 176.g

Thus, if in the mean time the drawer fail, the holder cannot call on the payee endorser, because *he* can have no remedy against the drawer.(a)

Blesard v. Hirst, Burr. 2670. [(a) But the objection of a want of notice may be waived. *Lunde v. Robertson*, 7 East, 231; *Gibbon v. Coggon*, 2 Camp. 188.]

So, also, if the drawee fail, the holder cannot recover against either the drawer or endorser, because, if he could, a loss must fall on one of them, as the drawer can have no remedy against the drawee.

Goodall v. Dolley, 1 Term R. 712.

Nor will it make any difference, though the endorser, from an ignorance of the law, thinking himself bound to make good the money, promise afterwards to take up the bill at some future time.

Burr. 2670. {Such promise is sufficient *prima facie* evidence that a regular demand was made, that the bill has been dishonoured, and that due notice was given. 7 East, 231, *Lundie v. Robertson*; 3 Johns. Rep. 68, *Piersons v. Hooker*. If due diligence has not been used, the promise is binding, if made with a full knowledge of the fact, but not if made under an ignorance of it. 7 East, 236, n.; 5 Johns. Rep. 248; *Duryee v. Dennison*, Ibid. 375; *Miller v. Hackley*, 1 Bay, 291; *Fotheringham v. Ex'rs of Price*; 4 Dall. 109, *Donaldson v. Means*;} *Stevens v. Lynch*, 2 Camp. 333; *Hopley v. Dufresne*, 15 East, 276, 277.] *Where there has been no demand on the drawee or notice to the drawer, or knowledge on his part that had not been given him, a promise by him, after the bill is due, to make an arrangement satisfactory to the holder, will not oblige him to pay the bill.* *Jones v. Savage*, 6 Wend. 658; *Offit v. Vick, Walker*, 99. See also *Bachelor v. Priest*, 12 Pick. 399; *Farrington v. Browne*, 7 N. H. 271. And a promise, by a drawer or endorser, to take up a bill, if made without knowledge that due diligence has not been used by the holder, is not binding. *Jones v. Savage*, 6 Wend. 658; *Lawrence v. Ralston*, 3 Bibb, 102; *Miller v. Hackley*, 5 Johns. 385; *May v. Coffin*, 4 Mass. 347; *Warder v. Tucker*, 7 Mass. 452; *Craig v. Brown*, 3 Wash. C. C. 506; *Fotheringham v. Price*, 1 Bay, 291; see also *Ralston v. Bullitts*, 3 Bibb, 261. *Aliter*, if he have full knowledge of the facts. Ibid. *Richter v. Selin*, 8 S. & R. 438; see also *Pate v. McClure*, 4 Rand. 164; *S. P. 12 Wheat* 183; 3 Wash. C. C. 506. Such promise, however, is *prima facie* evidence that the party

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making it had received due notice, &c. 3 Bibb, 261; Walker v. Laverty, 6 Munf. 487; 8 S. & R. 438; S. P. Read v. Wilkinson, 2 Wash. C. C. 514; Pierson v. Hooker, 3 Johns. 71; Martin v. Ingersoll, 8 Pick. 1; Offit v. Vick, Walker, 99.g

Much less can the endorser be bound by a proposal to discharge the bill by instalments, made after the return of the bill for non-payment, under an ignorance of acceptance being refused; more especially if that proposal be rejected by the endorsee.

1 Term R. 712.

If an acceptance varying from the tenor of the bill be offered by the drawee, the holder acquiescing must send the same notice to the preceding parties as if acceptance were refused, otherwise he cannot have recourse to them; for to admit of such acceptance without notice is to give credit to the acceptor.

Mar. 17; [and see Paton v. Winter, 1 Taunt. 422; *per* Bayley, J. in Sebag v. Abitbol, 4 Maul. & S. 466.]

§ The holder of a bill cannot resort to the drawer or endorser until he has demanded payment of the drawee, or used due diligence to demand it.

Munroe v. Easton, 2 Johns. Cas. 75; Treadway v. Nicks, 3 M'Cord, 195. See Aymar v. Sheldon, 12 Wend. 439. But the drawer of a bill in favour of a *feme covert* cannot, in an action by the husband for non-payment on her demand, deny the wife's right to demand payment thereof. Cashell v. Goodwin, 1 Har. & Gill, 468.g

It seems established, that the next day after a banker's draft is given is the stated time allowed by law for demanding payment, in order to exonerate the holder from the consequences of the drawer's insolvency.

Metcalf v. Hall, B. R. Tr. 22 G. 3; [Pocklington v. Silvester, Sittings at Guildhall after Trin. Term, 57 G. 3; Robson v. Bennett, 8 Taunt. 388; Rickford v. Ridge, 2 Camp. 537; Reynolds v. Chetle, 2 Camp. 596; Bayley on Bills, 194, 195; Camidge v. Allenby, 6 Barn. & C. 373.]

§ A bill payable on demand must be presented within a reasonable time, or the drawer will be discharged.

Elting v. Shook, 2 Hall, 459. A demand on the maker of a note payable on demand, made on the seventh day from the date, was held to have been made within a reasonable time, to charge the endorsee. Seaver v. Lincoln, 21 Pick. 267. A note payable on a demand is a continuing security, and cannot be treated as over-due, to effect a *bonâ fide* endorsee, although of several years' date and no interest paid. Brooks v. Mitchell, 9 Mees. & W. (Ex.) 15.g

Although no precise rule can be laid down as to the time when bills payable at sight, or so many days after, are to be presented for acceptance, yet it is said that if the holder do not present them he ought to put them in circulation. If he keep them by him, and do neither, he is guilty of laches, and cannot recover on them.

Muilman v. D'Eguino, 2 H. Bl. 569. § There is no fixed rule for the presentment of a bill payable at sight, or a certain number of days after sight; but the holder must use due diligence to put the bill into circulation, and it must be presented within a reasonable time. Robinson v. Ames, 20 Johns. 146; Austin v. Rodman, 1 Hawks, 195; 13 Mass. 137; Fernandez v. Lewis, 1 M'Cord, 322; Wallace v. Agry, 4 Mason, 336; 5 *ibid.* 118, Depau v. Browne, Harper, 259; Aymer v. Beers, 7 Cow. 705; Bachellor v. Priest, 12 Pick. 399.g

We have seen above, that it is the duty of the holder of a bill, whether accepted or not, to present it for payment within a limited time; for otherwise the law will imply that payment has been had, and it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time, when all accounts might be adjusted between him and the drawee.

§ Piatt v. Eads, 1 Blackf. 82; Eldridge v. Rogers, Minor, 392; Bussard v. Levering,

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6 Wheat. 102; Mitchell v. De Grand, 1 Mason, 176; Ontario Bank v. Petrie, 3 Wend. 456; Battertons v. Porter, 2 Litt. 388; Mills v. Rouse, Ibid. 207; Ontario Bank v. Petrie, 3 Wend. 456; Offitt v. Stout, 4 J. J. Marsh. 332.*g*

The same diligence, and the same attention to the usual rules of negotiation, is required from the party who takes a bill by way of security for an antecedent debt, as from one who receives it in the common course of business, or in solution of a debt. A contrary opinion appears to have prevailed in Scotland, and was sanctioned by the decisions of the courts of that country. Thus, a bill drawn by A upon and accepted by B, payable twelve months after date, was given to C, by way of security for the payment of a bill which had been endorsed by A to C, and had been dishonoured. In the receipt which C gave for the bill so given in security, it was declared, that it was in no respect to exonerate the acceptors of the original bill, or any of the parties thereby bound, till actual payment of the bill given in security was made. Almost three years elapsed without C's taking any one step to obtain payment of this last bill. About that time the acceptors failed, upon which C demanded payment of the original bill from the parties whose names appeared upon it, and on their refusal he instituted a suit against them in the Court of Session, and obtained two interlocutors in his favour. Upon appeal to the Lords of this country, these interlocutors were reversed, and the defenders were assolizied.

Reed v. Coats, Dom. Proc. Feb. 21, 1794.

The time of payment of a bill is the last of the three days of grace, and on that day the money must be demanded; and if the last day be Sunday,*(a)* or a great holiday, the demand must be made on the second.

Tassel v. Lewis, 1 Ld. Raym. 743; Coleman v. Sayer, 2 Stra. 829. Vide Beaves, 461. *β* An impossibility to present a bill for payment on the day it falls due, where the holder is in no fault, may render a subsequent presentment sufficient to charge the drawer. *Aliter*, of oversight, or negligence in the post-office, by which a bill miscarries, so that it cannot be presented till after it is due. Schofield v. Bayard, 3 Wend. 488. And where a drawee promised to pay in ten or fifteen days, and the holder did not present the bill till eighty or ninety days had elapsed, he was held to have lost his claim on the drawer. Brower v. Jones, 3 Johns. 230; Eldridge v. Rogers, Minor, 392. Where the maker of a note is entitled to grace, the endorser has the same privilege. Central Bank v. Allen, 4 Shepley, 41.*g* *¶*(*a*) So by the stat. 7 & 8 G. 4, c. 15, § 2, if the day upon which a bill of exchange or promissory note becomes due be a fast or thanksgiving day, such bill or note is to be payable on the day next preceding. *¶* 2 Cain. 343, Jackson v. Richards. In New York it has been determined that the 4th of July is a public holiday; and if that be the last day of grace, the bill must be paid on the 3d of July. 2 Cain. Er. 195, Lewis v. Burr.}

And the holder is not bound to wait till the last moment of the last day of grace, for the undertaking of the acceptor is to pay the bill on demand on any part of the last day of grace.

Lefley v. Mills, 4 Term R. 173. *β* Days of grace may be claimed by the parties as a matter of right. Thomas v. Shoemaker, 6 Watts & Serg. 179.*g*

The three days of grace are allowable on promissory notes, as well as upon bills of exchange.

Brown v. Harraden, 4 Term R. 148; *¶* 2 Cain. Er. 198, Lewis v. Burr.} *¶* Different countries vary in the number of days of grace allowed: as to the rule at Hamburg, see Goldsmith v. Shee, Goldsmith v. Bland, Bayley, 199. *¶*

A presentment either for payment or acceptance must be made at seasonable hours: and seasonable hours are the common hours of business in the place where the party lives to whom the presentment is to be made.

β Business hours, in respect to the time of presentment and demand of bills and notes,

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generally range through the whole day down to the hours of rest in the evening, except where the paper is due from a bank. *The Cayuga County Bank v. Hunt*, 2 Hill, 636. A presentment of a draft, payable at a particular bank, to the cashier for payment at the bank, on the day it fell due, but after business hours, who refused payment because the acceptors had provided no funds, was held sufficient. *Flint v. Rogers*, 3 Shepley, 67. Where a demand was made by the payee of a note upon the maker at eight o'clock on the morning of the day on which the note became payable, and payment not being then made, a suit was immediately commenced thereon; it was held that the action was prematurely brought and could not be maintained. *Lunt v. Adams*, 5 Shepley, 230.g

It is not enough to say in the notice, that the drawee or maker refuses, is insolvent, or has absconded; but it must be added, that the holder does not intend to give him credit.(a) The purpose of giving notice is not merely that the endorser should know that default has been made, for he is chargeable only in a secondary degree; but to render him liable it must be shown that the holder looked to him for payment, and gave him notice that he did so. A case might easily be imagined, where the endorser might have notice from the holder, and yet would not be liable; as, if that notice contained circumstances which showed that the endorsee had given time and credit to the acceptor or maker.

As to bills, vide 1 Stra. 441, 515; *Dagglish v. Weatherby*, 2 Bl. Rep. 747. As to notes, vide 1 Stra. 549; 2 Stra. 1087; *Tindal v. Brown*, 1 Term R. 170; {7 Ves. J. 597, *Ex parte Barclay*.} [(a) The notice should at least contain an intimation that payment has been refused by the acceptor. *Hartley v. Case*, 4 Barn. & C. 339.} § Notice of the dishonour of a bill need not state that the holder looks to the party notified for payment; this is implied by the act of giving notice. *Cowles v. Harts*, 3 Conn. 517; *Shrieve v. Duckham*, 1 Litt. 194. See *Bank of Cape Fear v. Seawell*, 2 Hawks, 560.g

It is therefore necessary that notice should come from the endorsee himself: it is not sufficient that the endorser should be informed by some third person, as by the drawee or maker, that he does not choose to accept, or cannot pay.

§ It is not necessary that notice should be given by the holder; if given by any person authorized by the holder, it is sufficient. *Hazlett v. Poultney*, 1 N. & M. 466; *Stanton v. Blossom*, 14 Mass. 116; *Tunno v. Lague*, 2 Johns. Cas. 1; *Chanoine v. Fowler*, 3 Wend. 179. See *Bank of Cape Fear v. Seawell*, 2 Hawks, 560; *Mead v. Engs*, 5 Cow. 303; *Van Hoesen v. Van Alstyne*, 3 Wend. 75; and see *Chapman v. Keane*, 3 Adol. & Ellis, 193; 4 Nev. & M. 607; 1 Har. & Woll. 165.g

{The endorser of a note is entitled to strict notice, though he endorsed merely for the accommodation of the maker.

4 Cranch, 141, *Exec. of French v. Bank of Columbia*; 2 Cain. 343, *Jackson v. Richards*; 2 H. Black. 609, *Nicholson v. Gouthit*. See 2 H. Black. 336, *De Berdt v. Atkinson*.}

|| It has, however, been held, that notice from the acceptor to the drawer that he has not been able to pay the bill, and that it is in the plaintiff's hands, is sufficient: that might, perhaps, be on the ground that the acceptor wrote for the plaintiff, and as his agent. A notice from the holder or any other party will inure to the benefit of every other party who stands between the party giving the notice and the person to whom it is given.

Rosher v. Kieran, 4 Camp. 87; *Stewart v. Kennet*, 2 Camp. 177; *Wilson v. Swabey*, 1 Stark. Ca. 34; and see *Edwards v. Dick*, 4 Barn. & A. 212.} § Notice by the drawee, who has refused acceptance, is not sufficient. 14 Mass. 116. It must be given by a party, or one who, on the return of the bill to him, would have a right of action on it. 3 Wend. 179; *Bachelor v. Priest*, 12 Pick. 406. See *Walker*, 99.g

§ He who accepts or pays *supra* protest must give the same notice,
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in order to charge a party, which is necessary to be given by other holders.

Martin v. Ingersoll, 8 Pick. 1; *Grosvenor v. Stone*, *Ibid.* 79; *Konig v. Bayard*, 1 Pet. 262.*g*

With respect to acceptance, it is usual to leave a bill for that purpose with the drawee till the next day, and that is not considered as giving him time; it being understood to be the usual practice; but if, on being called on the next day, he delay or refuse to accept according to the tenor of the bill, the rule now established, where the parties to whom notice is to be given reside at a different place from the holder and drawee, is, that notice must be sent by the next post. Under the same circumstances, the same rule obtains in the case of non-payment.

Mar. 16; 1 Term R. 169.

So, also, in case the drawee or maker has absconded, or cannot be found, notice of these circumstances, either in case of non-acceptance or non-payment, must be sent by the first post.

§ Notice of non-acceptance or non-payment of a bill must be given in a reasonable time in order to charge the drawer or endorser, (of which the court is to judge.)

Phillips v. McCurdy, 1 Har. & J. 187; *United States v. Barker*, Paine, 156; 14 Mass. 116; *Mallory v. Kirwan*, 2 Dall. 192; *Warden v. Carson's Ex'rs*, 2 Dall. 233; *Steinmetz v. Currey*, 1 Dall. 235; *Bank of North America v. McKnight*, 1 Yeates, 147; *Denniston v. Imbrie*, 3 Wash. C. C. R. 396; *London v. Howard*, 2 Hayw. 333; *Scarborough v. Harris*, 1 Bay, 177; *Bryden v. Bryden*, 11 Johns. 187; *Ribble v. Jefferson*, 5 Halst. 139; *United States Bank v. Barker*, 12 Wheat. 559; Paine, 156; *Stott v. Alexander*, 1 Wash. 331; *Dodge v. Bank of Kentucky*, 2 Marsh. 616; *Mohawk Bk. v. Broderick*, 10 Wend. 304; 13 Wend. 133; *Hagan v. Boswell*, 4 J. J. Marsh. 61. In some of the cases last cited, it was said that reasonable notice is a question for the jury to decide. Where reasonable notice or not was a question left to the jury, see *Siggers v. Brown*, 1 M. & Rob. (N. P.) 520; *Clarke v. Sharp*, 3 Mees. & W. (Ex.) 166; *Buxton v. Jones*, 1 Man. & Gr. (C. P.) 83; 1 Sc. N. S. 19; *Stockden v. Collins*, 9 C. & P. (N. P.) 653; 7 Mees. & W. (Ex.) 515; *Carlewis v. Corfield*, 1 Gale & D. (Q. B.) 480; *Brounell v. Bonney*, 1 Adol. & Ellis, N. S. (Q. B.) 39. No greater diligence in giving notice of the dishonour of a bill is required of one to whom it is sent for collection at the place of payment, than of the endorsee or holder. *Farmer's & Co. Bank v. Turner*, 2 Litt. 18; *S. P. Colt v. Noble*, 5 Mass. 167; *Tunno v. Lague*, 2 Johns. Cas. 1; *Van Wart v. Smith*, 1 Wend. 219. As to what constitutes good notice, see *Bussard v. Levering*, 6 Wheat. 103; *Munn v. Baldwin*, 6 Mass. 316; *Stanton v. Blossom*, 14 Mass. 116; *Remer v. Douner*, 23 Wend. 620; *Ellerbe v. Course*, 1 Rep. Con. Ct. 381; *Chapman v. Lipscombe*, 1 Johns. 294; 5 Wend. 588; 2 Stew. & Port. 428; *Triplett v. Hunt*, 3 Dana, 128; *Bank of the United States v. Hatch*, 6 Pet. 250; *Cresson v. Williamson*, 1 Marsh. 456; *Howsego v. Coune*, 2 Mees. & W. (Ex.) 348; *Goodman v. Hawey*, 1 Nev. & M. (K. B.) 373; 4 Adol. & Ellis, 870; *Hedger v. Stevenson*, 1 Nev. & P. (K. B.) 799; 5 Dowl. (P. C.) 771; *Woodthorpe v. Lawes*, 2 Mees. & W. (Ex.) 109; *Gruegon v. Smith*, 2 Nev. & P. (K. B.) 303; 6 Ad. & Ell. 499; *Houlditch v. Cates*, 4 Bing. N. S. (C. P.) 411; *Phillips v. Gould*, 8 C. & P. (N. P.) 355; *Shelton v. Braithwaite*, 7 Mees. & W. (Ex.) 436; *Cook v. French*, 3 Perr. & D. (Q. B.) 596; *Lewis v. Gompertz*, 6 Mees. & W. (Ex.) 399; *Hedger v. Stevenson*, 2 Mees. & W. 799. *Ahtler*, Boulton v. Welsh, 3 Bing. N. S. (C. P.) 688; *Strange v. Price*, 2 Perr. & D. (Q. B.) 278; 10 Adol. & Ellis, 125, supporting *Solarte v. Palmer*, 1 Bing. N. C. 194; *Messenger v. Southy*, 1 Mann. & Gr. (C. P.) 76; 1 Sc. N. S. 180; *Furze v. Sharwood*, 2 Gale & D. (Q. B.) 116 (reviewing the cases); *Bryden v. Bryden*, 11 Johns. 187; *Fidler v. Norris*, 6 Whar. 406; *Barnewell v. Mitchell*, 3 Conn. 101; *Hill v. Varrell*, 3 Greenl. 233. If in notice of non-payment dated on the day the bill is due, it is stated by mistake that it was protested the evening before, and that the holder looks to the endorser for payment, it is a question for the jury whether the endorser was misled. *Ontario Bank v. Petrie*, 3 Wend. 456. See *Moorman v. Bank of Alabama*, 3 Porter, 353. As to what will excuse delay in giving notice, see *Martin v. Ingersoll*, 8 Pick. 1; *Tunno v. Lague*, 2 Johns. Cas. 1; *Hapkirke v. Page*, 2 Brock. 20. *Ahtler*, *Lawrence v. Ralston*, 3 Bibb, 102.*g*

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The reason why the law requires notice is, that it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and that, if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. (a) But if the drawer have no effects in the other's hands, then he cannot be injured for want of notice; and if it be proved on the part of the plaintiff, that, from the time the bill was drawn till the time it became due, the drawee never had any effects of the drawer in his hands, notice to the latter is not necessary in order to charge him, for he must know whether he had effects in the hands of the drawee or not: and if he had none, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice, that it has been dishonoured.

1 Term R. 410; {1 Esp. Rep. 332, *Staples v. Akin*; 1 Bay, 291, *Fotheringham v. Exrs. of Price*. Regret has frequently been expressed that this exception to the rule requiring notice was ever established. 1 Bos. & Pul. 654, 655; 3 Bos. & Pul. 241, 242; 7 East, 362; 6 Ves. J. 305; 11 Ves. J. 411.} || (a) And the bankruptcy of the drawer will not excuse notice, but it must, it seems, be given to him, his assignee or trustee. *Rhode v. Proctor*, 4 Barn. & C. 517. *Ex parte Johnson*, 3 Deac. & Chit. 433; 1 Mont. & Ayr. 622. The insolvency and absconding of the drawer are no excuse for not giving notice of the dishonour of the bill to the endorser. *May v. Coffin*, 4 Mass. 341; *Barton v. Baker*, 1 S. & R. 334; *Gibbs v. Cannon*, 9 S. & R. 201. *g* And as to the requisite diligence in attempting to give notice, see *Bateman v. Joseph*, 2 Camp. 461; *Beveridge v. Burgess*, 3 Campb. 262; *Crosse v. Smith*, 1 Maul. & S. 545; *Goldsmith v. Bland*, *Bayley on Bills*, 224, (4th ed.) || *g* If the drawer had no effects in the hands of the drawee, at the date of the bill, and no reasonable ground to expect it would be honoured, he is chargeable without notice of non-acceptance. *Hopkirk v. Page*, 2 Brock. 20; *Eichelberger v. Finley*, 7 Har. & J. 381; *Warder v. Tucker*, 7 Mass. 452; 2 Wash. C. C. 514; 1 *Ibid.* 461; *Anon v. Stanton*, 1 Hayw. 271; *Valk v. Simmons*, 4 Mason, 113; *Cashell v. Goodwin*, 1 Har. & Gill, 468; *Hoffman v. Smith*, 1 Caines, 157; *Savage v. Merle*, 5 Pick. 88; *Armstrong v. Gay*, 1 Stew. 175; *Kinsley v. Robinson*, 21 Pick. 327. Otherwise, if he had reasonable ground to believe it would be honoured. *Austin v. Rodman*, 1 Hawks, 195; *Stanton v. Blossom*, 14 Mass. 116; *French's Executors v. Bank of Columbia*, 4 Cranch, 141; *Robinson v. Ames*, 20 Johns. 146; 3 Johns. Cas. 5; *Grosvenor v. Stone*, 8 Pick. 83; *Campbell v. Pettengill*, 7 Greenl. 126; *Hill v. Norris*, 2 Stew. & Port. 114. The following agreement signed by a third person on the back of a note then due, viz., "I hereby guaranty the payment of the within note, one year from this date, whether a suit is brought against the signer or not," requires on the part of the holder demand and notice in order to charge the guarantor. *Sage v. Wilcox*, 6 Conn. 81. *g*

A question arising on the validity of a commission of bankrupt, on account of the insufficiency of the debt due to the petitioning creditor, the facts appeared to be these: the bankrupt being indebted to the petitioning creditors in the sum of 115*l.* 3*s.* 8*d.* on the 15th of September, 1784, drew a bill for 20*l.* on the defendant, "who, till the time of the bankruptcy and of the bill becoming due, was a creditor of the bankrupt," payable to the petitioning creditors, two months after date, and paid it to them on account of part of their debt: the bill was presented for payment on the 18th of November following, and dishonoured. No notice, however, was ever given by the petitioning creditors to the bankrupt, or left at his house; a commission issued against the drawer on the 20th of November, on which he was declared a bankrupt in the afternoon of the 24th; that commission was afterwards superseded, and another commission was issued on the petition of the parties, on the amount of whose debt the present question arose. If the petitioning creditors, by not giving notice to the bankrupt of his bill being dishonoured, had made the bill their own, their debt was reduced within 100*l.*, and then the commission could not be supported: but if notice

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was not necessary, the bill was not paid; their debt remained as it originally was, and the commission was valid. On the principles before stated, the court held, that notice in this case was not necessary, and therefore the commission was good.

Bickerdike v. Bollman, 1 Term R. 405; [*Legge v. Thorpe*, 13 East, 171.]

[It is, however, no excuse for not giving notice to the drawer that he had no effects in the drawee's hands when the bill was drawn or became due, if he had effects on their way to the drawee; unless the drawer gets back those effects, and would stand indebted in the amount to the drawee if he paid the bill.

Rucker v. Hiller, 3 Camp. 217; 16 East, 43; and see 3 Camp. 334.

And the want of effects is no excuse, if the drawer would be entitled, on taking up the bill, to sue either the acceptor or any other party.

Cory v. Scott, 3 Barn. & A. 619; *Norton v. Pickering*, 8 Barn. & C. 610, which seem to overrule *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652; and see *Brown v. Mafey*, 15 East, 216.

If the drawer had effects in the hands of the drawee at the time when the bill was drawn, it has been held he is entitled to notice of non-acceptance, although at the time when the bill was presented for acceptance, and from thence until presentment for payment, he had not any.

Orr v. Maginnis, 7 East, 359.

So, if he had effects in the hands of the drawee when the bill was presented for acceptance, it has been held he will be entitled to notice of non-acceptance, although he was indebted to the drawee greatly beyond the amount of such effects.

Blackhan v. Doren, 2 Camp. 503; and see further on this subject, *Bayley*, 241, (4th ed.)

Yet, though it appear that the drawer had no effects in the hands of the drawee, no action can be maintained against the *endorser* if no notice was given him of the bill being dishonoured; for though the drawer may have received no injury, the endorser, who must be presumed to have paid a valuable consideration for the bill, probably has.

1 Term R. 714. β An endorser is entitled to notice in all cases, unless he has received funds from the drawer to take up the bill. *Scarborough v. Harris*, 1 Bay, 178; *Barton v. Baker*, 1 S. & R. 334; 7 Mass. 452; *Fotheringham v. Price's Executors*, 1 Bay, 291; *Dennison v. Imbrie*, 3 Wash. C. C. 401; *Ramdulollday v. Darieux*, 4 Wash. C. C. 61. In *Farmer's Bank, &c. v. Vanmeter*, 4 Rand. 553, it was held that an endorser is chargeable without notice, if he endorsed for the drawer's accommodation only, and had no expectation that the drawee would pay. See also *Allen v. Suydam*, 17 Wendall, 368; *Creamer v. Perry*, and Tr. 17 Pick. 332. Where the administrator of an endorser of a promissory note had been appointed to that office before the maturity of the note, and had given due notice of his appointment, it was held that he was entitled to the same notice of non-payment of the note, as is required by law to be given to an endorser. *Oriental Bank v. Blake*, 22 Pick. 206; γ {*Peake*, N. P. 202, *Wilkes v. Jacks*; 1 Bay, 177, *Scarborough v. Harris*; *ibid.* 291, *Fotheringham v. Ex're of Price*; 1 Dall. 271, *Steinmetz v. Currie*. Vide 1 Cranch, 259, *Fenwick v. Sears's Adm'rs.*}

{A person having a right to draw in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee, but not come to hand, or from any other cause, is considered as drawing upon funds in the hands of the drawee, and is entitled to notice. The transaction cannot be denominated a fraud, for in such case it is a fair commercial transaction. Neither can it be truly said that he had no right to

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expect his bill would be paid, for a person authorized to draw must expect his draft will be honoured. Neither can it be said that he has virtual notice of the protest, and that actual notice is useless, and the want of it can do him no injury; for this is only true *when at the time of drawing the drawer has no reason to expect that his bill will be paid.*

4 Cranch, 141, Exec. of French v. Bank of Columbia.—Yet in Walwyn v. St. Quintin, 1 Bos. & Pul. 652, where the bill was drawn for the accommodation of the payee, who had placed securities in the hands of the drawee, and the bill was actually accepted, it was held that the drawer was not discharged, though notice of the non-payment of the bill was not given to him. See the remarks of C. J. Marshall on that case in 4 Cranch, 157—160. In Hoffman v. Smith, 1 Cain. 157, the Supreme Court of New York decided that want of funds belonging to the drawer renders notice of non-payment unnecessary, as well when the bill is accepted as when not.

The following case was decided on the same principle. A, the agent in America of B in England, drew a bill upon him, and endorsed it to C, also residing in America, who endorsed it over. Before the bill became due, A having reason to believe that B would fail, lodged property belonging to B in the hands of C, to answer the bill in case it should be returned; C undertaking to restore the same whenever it should appear that he was exonerated from the bill. Acceptance and payment of the bill were refused, but no notice was given to A. It was held that A was discharged. The court said that the rule dispensing with notice proceeded on the ground of a supposed fraud, which was not applicable to a case where an agent draws upon his principal, and there is no evidence to show that he had not a right to do so. And the deposit with the endorsers, to indemnify them against the return of the bill, could not deprive him of the right to notice; the want of it might have induced them to pay back the deposit to him, and he might have paid it over to the drawee.

3 Bos. & Pul. 239, Clegg v. Cotton.

It is no excuse for not giving notice that the drawer had no effects in the hands of the drawee at the time when the bill was refused acceptance or afterwards, if he had some effects (to whatever amount) in the drawee's hands when the bill was drawn.

7 East 359, Orr v. Maginnis.}

Though, in the case where the drawer has effects in the hands of the drawee, the want of notice cannot be waived by a subsequent promise by him to discharge the bill, yet where he had no effects it may, though it appear that in fact he sustained an injury for want of such notice: such a subsequent promise is an acknowledgment that he had no right to draw on the drawee, and if he has in fact sustained damage it is his own fault.

Rogers v. Stephens, 2 Term R. 713. [In more recent cases it has been decided, that a payment of part, or a promise to pay, or "to see it paid," &c., made by the person insisting on the want of notice after he was aware of the laches, amounts to a waiver of the laches of the holder, and admits his right of action. See Harford v. Wilson, 1 Taunt. 12; Lundie v. Robertson, 7 East, 231; Taylor v. Jones, 2 Camp. 105; Gibbon v. Coggon, 2 Camp. 188; Wood v. Brown, 1 Stark. 217; Hopes v. Alder, 6 East, 16.]

But where damage in such a case has been sustained, and no subsequent promise appears, it may be very doubtful whether want of notice can be waived.

See Rogers v. Stephens, 2 Term R. 714.]

{No circumstance except the want of effects in the hands of the drawee will dispense with notice. The death, bankruptcy, or known insolvency {}}

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of the drawee, or his being in prison, constitute no excuses for the neglect to give it.

3 Esp. Rep. 158, *Dennis v. Morrice*, Chitty, 154. {1} 2 H. Black. 336, *De Berdt v. Atkinson*; *Ibid.* 609, *Nicholson v. Gouthit*; 2 Cain. 343, *Jackson v. Richards*; 2 Bos. & Pul. 277, *Whitefield v. Savage*. Vide 8 East, 246, *Warrington v. Furbor*.

Where the endorser of a note, before it became due, informed the holder that the maker had absconded, and that, being secured for his responsibility, he would give a new note, and requested time to pay, and in the mean time the note fell due, it was held that the holder was not bound to make a demand on the maker, or to give notice to the endorser, who by his conduct waived the necessity of any demand or notice.

1 Johns. Ca. 99, *Leffingwell v. White*;}.

¶ An agreement by the endorser and drawer with the holder, before the bill is due, that the holder should take any security that the acceptor could give, or make any arrangement he might deem proper to receive payment, without affecting their liabilities, was held not to dispense with demand and notice.

Bank v. Spell, 2 Hill, 366.¶

Merchants generally allow three days after a bill becomes due for the payment, and for non-payment within three days protest is made, but is not sent away till the next post after the time of payment is expired, and if *Saturday* be the third day no protest is made till *Monday*.

Molloy, 284; *Show*, 164, S. P., that the third day is the day of grace. ¶ See *Thomas v. Shoemaker*, 6 Watts & Serg. 179; *Moore v. Somerset*, 6 Watts & Serg. 262; *Jones v. Wardell*, 6 Watts & Serg. 399.¶

¶ And now by 7 & 8 G. 4, c. 15, § 1, where bills of exchange or promissory notes becoming due on the day preceding *Good Friday* or *Christmas-day* are dishonoured, notice thereof may be given on the day *after* such *Good Friday* or *Christmas-day*.¶

[But there is a difference between foreign and inland bills in this respect: the former must be presented for payment *before* the expiration of the last day of grace, and in time to have the protest sent off the same night, if the post then sets out; but on inland bills, the protest cannot be made till *after* the expiration of three days, and notice may be sent at any time within *fourteen* days after the protest.

Leftley v. Mills, 5 Term R. 170.

¶ With reference to the rule as to giving notice of non-payment, it seems that each party is entitled to a day to notify the dishonour to his immediate endorser; but that if the notice is to be given by the post, it may be sent off by the next convenient (not the next possible) post, when the parties do not reside in the same place; and when they do, then by the post, so as to be received on the day after that on which the party giving notice was first informed of the dishonour of the bill.

Darbishire v. Parker, 6 East, 3; *Smith v. Mullett*, 2 Camp. 208; and see *Chit. on Bills*, 225, (7th ed.)¶ ¶ Notice of non-payment, given to the drawer on the last day of grace, after demand on the acceptor upon the same day, is sufficient. 6 Wheat. 102; 4 Greenl. 482. Each endorser of a promissory note is entitled to one day for giving notice to the party next liable; but the time is to be calculated from the day on which the notice was in fact received, and is not enlarged, if he has received notice earlier than might in strictness have been required. *Farmer v. Rand*, 4 Shipley, 453; *Mitchell v. De Grand*, 1 Mason, 176; *Talbot v. Clark*, 8 Pick. 54; *Robinson v. Ames*, 20 Johns. 146; *Dodge v. Bank of Kentucky*, 2 Marsh. 616; *Sewall v. Russell*, 3 Wend. 277; *Hickman v. Ryan*, 5 Litt. 24; *Mead v. Engs*, 5 Cow. 303. If a notice

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of dishonour is sent by post on the day on which the party is to receive it, the onus is on the holder to prove affirmatively that the letter was put in in time to reach the party that day according to the course of the post. *Fowler v. Hendon*, 4 Tyr. 1002.g

§ The holder of a foreign bill is not bound to forward the protest for non-acceptance immediately, but he must give notice (a) of the fact to the parties whom he intends to resort to; and when he sues for non-payment, he must produce both protests.(b)

Lenox v. Leverett, 10 Mass. 5. See 4 Mass. 347; 5 Mass. 169; 6 Mass. 388; 2 Johns. Ca. 2; 20 Johns. 146; 1 Call. 394; 4 Mason, 336. (a) *Contra*, *Brown v. Barry*, 3 Dall. 368; *Ibid.* 424; 6 S. & R. 356. (b) Notice of protest need not state who is the holder of the bill. *Shreive v. Duckham*, 1 Litt. 194.g

To the constitution of a bill of exchange, it is not necessary that the words "value received" should be inserted, and the want of these in a foreign bill cannot deprive the holder of the benefit of a protest; but that benefit in case of non-payment is not given to inland bills, which want these words, and therefore they cannot be protested for non-payment: for the act of Queen Anne provides, that "where these words are wanting, or the value is less than twenty pounds, no protest is necessary either for non-acceptance or non-payment."

In foreign bills, there is no distinction between those payable at such a time after *date*, and after *sight*; but the statute confines the benefit of protest on inland ones to those payable after *date*; so that in *strictness* there can be no protest on those payable after *sight*: and this has been lately so adjudged.

In foreign bills, where the acceptance is in words only, or in some collateral writing, a protest may be made for non-payment, as well as if the acceptance had been in writing on the bill: but the statute of William confines the protest for non-payment to those bills on which the acceptance is written; and therefore, in order to have the benefit of a protest for non-payment, where the acceptance is collateral, the holder must protest for non-acceptance.

Leftley v. Mills, 4 Term Rep. 170. Vide Mar. 17.

But in practice a protest is hardly ever made for non-acceptance of an inland bill; it is only noted for non-acceptance, and if not paid when due, it is frequently protested for non-payment: however, notice must be given of the non-acceptance and noting, otherwise the holder takes the risk upon himself.

In the case of a foreign bill, noting alone for non-acceptance will not be sufficient, it must also be *protested* for non-acceptance; nor will the omission to make such protest be supplied by a subsequent protest for non-payment.

Rogers v. Stephens, 2 Term R. 713.] § On proof of his usage, the endorsement of a notary was taken as evidence of the time of demand, though the protest bore a different date. *Bank v. Simmons*, 1 Harring. 331; § 5 Term. 239, *Gale v. Walsh*; 7 East, 359, *Orr v. Maginnis*. But the Supreme Court of the United States have decided, that as to bills drawn in the United States and payable in Europe, the custom of merchants in this country does not ordinarily require, to recover on a protest for non-payment, that a protest for non-acceptance should be produced, though the bills were not accepted. 3 Dall. 368, *Brown v. Barry*; *Ibid.* 424, *Clarke v. Russel*. See 1 Cranch, 194, *Wilson v. Lenox*; 1 Bay. 292, *Lang v. Brailsford*; *Ibid.* 243, *Adm'rs of Ash v. Ex'rs of Brewton*.] [See *Orr v. Maginnis*, 7 East, 361; *Robins v. Gibson*, 1 Maul. & S. 288.] § In *Brown v. Barry*, 3 Dall. 368; *Clarke v. Russel*, *Ibid.* 424; and *Read v. Adams*, 6 S. & R. 356, it was held not to be necessary, in order to recover on a bill drawn in the United States and payable in Europe, and protested for non-payment, to aver or produce a protest for non-acceptance. *Contra*, *Lenox v. Leverett*, 10 Mass. 5; *Duncan v. Course*, 1 Rep. Con. Ct. 103; *Phillips v. M'Curdy*, 1 Har. & J. 187; *Thompson v.*

(M) Bills of Exchange, &c. (*Interest, Expenses, &c.*)Cumming, 2 Leigh, 321; Martin v. Ingersoll, 8 Pick. 1; Chase v. Taylor, 4 Har. & J. 54.*g*

¶ When one of a set of exchange is protested for non-payment, after having been accepted, it is sufficient to charge the endorser, if the protest of the accepted bill and one of the set, which has neither been accepted nor protested, is presented to him and payment demanded.

Kinworthy v. Hopkins, 1 Johns. Cas. 107.*g*

Interest upon a bill of exchange commences from the demand made;^(a) and therefore if there was no demand made till action brought, defendant may plead tender and refusal, and *uncore prist*, and so discharge himself of interest; but if it be the defendant's fault that demand could not be made, as if he were out of the kingdom, there, want of demand ought not to prejudice the plaintiff.

¶(a) This must be understood of a bill or note payable on demand, for if it be payable at a certain period after date, interest runs from the time when it becomes due, and if the bill or note is expressly payable "with interest," then interest commences at the date. Burr. 1077; 1 Stark. Ca. 452, 507; Bayley on Bills, 279; and that a jury are not bound to give interest where it is only recoverable as damages, see 2 Barn. & A. 305; 1 Dow. & Ry. 16; and see further, as to interest, Chitt. on Bills, 420, *et seq.* (7th edit.)

[Wherever interest is allowed, and a new action cannot be brought for it, which is the case on bills of exchange and promissory notes, the interest is to be calculated up to the time of signing final judgment.

2 Burr. 1086.

Where a bill endorsed over is not duly paid, the endorsee may charge the endorser with interest, exchange, and other incidental expenses, beyond the amount of 5 *per cent.*, if such charges be reasonable, warranted by usage, and not made a colour for usury; thus, the constant course has been, with respect to bills returned protested from India, to allow 10s. per pagoda, which includes interest, exchange, and all other charges; and this, notwithstanding the current price of exchange at which the bill was discounted may have been greatly below 10s., as, at 6s. 6d.: and the endorsee will also be entitled to interest at 5 *per cent.* from a reasonable time after notice given to the endorser of the bill having been returned unpaid.

Auriol v. Thomas, 2 Term R. 52;] *Ex parte* Jones, 17 Ves. 332; 1 Rose Ca. 29, S. C.] ¶ If the holder receive part of the money from the acceptor, after protest for non-payment, the claim to damages against the endorser is reduced *pro rata*. Bangor Bank v. Hook, 5 Greenl. 174. When damages not recoverable, see Rouvert v. Paton, 12 S. & R. 253; M'Candlish v. Cruget, 2 Bay, 377; King v. Phillips, Pet. C. C. 350. If the principal sum due on a protested bill has been recovered, and the judgment satisfied, damages cannot be recovered in another action. Kenner v. Kennedy, 4 Har. & J. 240.*g*

{ A deposited a sum of money at the banking-house of B in Paris, for which B gave him his note "payable in Paris, or at the choice of the bearer at the Union Bank in Dover, or at my usual residence in London, according to the course of exchange upon Paris." After this note was given, the direct course of exchange between London and Paris ceased altogether, having been previous to its total cessation extremely low. The note was, at a subsequent period, presented for acceptance and payment at the residence of B in London, at which time there was a circuitous course of exchange upon Paris by way of Hamburgh. A is entitled to recover upon the note according to such circuitous course of exchange upon Paris at the time when the note was presented.

1 Bos. & Pul. 335, Pollard v. Herries.

(M) Bills of Exchange, &c. (*Payment by Bill.*)

By a statute of Pennsylvania, if a bill drawn on Europe is returned back unpaid with a legal protest, the drawer and all others concerned shall pay it together with damages at the rate of 20 *per cent.*

1 Laws Penn. (Dallas's ed.) 23, Act of 1700.—The same rule has been established in New York by immemorial commercial usage. 4 Johns. Rep. 122, *Hendricks v. Franklin*.

A bill being returned protested for non-acceptance, the drawer, without waiting for a protest for non-payment, paid it with 20 *per cent.* damages. Before the payment was made, the bill had been protested for non-payment, though it was not known. It was held that the defendant might retain the damages with a good conscience, and that the drawer could not recover them back.

1 Dall. 147, *Morris v. Tarrin*. Whether damages are payable on a protest for *non-acceptance* was not decided. In New York it is held that they are. 4 Johns. Rep. 144, *Weldon v. Buck*.

When the bill is received for an antecedent debt, and to be in full *when paid*, no damages can be recovered.

1 Dall. 261, *Chapman v. Steinmetz*; 2 Dall. 100, *Watts v. Willing*; 4 Dall. 155, *Keppele v. Carr*; 1 Johns. Ca. 107, *Kenworthy v. Hopkins*; 4 Johns. Rep. 27, *Thompson v. Robertson*.

The holder can recover no more than the contents of the bill and 20 *per cent.* damages with interest, at the par of exchange. He can recover nothing for the difference between the price of bills at the time the bill was returned and the time it was drawn.

4 Johns. Rep. 419, *Hendricks v. Franklin*. See *Ibid.* 124, *Martin v. Franklin*.

If the holder receives from the acceptor, payment of the bill after it is protested, and before it is returned with the protest, he waives his right to damages.

4 Cranch. 333, 345, *United States v. Gurney & others.*}

§7 b. *When a Bill is, or is not, regarded as Payment, or tantamount thereto.*

Generally, a bill is not considered as satisfaction of a pre-existing debt, unless it be *bond fide* accepted and paid as such; or unless it be received as payment, on condition that it is collected, and the debtor is injured by the laches of the creditor who receives it.

Gallagher v. Roberts, 2 Wash. C. C. 191; *Ibid.* 321; 1 *Ibid.* 156; *Maze v. Miller*, *Ibid.* 328; *Murray v. Gouverneur*, 2 Johns. Cas. 438; *Hoar v. Clute*, 15 Johns. 224; *Woodcock v. Bennet*, 1 Cow. 711; *Henry v. Donaghy*, *Addis.* 39; *Denniston v. Imbrie*, 3 Wash. C. C. 396; *Brown v. Jackson*, 2 Wash. C. C. 24; 1 *Ibid.* 512; *Parker v. United States*, Pet. C. C. 266; *Dougal v. Cowles*, 5 Day, 511. Vide 4 Munf. 487; *Paine*, 285; *Suckley v. Furse*, 15 Johns. 338; *Van Ostrand v. Reed*, 1 Wend. 424.

A having a book account against B and C, copartners, received a separate bill of each, drawn on different persons, and gave a receipt therefor on the account, expressing that, "when paid, they would be in full of said account." One of said bills was paid, but the other was protested for non-acceptance. After the protest, A received another bill from the drawer and wrote on the protested bill, "Received the within amount per bill on S." In a suit by A, for the balance of the account, he was not permitted to show that the bill on S had not been paid.

Anderson v. Henshaw, 2 Day, 272.

(M) Bills of Exchange, &c. (Proceedings on Bills, &c.)

8. Of the Action and Remedy on a Bill of Exchange, and Manner of declaring and pleading therein.

It seems to be agreed, that against the drawer an action of debt, or a general *indebitatus assumpsit*, will lie, for he having received the money, the law raises a contract, and lays him under an obligation to pay it. But it hath been adjudged, that neither an action of debt, nor an *indebitatus assumpsit*, will lie against the acceptor of a bill of exchange, and that therefore the remedy against him must be by a special action on the case, founded on the custom of merchants: for the acceptance is only a collateral engagement to pay the debt for another, in the same manner as a promise by a stranger to pay, &c., if the creditor will forbear his debt.

Hard. 485; Vent. 152; Lev. 298; 2 Keb. 695, 713, 758, 822; Salk. 125, pl. 2; 2 Lutw. 1594; Skin. 255, pl. 3; 6 Mod. 129; and see Bishop v. Young, 2 Bos. & Pul. 80.]

[In a late case, however, where all the former decisions were fully considered, it was decided that debt is maintainable by the drawer of a bill against the acceptor, where the bill is payable to the drawer or his order, and is expressed to be for *value received*.

Priddy v. Henbrey, 1 Barn. & C. 674.]

¶ The action of debt held to be maintainable by the payee against the maker of a note, as well as by the drawer of a bill against the acceptor, although the words "value received" or the consideration, are not expressed on the face of the instrument.

Hatch v. Trayes, 3 Perr. & D. (2 B.) 408; and 11 Ad. & Ell. 702; and see Sison v. Kidman, 1 Dowl. N. S. (P. C.) 493.

And debt is maintainable on a bill by endorsee against his immediate endorser, by reason of the privity between the parties.

Watkins v. Wake, 7 Mees. & W. (Ex.) 488; and see Stratton v. Hill, 3 Price, 253.]

But though a general *indebitatus assumpsit* will not [(except under the above circumstances)] lie against the acceptor of a bill of exchange, yet if A delivers money to B to pay over to C, and gives C a bill of exchange drawn upon B, and B accepts it, C may have an *indebitatus assumpsit* against B (a) as having received money to his use, but must not declare only upon the bill of exchange accepted.

Vent. 153. (a) So, if goods delivered, Roll. Abr. 32.

{If a bill of exchange is not accepted, an action will lie upon it against the drawer or endorser, before the time when it is made payable.

Buller, 269, Bright v. Purrier; Doug. 54, Milford v. Mayor; 3 East, 481, Ballingalls v. Gloster; 3 Mass. T. Rep. 557, Watson v. Loring; 1 Day. 11, Sterry v. Robinson; 4 Johns. Rep. 144, Weldon v. Buck; 1 Bay, 468, Winthrop v. Pepoon. And as their responsibility is fixed by the protest for non-acceptance, it is not necessary to lay in the declaration a protest for non-payment. 3 Johns. Rep. 202, Mason v. Franklin; and though the demand and protest for non-payment were a day too late, the holder may recover. 5 Johns. Rep. 375, Miller v. Hackley.]

As to the manner of declaring on a bill of exchange, this is said to have varied, the declaration in some cases being general, sometimes special and laid with an express promise, and at other times without; but it seems to be now settled, that the custom of merchants concerning bills of exchange being part of the common law, of which the judges will take notice *ex officio*, it is unnecessary to set forth the custom specially in the declaration, and that it is sufficient to say, that such a person, according to the usage and custom of merchants, drew the bill.

Co. Lit. 182; 2 Inst. 404; Yelv. 136; 4 Co. 76; Cro. Car. 301; Hard. 486; Salk.

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125, pl. 2, 157, pl. 7; Lutw. 233; Carth. 83, 269; 5 Mod. 367; Show. 127; 3 Mod. 226; Ld. Raym. 175, 281, 575, 759, 774; 10 Mod. 287.

[In stating a bill or the note, regard must be had to the legal operation of each respectively.

1 Burr. 324, 325.

It has been decided, that the legal operation of a bill or of a note, payable to a fictitious payee, is, that it is payable to the bearer; and therefore, if that decision be right, it is proper, in the statement of such a bill, to allege that the drawer thereby requested the drawee to pay so much money to the bearer; in the statement of such a note, that the maker thereby promised to pay such a sum to the bearer. Or in such a case the plaintiff may state all the special circumstances, and if the verdict correspond with them, he will be entitled to recover.

Vere v. Lewis, 3 Term B. 183; Minet v. Gibson, Ibid. 485; Collis v. Emet, 1 H. Bl. 313; [and see Gibson v. Hunter, 2 H. Bl. 187, 288; *β* Hunter v. Blodget, 2 Yeates, 480; *γ* but these cases were decided on the ground that the circumstance of the payee being a fictitious person was known to the acceptor.]

β A bill drawn in favour of an agent for a debt due to his principal, will support an action in the name of the principal, if the drawer knew of the agency.

Jordan v. Tarkington, 4 Dev. 358.*γ*

A bill or note payable to the order of a man may, in an action by him, be stated as payable to himself, for that is its legal import: or it may be stated in the very words of it, with an averment that he made no order.(*a*)

[(*a*) It is not necessary to aver that he made no order, for no such order appearing, it must be presumed he made none. Smith v. M'Clure, 5 East, 476.] *β* Where a promissory note was made payable, "to the cashier of the Commercial Bank or his order," and the consideration proceeded from the bank, it was held, that an action on the note might be maintained in the name of the bank as the promisee. Commercial Bank v. French, 21 Pick. 486.*γ*

If a note purport to be given by two, and be signed only by one, a declaration generally, as on a note by that one who signed it, will be good; for the legal operation of such a note is, that he who signed it promised to pay.

Semo, 1 Burr. 323.

On a note to pay jointly and severally, a declaration against one in the terms of the note will be good.

Burchell v. Slocock, 2 Ld. Raym. 1545.

Where a note is given by two, to pay jointly or severally, the payee may sue both or either; if he sue both, he may declare on the note in the words of it jointly or severally: but if he sue either of them singly, it was formerly held, that he could not declare in that way, but that he must state the note as given only by one, and that the joint or several note would be good evidence to support such a declaration.

Butler v. Malissey, Stra. 76; Neale v. Ovington, 2 Ld. Raym. 1544; 2 Stra. 819.

But the doctrine in the latter case has been since overruled; and it is now held, that in an action on a joint or several promissory note, against one, a declaration that he and another made their promissory note, by which they jointly or severally promised to pay, is good; for if or must be understood as a disjunctive, the election, whether the note shall be joint or several, is in the person to whom it is given, and by suing one he shows his election to consider it as a several note: but in this case, the true construction of

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the word *or* is, that it is synonymous with *and*. They both promise that *they* or *one* of them shall pay; therefore the liability is on *both* and on *each*. The nature of the transaction forces this construction.

Rees v. Abbott, Cowp. 832; ¶and see Chit. on Bills, 338, 339, (7th ed.)¶

And if the note had been joint only, and it had been stated as a several one, no advantage could have been taken of this but by a plea in abatement.

Rees v. Abbott, Cowp. 832, by Buller, J.

¶And if one of several makers of a promissory note be an infant, he should not be sued, nor should the declaration state that he was a party.

Burgess v. Merrill, 4 Taunt. 468.¶

Where the payment of a bill or note is limited at a certain time after the date, it must be stated as being made on the day of the date, that it may appear on the face of the declaration at what time it became due; if the bill have no date, as on the day when it issued, or the first day the plaintiff had knowledge of its existence; for an instrument not dated must be considered as dated at the time of the delivery.(a)

1 Stra. 22. ¶(a) See Co. Lit. 46 b; 4 Barn. & C. 908. It is no legal objection to a bill that it is dated on a Sunday. *Drury v. De Fontaine*, 1 Taunt. 131; ¶2 Ld. Raym. 1082.

But in stating the bill or note it is not necessary to allege that it bore date, though that be generally done; it is sufficient that the date appear by implication, which it does from the allegation, that on such a day the drawer made the bill or note.

2 Show. 422; {3 Bos. & Pul. 173, *Hague v. French*, S. P.}

In stating the drawing of a bill or note, it is unnecessary to say that the drawer subscribed it with his own handwriting, though that is generally done,(b) the allegation that he made his bill of exchange or promissory note, and, in the case of the former, that he directed the bill to the drawee, by which he requested him to pay, and in the case of the latter, that by such note he promised to pay, sufficiently implies that his name was somewhere on the instrument, and that he, or somebody by his authority, wrote it; otherwise it could not with propriety be said that he requested in the one case, or promised in the other.

Ereskine v. Murray, 2 Ld. Raym. 1542, 1543; *Taylor v. Dobbins*, 1 Stra. 399; 2 Ld. Raym. 1543; *Elliot v. Cooper*, 2 Ld. Raym. 1376. ¶(b) In a count upon a bill, these words are now always omitted; as to the danger of using them, see *Helmley v. Loader*, 2 Camp. 450; *Levy v. Wilson*, 5 Esp. Ca. 180; *Jones v. Mars*, 2 Camp. 305.¶

{It is not necessary to aver in the declaration that the drawer *delivered* the bill; it is sufficient to state that he *made* it. The delivery of the bill is included in that allegation.

7 Term, 596, *Churchill v. Gardner*.}

If the bill was in fact drawn by a servant, by the authority of a master, it is sufficient to state it as drawn by the master himself, unless the subscription be alleged, and then it must be stated according to the truth of the case, that the servant, by the authority of his master, drew and subscribed the bill on his master's account.

Vide 12 Mod. 346; ¶and see 2 Chit. on Plead. (4th ed.) 150.¶

The same observations apply to the case of an endorsement or acceptance by the servant, by the authority, and on the account of his master.(c)

Vide 12 Mod. 564. ¶(c) But in the case of an acceptance by an agent, it must be

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shown that he was legally authorized by the principal. *Johnson v. Mason*, 1 Esp. Ca. 90.¶

Where partners are concerned in the drawing, negotiating, or accepting of a bill or note, the usual way of introducing the partnership is to mention it by way of inducement, and to state that one of them, according to the custom of merchants, subscribed, accepted, or endorsed the bill for the partnership account: but the allusion to the custom is not absolutely necessary; nor is it absolutely necessary that it should be directly charged that the partner acting for the rest subscribed, accepted, or endorsed for the partnership; it is sufficient if, on the whole, it appear to have been so.(a)

Vide *Morg. Prec.* 43; ¶*Meux v. Humphreys*, 8 Term R. 25; ¶ 2 *Ld. Raym.* 1484; ¶(a) In *Mason v. Rumsey*, 1 Camp. 384, it was determined that a bill drawn upon a firm, and accepted by one partner only in his name, will bind the firm.¶ β A bill drawn by one of a firm in the name of the partnership, but expressed to be "surety" for another drawer, binds the partner only who signed as drawer, if the holder knows the manner in which the bill was drawn; and the word "surety" is sufficient to put the burden of proof on the holder to show that the drawing was with the assent of all the partners. *Boyd v. Plumb*, 7 Wend. 309.γ

{A declaration averring that the defendants (who are partners) made or endorsed a note, is supported by evidence that the name of the firm was subscribed or endorsed by one of the partners; for that is the legal effect of such subscription or endorsement.

1 *Cain. 199*, *Manhattan Co. v. Ledyard*. See 2 *Cain. 368*, *Kane v. Scofield*.}

Where a bill is drawn in sets, and the action is brought on the first, the usual way of stating the request to the drawee is, "that he requested him to pay that first of exchange (second and third not paid), following the very form of the bill;" and then it is not necessary, in the subsequent part of the declaration, to aver that the second and third were not paid, for if either of them was paid that would be a sufficient defence at the trial.

Essington v. East, 2 *Ld. Raym.* 810; 1 *Salk.* 130; *Wegerslofe v. Keene*, 1 *Stra.* 224. ¶See *Chit. on Bills*, (7th ed.) 507, note (1).¶ β The drawer was held liable on the second of a set of exchange protested, though the drawee had accepted and paid the first on a forged endorsement. *Depau v. Browne, Harper*, 251.γ

In an action against the acceptor, it must be alleged that he accepted the bill, for the acceptance is the foundation of the action; but the manner of acceptance need not be alleged.(b)

· *Ereskine v. Murray*, 2 *Stra.* 817; 2 *Ld. Raym.* 1542. {Vide 5 *East*, 476, *Smith v. McClure*.} ¶(b) If the acceptance be conditional, it must be declared on specially, with an averment that the condition has been performed. *Langston v. Corney*, 4 *Camp.* 176; *Swan v. Cox*, 1 *Marsh.* 176.¶

And if the acceptance be alleged generally, without any specification of time, evidence of acceptance after time of payment will maintain the declaration, though the acceptance be alleged to have been according to the tenor and effect of the bill, for this shall be construed as a general promise to pay the money, and the words, "according to the tenor and effect of the bill," shall be rejected as surplusage; but if the acceptance be alleged to have been before the time of payment, perhaps evidence of an acceptance after will not do.

1 *Ld. Raym.* 364, 365, 574, 575; 1 *Salk.* 127, 129; *Carth.* 459; ¶*Wynne v. Raikes*, 3 *East*, 521; *Forman v. Jacob*, 1 *Stark.* 45.¶

¶It was formerly held in actions against the acceptors of bills of exchange, where a particular place for payment was pointed out in the body of the bill, that it was necessary to allege and prove presentment at that place;(c) but

(M) Bills of Exchange, &c. (*Proceedings, Evidence, &c.*)

in a recent case, (d) where the declaration stated the bill of exchange to have been drawn payable to the order of the drawer in London, and accepted by the defendant at London, according to the usage of merchants, it was decided that averment and proof of presentment in London, or of excuse for non-presentment in London, were unnecessary, since the case fell within the new act, 1 & 2 G. 4, c. 78.

(c) *Hodge v. Fillis*, 3 Camp. 463; *Bayley on Bills*, (4th ed.) 25. ¶ But see *Foden v. Sharp*, 4 Johns. 183; *Wolcott v. Santwoord*, 17 Johns. 248. It is for the defendant to show that no such demand was made; he not being liable unless it were made. Vide *Piquet v. Curtis*, 1 Sumner, 478; *Wallace v. McConnell*, 13 Pet. 136. In *Covington v. Comstock*, 14 Pet. 43, it was held, that to maintain an action against the drawer or endorser of a promissory note or bill of exchange, payable at a particular place, it is not necessary to aver in the declaration, that the note when due was presented at the place of payment, and was not paid; but the place of payment is a material part of the description of the note, and must be set out in the declaration. (d) *Selby v. Eden*, 3 Bing. 611; and see a similar decision in *K. B. Fayle v. Bird*, 6 Barn. & C. 531.]

In an action against the drawer or endorser of a bill, or against the endorser of a note, it is absolutely necessary to state a demand of payment from the acceptor of the bill or the maker of the note, (a) and due notice of refusal given to the party against whom the action is brought; for these circumstances are absolutely necessary to entitle the plaintiff to maintain his action; and a verdict will help him on a writ of error.

Rushton v. Aspinall, Dougl. 654. {Evidence that the maker of a note could not be found is sufficient to support an averment that the note was presented and payment refused. 2 Cain. 121, *Stewart v. Eden*.} [¶ *Esdaile v. Sowerby*, 11 East, 117; *Bowes v. Howe*, 16 East, 115; *S. C.* 5 Taunt. 30. ¶ *Ribble v. Jefferson*, 5 Halet. 139; *Baker v. Gallagher*, 1 Wash. C. C. 461. And the precise time of presentment for payment must be alleged; though a verdict will cure the defect. *Hall v. Crandall*, Kirby, 402. And demand of payment at the counting-room of acceptor, of his clerk, was held sufficient, without showing any special authority given the clerk in regard to such matters by his principal. *Draper v. Clemens*, 4 Missouri, 59. Where the maker of a note has removed before it falls due, and his residence cannot be ascertained by reasonable diligence, if it be necessary to make a demand, it may be made at his former residence. *Central Bank v. Allen*, 4 Shipley, 41. After presentment and non-acceptance of a bill of exchange, and due notice given, it is not necessary that it should be presented for payment. *Bank of Rochester v. Gray*, 2 Hill, 227. (a) Since the stat. 1 & 2 G. 4, c. 78, to make a bill of exchange payable at a particular place only, the acceptance should run thus:—"Accepted, payable at, &c., only, and not otherwise or elsewhere."]

¶ But on the principle that the plaintiff should not state more of the bill than is essential to his title, it is not necessary, in an action against the drawer or endorser of a bill, to state that the drawee accepted it; if, however, it be so stated, as the averment is unnecessary, it need not be proved.

Tanner v. Bean, 4 Barn. & C. 312, overruling *Jones v. Morgan*, 2 Campb. 474.]

Due notice of the dishonour of a foreign bill can only be by protest, yet the omitting to allege a protest in the declaration is only matter of form; notice being alleged generally, it shall be presumed to have been given with all the necessary formalities; and if these be not proved at the trial, the plaintiff cannot recover.

Salomons v. Stavelly, B. R. M. 24 G. 3, Dougl. 684, in the notes. ¶ If a declaration allege that the defendant had notice of the protest of a bill, without stating that the bill was presented to him protested, it is sufficient to maintain the action. *Proudfit v. Murray*, 1 Call, 394. The protest on the bill is *prima facie* evidence of the facts of demand, &c. *Moore v. Clements*, 4 Porter, 227.]

It is not necessary, in an action against an endorser, to state that the endorsee demanded the money of the drawer of a bill, or the first endorser of

(M) Bills of Exchange, &c. (*Proceedings, Evidence, &c.*)

a note, because such demand is not necessary to be made in order to complete the title of the endorsee.

Whether the drawer of a bill, or the endorser of a bill or of a note, receiving the bill or the note in the regular course of negotiation before it has become due, can maintain an action on it, against the acceptor or maker, in the character of endorsee, seems undecided: that such actions have been brought, has been incidentally said from the bench; but the only case in which it is directly held that the drawer may maintain an action in the character of endorsee, is no authority to establish this point: for there it appears that the bill was protested for non-payment before the endorsement; and a more recent case, determined on principle, clearly shows that a drawer or endorser cannot maintain an action against the acceptor in the character of endorsee, where the endorsement is after the refusal of payment; because, when a bill is returned unpaid, either on the drawer or endorser, its negotiability is at an end.

Per Ashhurst, J., Tr. 14 G. 3, Louviere v. Laubray, 10 Mod. 36; Beck v. Robley, Tr. 14 G. 3, B. R. 1 H. Bl. 89, in the notes. ¶ If an endorser comes into possession of the bill again, he shall, *prima facie*, be regarded the *bond fide* holder, though there be endorsements in full prior to the one to him, without showing any receipt or endorsement back by either of the prior endorsees. *Dugan v. United States, 3 Wheat. 178; Picquet v. Curtis, 1 Sumner, 480.* ¶ See *Bishop v. Hayward, 4 Term R. 470; Bayley, 262.* ¶

The action, therefore, in which the drawer or endorser, after payment of the money in default of the acceptor, may recover, the first against the acceptor, and the latter against any of the preceding parties, must be brought in their original capacity as drawer or endorser, and not as endorsee.

Vide Symonds v. Parminster, 1 Wils. 185. Vide Morg. Prec. 43, 44, 50; Cowley v. Dunlop, 7 Term R. 571; Bosanquet v. Dudman, 1 Stark. Ca. 3. ¶ Where the endorsee of a bill of exchange, whether as agent or owner, returns it after protest to the last endorser, the latter may sue upon it in his own name. *Jacob Barker v. United States, 1 Paine's C. C. R. 156.* ¶

{ Where the payee has once *specially* endorsed the bill, the acceptor is entirely discharged as to him, unless he becomes again entitled to receive the money by an actual payment to the endorsee. In an action against the acceptor, he must prove such payment; and the possession {1} of the bill and protest is not sufficient evidence of it.

2 Dall. 144, *Georget v. M'Carty*. {1} *Vide 1 Dall. 193, Morris v. Foreman, cited 2 Dall. 147.*

A promissory note or bill of exchange, being once paid, ceases to be negotiable: and a subsequent endorsee cannot maintain an action on it.

3 Mass. T. Rep. 556, *Blake v. Sewell*. }

In this action, after stating the drawing of the bill, the delivery, the necessary endorsements, the presentment for acceptance, and the acceptance or refusal to accept, it must be further stated, that at the proper time it was presented to the acceptor for payment, who refused, or that the acceptor could not be found; and if on a foreign bill, a protest for non-payment may be stated; then that it was returned to the plaintiff, and that the defendant had notice of the premises.

2 Show. 180.

It may also be stated, that the plaintiff paid the contents of the bill, and, in the case of a protest, the costs, interest, and damages arising from the

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delay; but this does not seem absolutely necessary; that the bill was returned to the plaintiff implies payment by him.

1 Wils. 185. Vide Morg. Prec. 44.

{In an action on a promissory note by the endorsee against the maker, notice of the endorsement need not be averred.

1 Bos. & Pul. 625, Reynolds v. Davies.}

¶In an action upon a bill with several endorsements, it is sufficient for the plaintiff, who has paid the bill under protest for the honour of one of the endorsers, to state that he paid the bill according to the usage and custom of merchants, without stating that he had paid it to the last endorsee.

Cox v. Earle, 3 Barn. & A. 430.¶

One who has endorsed a bill or note cannot, in general, maintain an action on a re-endorsement to him, against the party to whom he endorsed it.

Bishop v. Hayward, 4 Term R. 470.

It is not necessary, in any action on a bill of exchange or promissory note, to state an express promise by the defendant: the law implies a promise where the party is liable; and therefore it is sufficient, after stating the circumstances, to say, that by these he became liable to pay.

Starkey v. Cheeseman, 1 Ld. Raym. 538; 1 Salk. 198; Carth. 409. ¶The payees of a promissory note, in common form by a contract in writing of the same date as the note, agreed to take certain goods of the promisor, and apply what they could get for them in market on such note. It was held, in an action by the payees on such note, that the declaration need not set out such separate contract. Sexton v. Wood, 17 Pick. 110.¶

But it is usual to allege an express promise, after stating the liability, that no exception may be taken to the addition of other counts in *assumpsit*, which are usually added; for it is said, that where the declaration was upon the custom, and likewise on an *indebitatus assumpsit*, the judgment was arrested, which could not have been the case had an express promise been added to the count on the custom, because it is an established rule in pleading, that wherever the same plea may be pleaded, and the same judgment given on different counts, they may be joined in the same declaration.

1 Vent. 153. Vide 1 Salk. 24; 1 Term R. 276.

{If an endorser die before the note becomes due, the promise to pay must, in an action against his executors, be stated to have been made by them. The holder cannot recover upon a count laying the promise to have been made by the endorser in his lifetime.

2 Cain. 121, Stewart v. Eden.}

Instead of bringing an action on the custom or on the statute, the plaintiff may in many cases use a bill or note only as evidence in another action; and where the instrument wants some of the requisites to form a good bill or note, the only use he can make of it is to give it in evidence; or if the count on the instrument be defective, he may give it in evidence, in support of some of the other counts for money had and received, or money lent and advanced, according to the circumstances of the transaction.

Tatlook v. Harris, 3 Term R. 174. ¶See Alves v. Hodgson, 7 Term R. 241; Tyte v. Jones, 1 East, 58, n. (a); Wilson v. Kennedy, 1 Esp. N. P. C. 245; and see Selw. N. P. 6th ed. p. 377, n. (62).¶

A bill is presumptive evidence of money lent by the payee to the drawer, and a note of money lent by the payee to the maker, and both, consequently,

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of money had and received to the use of the holder, whether they be payable to the bearer, or to the order of the payee.

Vide *Grant v. Vaughan*, 3 Burr. 1516; ||*Smith v. Kendall*, 6 Term R. 124; *Carr v. Shaw*, B. R. Hil. 39 G. 3, Chit. on Bills, 327, n. (e), 6th ed. ||

||And also of money paid by the holder to the use of the drawer or maker.

An acceptance also is *prima facie* evidence of money had and received by the acceptor to the use of the holder, and of money paid by the holder to the use of the acceptor, and an endorsement of money lent by the endorsee to the endorser.

Tatlock v. Harris, 3 Term R. 174; *Vere v. Lewis*, Ibid. 182; *Thompson v. Morgan*, 3 Camp. 101; *Bayley*, 288, (4th ed.)

He who transfers a bill or note without endorsement, gives no additional credit to the instrument, and therefore cannot be sued on the instrument itself; nor is he liable to answer in any species of action to any holder but him to whom he immediately transferred it, and to him only for the consideration on which it was given, whether for work and labour, goods sold and delivered, money lent and advanced, or any other legal consideration.

But if the party who took the bill or note did not use due diligence to obtain payment from the acceptor or maker, nor give due notice of their default to the party from whom he received it; the latter may either plead or give in evidence, the bill or note, to an action on the original consideration.

Chamberlyne v. Delarive, 2 Wils. 353; ||and see *Beeching v. —*, Holt, N. P. C. 313; *Camidge v. Allenby*, 6 Barn. & C. 373. ||

The holder of the bill or note may sue all the parties who are liable to pay the money, either at the same time or in succession; and he may recover judgment against all, if satisfaction be not made by the payment of the money before judgment obtained against all; and proceedings will not be stayed in any one action, but on payment of the debt and costs in that action, and the costs in all the others in which he has not obtained judgment.(a)

Vide *Golding v. Grace*, 2 Bl. Rep. 749. ||(a) Where separate actions are brought against the acceptor, the drawer, and the endorsers, at the same time, the practice is for the court to stay the proceedings in the action against the drawer, or any one of the endorsers, upon payment of the amount of the bill, and the costs of that particular action; but the action against the acceptor will only be stayed on the terms of his paying the costs in all the actions, he being the original defaulter. *Smith v. Woodcock*, 4 Term R. 691. If, however, the acceptor suffer judgment to pass against him by default, he can only be charged with the costs of the particular action against himself. *The King v. the Sheriffs of London*, 2 Barn. & A. 192; and see Chit. on Bills, 368, 369. ||

But though he may have judgment against all, yet he can recover but one satisfaction. But though he be paid by one, he may sue out execution for the costs {} in the several actions against the others.

2 Vesey, 115. {} 2 Dall. 115, *Tarin v. Morris*; acc. *contra*, 2 Mass. T. Rep. 171, *Gilmore v. Carr*. }

And if he have recovered judgment in more than one action, a tender of the principal recovered in one, and the costs in all the rest, will prevent him from taking out execution; and it will be considered as a contempt of the court, if he take out execution against more than one.

Windham v. Wither; *Idem v. Trull*, 1 Stra. 515.

Macdonald drew a bill of Exchange for 20*l.* on Bovington, who accepted it; the bill afterwards came into the hands of Thompson, who recovered judgment against Bovington, and charged him in execution. Bovington having obtained his discharge under the Lord's act in that suit, Thompson sued Macdonald the drawer, and recovered the amount of the bill, on which

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Macdonald sued Bovington on his acceptance, and charged him in execution. On a rule to discharge Bovington out of custody, it was contended, that he had satisfied the debt, by being charged in execution at the suit of Thompson, and that he was not liable to be sued again for the same sum. But the court said, that nothing could be more clear than that this was not a satisfaction of the debt as between these parties, though it was as between the defendant and Thompson; that to the holder it was a mere *formal satisfaction*, and not like actual payment; that the present plaintiff, having been obliged to pay the amount of the bill since the defendant was charged in execution at the suit of Thompson, had a right to have recourse to this defendant as acceptor; for that by this payment a new cause of action arose against the defendant, without regard to what had passed in the former action.

Macdonald v. Bovington, 4 Term Rep. 825.

The plea generally pleaded to this action is that of *non assumpsit*: but the defendant may, if the truth will warrant him, plead *non assumpsit infra sex annos*; for by statute 21 Jac. 1, c. 16, actions on the case, except upon accounts between merchants, must be brought within six years; and by the express provision of the statute of Queen Anne, § 2, all actions on promissory notes must be brought within the same time as is limited by the statute of James, with respect to actions on the case.

But an acknowledgment of the debt, or a promise to pay, made within six years of the commencement of the action, will take the case out of the statute.

[See tit. *Limitation of Actions*.] § The endorsee of a witnessed promissory note may maintain an action thereon for his own use, in the name of the payee, against the maker, after the expiration of six years from the time when the cause of action accrued, if such action is brought with the consent of the payee, or he makes no objection thereto. Hodges v. Holland, 19 Pick. 43. *g*

§ In a suit on a bill or check, payable on demand, or where no time of payment is expressed, it is no defence that the action was commenced immediately, no grace being allowed on such bill.

Sommerville v. Williams, 1 Stew. 484. *g*

To an action on the case on a bill of exchange against the defendant as acceptor, he pleaded that after acceptance he gave a bond in discharge of it; it was held that this plea was bad, because it amounted to the general issue; for the debt on the bill being extinguished by the bond, the defendant ought to have pleaded *non assumpsit*, and to have given the bond in evidence.

8 W. & M. Mod. 314.

§ If the holder of a bill discharge a party who is liable to pay it, he thereby discharges all other parties whose liability was subsequent.

Sargent v. Appleton, 6 Mass. 85. But this effect is not produced by the holder's discharging a party who would not be liable to the other parties, though prior to them. Ibid. Where the discharge of a drawer or endorser is not express, but by implication from facts, the jury are to decide whether the party is discharged, per Chase, J., 1 Cranch, 200, note. As to what will operate as a discharge, vide Henry v. Donnaghy, Addis. 39; Bogart v. Nevins, 6 S. & R. 361. *After*, Martin v. Mechanics' Bank, &c., 6 Har. & J. 235; Hurd v. Little, 12 Mass. 502.

The drawer of a bill, when sued by the payee, may prove in defence that he was merely an agent, and not to be held responsible; and to prove this, he need not show a special agreement; a general understanding that he was a mere agent may be sufficient.

Miles v. O'Harra, 1 S. & R. 32.

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In a suit by the endorsee against the drawer of a bill made in this country by a Dutch agent for a sugar plantation, and on its face negotiable, the defendant cannot be permitted to prove a custom of Dutch merchants in Holland and the West Indies, that those who draw bills as agents are not responsible for payment.

Rhinhold v. Dertzell, 1 Yeates, 39.g

In an action against the acceptor, it is a general rule that the drawer's hand is admitted, because the acceptor is supposed to be acquainted with the writing of his correspondent, and by his acceptance he holds out to every one who shall afterwards be the holder, that the bill is truly drawn.(a)

1 Ld. Raym. 444; Jenys v. Fowler, Stra. 946; Price v. Neil, 3 Burr. 1354, 1 Bl. Rep. 390. [(a) Even though the drawer's name has been forged. See Bass v. Clive, 4 Maul. & S. 15.] # An acceptor is bound to know the drawer's handwriting, and cannot resist payment to a *bond fide* holder, though the bill be a forgery. Bank of United States v. Bank of Georgia, 10 Wheat. 333, 4 Dall. 235 n.; Levy v. Bank of United States, 1 Binn. 27, 4 Dall. 234; and it is no defence to an action by a *bond fide* holder of a bill of exchange against the acceptor, that the bill was fraudulently altered before acceptance. Ward v. Allen, 2 Metcalf, 53.

Where the plaintiff declares on an altered bill of exchange, the defendant, on a plea denying the acceptance, may show a material alteration since he accepted it.

Cock v. Coxwell, 2 C. M. & R. 291; 4 Dowl. P. C. 187; 1 Gale, 177; and see as to alteration of bills, Walter v. Cubley, 2 C. & M. 151, 4 Tyr. 87; Sloman v. Cox, 1 C. M. & R. 471, 5 Tyr. 174. And where neither the plaintiff nor defendant gave evidence as to where or by whom the alterations were made:—Held, in an action by endorsee against acceptor, that it was for the jury to say, under the circumstances, whether the bill had been altered after acceptance, and that, if they thought it had, the plaintiff could not recover. Taylor v. Mosely, 6 C. & P. 273, Lyndhurst.g

On a bill payable to bearer, there is no person through whom the holder derives his title: in an action against the acceptor, therefore, he has only to prove the handwriting of the acceptor himself.

In an action against the acceptor of a bill payable to order, the plaintiff must prove the handwriting of the payee or first endorser; and this, though it were on the bill at the time it was accepted: if his endorsement be special to "another person," or to "another, or his order," the same rule, on the same principle, applies to the endorsement of that other person, as it does to the endorsement specifically made of every subsequent endorser, between the payee and plaintiff. If the endorsement of the payee be general, the proof of his handwriting is sufficient; that of any other of the endorsers is not requisite, though all the subsequent endorsements be stated in the declaration; for by endorsing generally, the payee has shown his order to be, that the bill should be payable to any subsequent holder; and accordingly it has been shown, that any such subsequent holder may declare as the endorsee of the first endorser, or of that endorser who first endorses in blank: but in this case, in order to render the evidence correspondent to the declaration, all the subsequent names must be struck out, either at the time of the trial or before.

Smith v. Chester, 1 Term R. 654. {If the payee endorses in blank, a subsequent special endorsement may be struck out. Peake, N. P. 225, Smith v. Clarke; 4 Esp. Rep. 210, Chaters v. Bell. See 1 Dall. 193, Morris v. Foreman, cited and explained by Bradford, J., in Gogerat v. McCarty, 2 Dall. 147; also 4 Johns. Rep. 27, Thompson v. Robertson.} #Macferson v. Thoytes, Peake's Ca. 20; Bosanquet v. Anderson, 6 Esp. Ca. 43; Sedforth v. Chambers, 1 Stark. Ca. 326.} # An endorser cannot maintain a suit against a drawer or acceptor, unless he proves an assignment by the payee, either by proving his signature as assignor, or by other sufficient evidence. Blakely v. Grant, 6 Mass. 386; S. P. Harper, 257.g

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In an action by an endorsee against the drawer, the same rules obtain with respect to proof of the handwriting of the endorsers as in an action against the acceptor.(a)

Vide *Collis v. Emmett*, 1 H. Bl. 313. [(a) But the acceptor's handwriting need not be proved, even though an acceptance is averred. *Tanner v. Bean*, 4 Barn. & C. 312.]

That of the drawer himself must of course be proved: it must also be proved that the plaintiff has pursued that diligence with respect to the drawee, and given such notice to the drawer of the default of the former, as we have seen to be necessary on his part to entitle him to have recourse to the latter.(b)

[(b) The action against the drawer, it is to be observed, lies immediately upon non-acceptance. *Ballingalls v. Gloster*, 3 East, 481.] β The burden of proof is on the holder of a bill, to show that the drawer has no funds in the drawee's hands, in order to excuse want of notice. *Baxter v. Graves*, 2 Marsh. 152; *S. P. Ralston v. Bullis*, 3 Bibb, 361; *Thompson v. Stewart*, 3 Conn. 172. If the drawer be a partner of the firm on which the bill is drawn, the holder need not prove notice to the drawer that it was dishonoured. *Gowan v. Jackson*, 20 Johns. 176; *sed vide* 2 Conn. 654. In an action against the maker of a bill of exchange, an averment of notice of the demand of payment, and its refusal and protest, may be supported by evidence showing a want of funds in the hands of the acceptors. *Shirley v. Fellows, Wadsworth & Company*, 9 Port. 300.g

From the rule that, in an action against the drawer or acceptor of a bill payable to order, there must be proof of the signature of the first endorser, and of all those to whom an endorsement has been specially made, has arisen the question which has so long agitated the commercial world on the subject of endorsements, in the name of fictitious payees.

The result of the cases upon this point seems to be, that in all cases, where the holder of such a bill declares against the acceptor, as on a bill *payable to the bearer*, it is sufficient to maintain the action, that he should prove, 1. That the payee was fictitious; and, 2. That the defendant knew this at the time when he accepted the bill;—or, 1. That the payee was fictitious; and, 2. That the defendant had given a *general* authority to the drawer, &c., to draw bills upon him in the name of fictitious payees.

Minet v. Gibson, 3 Term R. 483; *Gibson v. Hunter*, 2 H. Bl. 288; [and see *Bayley on Bills*, (4th ed.) p. 27.]

In an action by an endorsee against an endorser, it is not necessary to prove either the hand of the drawer or of the acceptor, or of any endorser before him against whom the action is brought; for, by his endorsement, he virtually undertakes to every subsequent holder, that the names of the drawer, acceptor, and previous endorsers are really in the handwriting of those to whom they respectively purport to belong.

1 Ld. Raym. 174; *Stra.* 444; 2 Burr. 675; [Free v. Rawlings, Holt, C. N. P. 550; *Critchlow v. Parry*, 2 Camp. 182; *Chaters v. Bell*, 4 Esp. Ca. 210.] β *Semble*, that a subsequent endorsement of a bill by a holder does not imply a warranty by him that the former endorsement is genuine. *E. I. Comp. v. Tretton*, 5 D. & R. 214; *S. C.* 3 B. & C. 280.g

The same diligence also, with respect to the drawee, and the same notice to the defendant as endorser, must be proved in this action as in that against the drawer, every endorser being, with respect to subsequent endorsees or holders, a new drawer. But proof of a demand from the drawer, and notice of non-payment by him, is not necessary.

[See *ante*, and *Darbishire v. Parker*, 6 East, 10, 11, 12.]

Where the action is by an endorser (c) who has paid the money, proof must be given of the payment.

1 Ld. Raym. 743. [(c) An endorser having been sued by the holder, and paid the

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money to him, may recover it from the acceptor as money paid to his use. *Pownal v. Ferrand*, 6 Barn. & C. 439.]]

§ In an action by the payee, against the acceptor of a bill endorsed *specialty*, mere possession of the bill and protest is not sufficient evidence that a subsequent endorsee has received the amount of the bill.

Gorgerat v. M'Carty, 1 Yeates, 94; 2 Dall. 144. *Contra*, *Lonsdale v. Brown*, 3 Wash. C. C. 404. See also *Morris v. Foreman*, 1 Dall. 193.g

In an action by the drawer against the acceptor, it is necessary to prove the handwriting of the latter: demand of payment from him, and refusal; the return of the bill, and payment by the plaintiff: but it does not appear necessary to prove, that the acceptor had in his hands effects of the drawer; his acceptance is presumption that he had, and if he had not, the proof must lie upon himself.

Vide *Louviere v. Laubray*, 10 Mod. 36, 37; *Simmonds v. Parminter*, 1 Wils. 185. § In an action on an acceptance of an order drawn for the proceeds of goods, the payee must show the amount of the proceeds received by the acceptor. A general acceptance of such order is merely evidence that the proceeds of the goods, received after the date of the acceptance, are received to the use of the payee. *Atkinson v. Manks*, 1 Cow. 691.g

§ In a suit by the endorsee of a dishonoured bill against the acceptor, the endorser's declarations, made while he owned the bill, are evidence for the defendant.

Shirley v. Todd, 9 Greenl. 83.g

In an action on the case by the acceptor against the drawer, the plaintiff must prove the handwriting of the defendant, and payment of the money by himself, or something equivalent to that, such as his being in prison in execution.

Vide 3 Wils. 18

§ In an action by the endorser against the drawer, the letter of a person deceased, stating that he had returned the bill with protest to the plaintiff, is admissible to prove that the plaintiff had paid the bill.

Usher v. Gaither, 2 Har. & M'Hen. 457.g

In actions against the drawer or endorser, the protest is sufficient evidence that the bill is not paid; and the mere production of the protest is sufficient; it is not necessary to prove either the writing of the notary, or to give any account how the plaintiff had the protest; for that would be destructive to public commerce, and throw too great a difficulty on transactions of this kind: and beyond seas, it is said, that it is sufficient to show the court the protest without producing the bill itself; but here in general the bill itself must be shown, as well as the protest, because the whole declaration must be proved, which cannot be without giving the bill in evidence.

12 Mod. 345; § *Green v. Jackson*, 3 Shepley, 136; *Halliday v. M'Dougal*, 20 Wend. 81; § *Gilb. L. E.* 118; § 2 *Stark. on Ev.* 266.]] § The protest itself, or a copy from the notary's books, is the only evidence that a bill was protested, unless it be shown that the original and the books are lost. *Chase v. Taylor*, 4 Harr. & J. 54. If a notary testify that it is his usual practice to send written notice of protest by post on the evening of the day a bill is dishonoured, to the endorser or drawer, and that he believes he gave such notice to the endorser, in the case in question, this is *prima facie* evidence to support the averment of due proof to the endorser. *Miller v. Huckley*, 5 Johns. 375. The notarial book of a deceased notary is evidence of the facts it states respecting protest, notice, &c. *Bank v. Cooper*, 1 Harring. 10; *Homes v. Smith*, 4 Shipley, 181. The contents of a letter directed to an endorser at his residence, giving him notice of the dishonour of the bill, may be proved by parol without notice to produce the original. *Faribault v. Ely*, 2 Dev. 67. And see *Offit v. Vick*, *Walker*, 99, *sed qu.* And see further as to what is admissible in evidence to prove notice to endorser, *Washington*

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Bank v. Prescott, 30 Pick. 339. But the certificate of a notary who has protested a foreign bill of exchange, stating that he notified the endorser, cannot be received as evidence of such notice in whatever mode the certificate may be authenticated. *Bank of Rochester v. Gray*, 2 Hill, 237. Bills of exchange payable out of the state are to be considered as foreign bills, and the ordinary notarial certificate is evidence of demand and notice. *Warren v. Coombs*, 20 Maine, 175. *Gilb. L. E.* 119. § In an action against the drawer of a protested bill, the bill must be produced, or be proved to be lost, or in a situation not to be brought against the defendant again. *Palmer v. Blight*, 2 Wash. C. C. 96. A duplicate protest of a bill may be given in evidence without producing the original bill, if it be shown that the bill was lost after protest. *Usher v. Gaither*, 2 Har. & M'Hen. 457. See also *Anderson v. Robson*, 2 Bay, 495. The plaintiffs in an action on the second set of a foreign bill of exchange, which was protested for non-acceptance, with the protests thereto attached, can recover, without producing the first of the same set, or accounting for its non-production. *Downes v. Church*, 13 Pet. 205.

But in an action against the drawer of a bill which was lost, it was held by *Holt, C. J.*, that proof of the defendant's having owned that he had made the bill was sufficient.

Hart v. King, 12 Mod. 309. ¶ But it is now settled that an action cannot be maintained on a lost bill. *Hansard v. Robinson*, 7 Barn. & C. 90. § A recovery may be had against the acceptor of a lost bill; but the plaintiff must indemnify the defendant; and the indemnity must be given or tendered before action brought. *Mecker v. Jackson*, 3 Yeates, 442; *Snyder v. Wolfly*, 8 S. & R. 331. If a negotiable note, endorsed in blank by the payee, be lost by the endorsee, and he afterwards assigns to another his right thereto, the assignee cannot maintain an action at law in his own name upon such lost note. *Willis v. Cresey*, 5 Shepley, 9. In order to charge the endorser of a lost negotiable promissory note, the holder must tender an indemnity both to him and the maker at the time of demand and notice; and should the endorser sustain any injury by reason of the holder's neglect in this particular, it will be a good defence at the trial. *Smith et al. v. W. & J. J. Rockwell*, 2 Hill, 482. A court of equity will decree the payment of a lost bill of exchange on a sufficient indemnity being given, though there may be a remedy at law. *Davies v. Dodd*, 1 Wils. Exch. 110.

With respect to a promissory note, the same rules, of what is necessary to be proved, apply as in a bill of exchange; the maker being in the place of the acceptor; the payee, after endorsement, in that of the drawer; and the endorsers and endorsees the same in each.

In general, direct proof is required of the signature of those parties whose endorsement must be proved; but with respect to the party himself against whom the action is brought, proof of other circumstances may be sufficient to supply the place of actual proof of his signature; particularly confession. Thus, where the defendant was sued as endorser of a note, and it was proved that a person to whom application had been made to discount it sent it to the defendant, who looked on it and said it was his hand, and that the note, which had some months to run, would be paid when due; the Chief Justice would not permit the defendant to show forgery, by similitude of hands, because that would tend to destroy all negotiation of bills and notes. But he seemed inclined to have admitted actual proof of forgery, if the defendant could have given it; but this he was unable to do, and the plaintiff had a verdict.

Ld. Hardwicke, Cooper v. Le Blanc, 2 Str. 1051; ¶ *Leech v. Buchanan*, 4 Esp. Ca. 226.

So, where a letter was produced under the defendant's hand, in which he wrote to a friend that he had received a bill of exchange from the drawer on the acceptor, bearing date such a day, and payable to him or order six months after date, and in all these circumstances the bill agreed with the letter, though no sum was mentioned in the letter, this was thought sufficient evidence that the defendant had had the bill in question in his possession; and to show that he had endorsed it over, it was proved that he had

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said he had come to town to hasten the trial of a case brought against him on an endorsement he had made on a bill of exchange, and that in fact he had brought down this very cause by proviso.

Dale v. Lubbock, 1 Barnard. B. R. 198.

But where, in an action against any one party, proof of the signature of another is necessary to support the action against the defendant, that proof must be direct; confession of the party whose signature it purports to be, will not be sufficient evidence. Thus in an action against the drawer or acceptor of a bill, or maker of a note, a confession of an endorser that he endorsed the bill or note will not be proper proof of the endorsement.

Barnes, 436; Hemmings v. Robinson; [see, however, Maddocks v. Hankey, 2 Esp. Ca. 647.]

But where an action is brought against one, on a joint and several promissory note, signed by him and others, proof of payment by one of the others of interest and part of the principal, within six years before the action brought, will be sufficient to bind the defendant, and take the case out of the statute as to him.

Whitcomb v. Whiting, Dougl. 659; [Halliday v. Ward, 3 Camp. 32; Burleigh v. Stott, 8 Barn. & C. 36; and see tit. *Limitation of Actions.*]

β In an action on a note, if it appears on inspection to have been altered, it lies on the plaintiff to show that the alteration took place under such circumstances as will entitle him to recover.

Bishop v. Chambre, 3 C. & P. 55, Tenterden; S. C. 1 M. & M. 116. And if the plaintiff gives no account of the note, it is for the jury to say if an alteration was made after the completion of the instrument. Ibid. And see further as to alteration, Sutton v. Toomer, 7 B. & C. 416; Wright v. Inshaus, 1 Dowl. N. S. (P. C.) 802; Clifford v. Parker, 3 Sc. N. S. (C. P.) 233; Cariss v. Tattersall, 3 Sc. N. S. (C. P.) 257; Bell v. Gardner, 1 Dowl. N. S. (P. C.) 683; Kelly v. Solari, 9 Mees. & W. 54.

It is a well-settled principle, that no man who is a party to a negotiable instrument, shall be permitted by his own testimony to invalidate it.

Bank of United States v. Dunn, 6 Peters, 51. But this rule is only applicable where the instrument has actually been negotiated in the usual course of business. Park v. Smith, 4 Watts & Serg. 287. And in an action on a promissory note brought by one not entitled to be treated as a *bonâ fide* holder, the maker may defend on the ground that the note was given in consideration of land sold for the purpose of defrauding creditors; and this, though he was himself a party to the fraud. Willis v. Clark, 4 Hill, 424.g

Where a bill is accepted, or a bill or note is drawn or endorsed by one of two or more partners, on the partnership account, proof of the signature of the partner accepting, drawing, or endorsing, is sufficient to bind all the rest.

Pinkney v. Hall, 1 Salk. 196, 1 Ld. Raym. 175. Vide Carvick v. Vickery, Dougl. 653, Gilb. L. E. 117; [Shirreff v. Wilkes, 1 East, 48; Swan v. Steele, 7 East, 210; Ridley v. Taylor, 13 East, 175; Chit. on Bills, 29, 30. See tit. *Partners, ante.*] β That one of a firm has been in the habit of endorsing bills in the name of the firm, as security, is evidence from which a jury may infer his authority from the other parties so to do; and a *bonâ fide* holder may, in such case, recover of all the partners, though the articles of copartnership prohibit such endorsement. Bank, &c., v. Brooking, 2 Litt. 45.g

Where a servant has a general authority to draw, accept, or endorse bills or notes, proof of his signature is sufficient against the master; but his authority must be proved.

Subsequent assent, it seemeth, is evidence of authority.

Comb. 450; [Courteen v. Touse, 1 Camp. 43, n. (a). Neal v. Irving, Esp. C. 61; Watkins v. Vince, 2 Stark. Ca. 369; and see 2 Stark. on Ev. 58; and head *Master and Servant* and *Principal and Agent, ante.*] β Rice v. Gore, 22 Pick. 158.g

A general custom of the servant's signature, and payment by the master,

(M) Bills of Exchange, &c. (*Evidence.*)

is sufficient proof of a general authority; and a general authority will continue to bind the master till its determination be generally known. Therefore, if a servant, having authority, draw a bill of exchange in so short a time after he is dismissed, that the world cannot take notice of his being out of service; or, if he were a long time out of service, but that kept so secret that the world could not take notice of it, the bill in those cases will bind the master.

19 Mod. 346, *Anonymous v. Harrison.*

Where notice is to be given by the post, it seemeth that proof of putting the letter into the post is sufficient, that being in general all that is in the plaintiff's power to prove.

1 Barnard. B. R. 198; {2 H. Black. 509, *Saunderson v. Judge*; 7 East, 385, *Parke v. Gordon*; 5 Johns. Rep. 375, *Miller v. Hackley*;} [Scott v. Lifford, 9 East, 347, 1 Campb. 246; Smith v. Mullett, 2 Camp. 908; Hilton v. Fairclough, 2 Camp. 633; Walter v. Haynes, 1 Ry. & Moo. 149; Mann v. Moors, Ibid. 250; 2 Stark. on Evid. 260; 2 Phillips on Evid. 21.] § Notice put into the post-office, if the parties live in different places, is good. *Bussard v. Levering*, 6 Wheat. 102; *Mumm v. Baldwin*, 6 Mass. 316; *Stanton v. Blossom*, 14 Mass. 116. The certificate of a notary of the service of notice of presentment and protest, is defective, unless it specify the post-office nearest to the reputed place of residence to the party to whom the notice is given; it is not enough that it be stated that the notice was put into the post-office at the place of presentment of the note, directed to the party at a particular place, the reputed place of his residence. *Rogers v. Jackson*, 19 Wend. 383. But see *Marsh v. Barr*, Meigs, 68. §

§ Where judgment goes by default, the days of presentation and notice of protest, alleged in a declaration, are immaterial, and may be proved to be different from the alleged.

Brown v. Hull, 2 Marsh. 600. See 3 Leigh, 197. §

Where the defendant suffers judgment by default, and the plaintiff executes a writ of inquiry, it is sufficient for the latter to produce the note or bill, without any proof of the defendant's hand: this was determined so long ago as the 14th G. 2, in a case in the King's Bench, where the plaintiff having offered collateral evidence to prove the defendant's hand, the court not only held that this was sufficient, but said, that the note being set out in the declaration, was admitted by the default, and that the only use of producing it was, to see whether any money was endorsed on it as paid.

Bevis v. Lindsell, B. R. 2 Stra. 1149; *Green v. Hearne*, 3 Term Rep.; [Shepherd v. Charter, 4 Term R. 275.]

On such judgment, a writ of inquiry is not necessary, for the court, on application by the plaintiff, will, if no good reason shown to the contrary, refer it to the proper officer to ascertain the damages and costs, and calculate the interest.

Ruled Anon. B. R. Hil. 26 G. 3, *Bayley*, 67; *Rashleigh v. Salmon*, C. B. Trin. 29 G. 3, 1 H. Bl. 252; [for the cases where the court will, and will not make this reference, see *Tidd's Pract.* 619, (8th edit.)]

§ Damages and interest on a bill are to be assessed according to the laws of the place where the bill was drawn, unless it were drawn with a view to another place.

Winthrop v. Pepon, 1 Bay, 468; *Anon.* 2 Hayw. 280; *Schermerhorn v. Pelham*, C. & N. 452; *Foden v. Sharp*, 4 Johns. 183; *Hazlehurst v. Kean*, 4 Yeates, 19; *Boyce v. Edwards*, 4 Pet. 123; *Golden v. Prince*, 3 Wash. C. C. 316. If a drawer knows that money is depreciated at the place on which he draws, and conceals that fact, he is chargeable with interest from the date of the draft. *Fowl v. Todd*, 1 Bay, 177.

Where a bill was drawn in this country, payable in France, it was held

[(N) Shipping and Navigation Laws.]

to be a question for the jury, under all the circumstances of the case, whether it was intended that payment should be made in specie or in any other lawful currency of France.

Searight v. Calbraith, 4 Dall. 325.g

[(N) Of the Provisions for the Encouragement of Shipping and Navigation.

1. *What Foreign Produce must be brought Home in British Ships.*

THE various statutes lately in force relating to the customs having been repealed, and their provisions extended and consolidated by the 6 G. 4, c. 106, which as a consequence repealed the laws relating to the encouragement of British shipping and British seamen, the 6 G. 4, c. 109, intitled "An act for the encouragement of British shipping and navigation," was passed, which enacts, § 2, that masts, timber, boards, salt, pitch, tar, tallow, resin, hemp, flax, currants, raisins, figs, prunes, olive-oil, corn, or grain, pot-ashes, wine, sugar, vinegar, brandy, and tobacco, being the produce of Europe, shall not be imported into the United Kingdom to be used therein, except in British ships, or in ships of the country of which the goods are the produce, or in ships of the country from which the goods are imported.

See *Abbott on Shipping*, (5th edit.) Append. No. 8.

§ 3. And that goods, the produce of Asia, Africa, or America, shall not be imported from Europe into the United Kingdom, to be used therein, except goods, the produce of places in Asia or Africa, within the Straits of Gibraltar, or of the dominions of the Emperor of Morocco, imported from places in Europe, within the Straits of Gibraltar, goods the produce of places within the limits of the East India Company's charter, which (having been imported into Gibraltar or Malta in British ships) may be imported from Gibraltar or Malta, and bullion, diamonds, pearls, rubies, emeralds, and other jewels or precious stones.

§ 4. And goods the produce of Asia, Africa, or America shall not be imported into the United Kingdom to be used therein in foreign ships, unless they be the ships of the country in Asia, Africa, or America, of which the goods are the produce, and from which they are imported, except goods the produce of the dominions of the Grand Seigneur in Asia or Africa, which may be imported from his dominions in Europe, in ships of his dominions, raw silk and mohair yarn, the produce of Asia, which may be imported from the dominions of the Grand Seigneur in the Levant seas in ships of his dominions, and bullion.

§ 5. Provided, that all manufactured goods shall be deemed to be the produce of the country of which they are the manufacture.

§ 6. And it is further enacted, that no goods shall be imported into the United Kingdom from the islands of Guernsey, Jersey, Alderney, Sark, or Man, except in British ships. § 7. And no goods shall be exported from the United Kingdom to any British possession in Asia, Africa, or America, nor to the islands of Guernsey, Jersey, Alderney, Sark, or Man, except in British ships.

§ 8. And no goods shall be carried coastwise, from one part of the United Kingdom to another, except in British ships. § 9. Nor shall any goods be carried, except in British ships, from any of the islands of Guernsey, Jersey, Alderney, Sark, or Man, to any other of such islands; nor from one part of any such islands to another part of the same island. § 10. Nor shall goods be carried except as aforesaid from any British possession in Asia, Africa, or America, to any other of such possessions, nor from one part of

[(N) Shipping and Navigation Laws. (*Registry.*)]

any of such possessions to another part of the same. § 11. Nor shall goods be imported into any British possession in Asia, Africa, or America, in any foreign ships, unless they be ships of the country of which the goods are the produce, and from which the goods are imported.

By § 12 of the same act it is further enacted, that no ship shall be admitted to be a British ship, unless duly registered and navigated as such; and that every British registered ship (so long as the registry of such ship shall be in force, or the certificate of such registry retained for the use of such ship) shall be navigated during the whole of every voyage, (whether with a cargo or in ballast,) in every part of the world, by a master who is a British subject, and by a crew whereof three-fourths at least are British seamen; and if such ship be employed in a coasting voyage from one part of the United Kingdom to another, or on a voyage between the United Kingdom and the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from one of the said islands to another of them, or from one part of either of them to another of the same, or be employed in fishing on the coasts of the United Kingdom, or of any of the said islands, then the whole of the crew shall be British seamen.

§ 13. The statute then makes an exception in favour of vessels under fifteen tons, which are to be admitted to navigate in the rivers and upon the coasts of the United Kingdom, and its possessions abroad, without being registered; and the same provision is extended to British built vessels, under thirty tons, employed in the Newfoundland fishery.

§ 16, 17. It then specifies the qualifications necessary to constitute the master and seamen British; the scale on which the British seamen shall be proportioned to the tonnage of the vessel; and what foreigners may be declared British seamen.

2. *As to the Registering of British Vessels.*

See Abbott on Shipping, part i. chap. 2, (5th edit.)

By the 6 G. 4, c. 110, § 2, it is enacted, "That no ship or vessel shall be entitled to any of the privileges or advantages of a British registered ship, until the person or persons claiming property therein shall have caused the same to be registered in manner thereafter mentioned, and shall have obtained a certificate of such registry from the person or persons authorized to make such registry, and grant such certificate as thereafter mentioned." The form of the certificate is given in the act.

This act does not appear to differ from the repealed act, 4 G. 4, c. 41, except by the introduction of two clauses, relating to the repairs and manning of British ships, introduced to prevent the bad effects of combinations amongst shipwrights and seamen. As to the principal difference between this new act and the old registry acts, see *post*, 853.

And by § 5, it is further enacted, "That no ship or vessel shall be registered, or, having been registered, shall be deemed to be duly registered by virtue of that act, except such as are wholly of the build of the United Kingdom, or of the Isle of Man, or of the islands of Guernsey or Jersey, or of Gibraltar or Heligoland, which belong to his majesty, his heirs or successors, at the time of the building of such ships or vessels, or such ships or vessels as shall have been condemned in any Court of Admiralty as prize of war, or such ships or vessel as shall have been condemned in any competent court as forfeited for the breach of the laws made for the prevention of the slave-trade, and which shall wholly belong, and continue wholly to belong, to his majesty's subjects, duly entitled to be owners of ships or vessels registered by virtue of that act."

And lastly, by § 25, it is further enacted, "That all and every person and persons who shall apply for a certificate of the registry of any ship or vessel shall, and they are thereby required, to produce to the person or persons authorized to grant such certificate a true and full account, under the hand of the builder of such ship or vessel, of the proper denomination, and of the time when and the place where such ship or vessel was built, and also an exact account of the tonnage of such ship or vessel, together with the name of the first purchaser or purchasers thereof (which account such builder is thereby directed and required to give under his hand on the same being demanded by such person or persons so applying for a certificate as aforesaid;) and shall also make oath before the person or persons thereinbefore authorized to grant such certificate (which oath he or they is or are thereby authorized to administer,) that the ship or vessel for which such certificate is required is the same with that which is so described by the builder as aforesaid."

By § 14 & 15, no registry is to be made, or certificate granted, until an oath be taken and subscribed in the form set forth in the statute. This oath, in the case of individuals, is to be made by the owner, if only one; if two owners, and both resident within twenty miles of the place of registry, by both; if both, or either, are resident at a greater distance, by one only; if more than two owners, by the greater part, not exceeding three, if resident within twenty miles, unless a greater number shall be desirous to join in taking the oath; or by one, if all, or all except one, are resident at a greater distance; and if the required number do not attend, oath must further be made by such as do attend, that the absent are not resident within twenty miles, and have not wilfully absented themselves to avoid taking the oath, or are prevented by illness from attending. The oath to be made thus contains the name of the ship, her port, and master, the description of the ship, the name, occupation, and residence of every part-owner, with other particulars, tending to prove them to be subjects of his majesty; and concludes with a positive averment, that no foreigner, either directly or indirectly, hath any share or interest in the ship; if the ship belong to a corporate body, the oath is to be made by the secretary or other proper officer of such body; and instead of the names and descriptions of the owners, he is to state the name and description of the company or corporation to which the ship belongs.

§ 21. At the time of obtaining the certificate, a bond must be executed by the master, and such of the owners as personally attend, to be approved of and taken by the person authorized to make the registry, in a penalty varying in proportion to the burden of the ship, but never exceeding 1000*l.*; but if the master cannot attend at the time of registry, by reason of the absence of himself and the ship at some other port, a separate bond may be given by him at the port where the ship may then be, which shall be transmitted to the port where the ship is to be registered; and the two bonds shall be of the same effect as if the parties had bound themselves jointly and severally in one bond; and every such bond is to be as a security that the certificate shall not be lent, sold, or disposed of, but solely used for the service of the ship for which it is granted; and in case the ship be lost, captured, or destroyed, or otherwise prevented from returning to the port to which she belongs, or shall have forfeited the privileges of a British ship, or been condemned for illicit trading, or have been taken in execution for debt and sold accordingly, or sold to the crown, or have been registered *de*

§(N) Shipping and Navigation Laws. (*Registry.*)§

novo, the certificate, if preserved, shall be delivered up, within one month after the arrival of the master in any port in his majesty's dominions, to the collector and comptroller of some port in Great Britain or the Isle of Man, or of the British plantations, or to the governor and so forth of Guernsey and Jersey; and if any foreigner shall have purchased or become entitled to the whole or a part of the ship, the certificate must be given up at the time and place mentioned in the statute, which vary according to the different circumstances therein mentioned.

§ 29. In the case of a prize ship, or a ship condemned for breach of the laws for the prevention of the slave-trade, the owner must produce a certificate of the condemnation under the hand and seal of the judge of the court, and an account, in writing, of all the particulars contained in the form of the certificate of registry, made and subscribed by one or more skilful persons, to be appointed by the court to survey the ship, and must also make oath of the identity of the ship.

§ 32. The property in every ship, of which there are more than one owner, shall be taken and considered to be divided into sixty-four parts or shares, and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth parts or shares, and no person shall be entitled to be registered as an owner in respect of any proportion of a ship which shall not be an integral sixty-fourth part or share; and, upon the first registry, the owners who take the oath required by this act before registry be made, shall declare upon oath the number of such parts or shares held by each owner, and the same shall be so registered accordingly.

§ 34. And whenever any ship which hath been registered before the 31st December, 1823, (*viz.* the day on which the act passed in that year for the registering of vessels came into operation,) and shall not have been registered *de novo* since that day, and before the commencement of this act, (*viz.* 5th January, 1826,) shall be registered *de novo*; the number of shares held by each owner shall be registered as far as the same be practicable; and to that intent, the owners who shall take the oath required by this act before registry be made shall produce the bills of sale or other titles of themselves and of the other owners, in order that the number of such shares held by each of them may be ascertained and registered accordingly; and if the registry of such ship then in force shall be the first registry, and the shares of any of the owners shall remain the same as they were at the time of such registry, and the owners or any one of them who shall attend to take the oath required by this act before the registry be made shall be the same as were the owners or one of them who took the oath before such first registry was made, such original owner or owners, instead of producing the bills of sale, shall declare upon oath, to the best of his or their knowledge and belief, the number of shares held by him or them, or by any other original owner or owners whose proportionate property in such ship shall have remained unchanged; but if, at the time of such registry *de novo*, such owner or owners shall make oath of their inability to produce the bill or bills of sale, or to give certain account or proof of the share or shares of the other previous owners, or some or any one of them, in such case the collector and comptroller may register the ship without requiring the shares of such owners to be declared and specified.

These are some of the principal enactments of this statute; it also contains very ample provisions as to the manner in which vessels shall be

[(N) Shipping and Navigation Laws. (Quarantine.)]

admeasured, and the tonnage ascertained previous to registry; (a) for the registry *de novo* of vessels where the certificate has been lost (b) as to the number of persons who may be owners of any ship at one time; as to the officers by whom the registry is to be made; (c) and the place at which it is to be made; (d) the preservation of the name; (e) the transfer of the property, (g) and other matters, for which the reader is referred to the statute itself, and to the fifth edition of Abbott on Shipping, (h) where the provisions of the statute are correctly and luminously abstracted, and arranged under eighteen heads; and the effect of the alterations made by this new act is there considered, with reference to the cases on the old statutes.

See some slight alterations made by 7 G. 4, c. 48. (a) § 16 to 20. (b) § 35, 36. (c) § 3. (d) § 3, 11, 12, 30. (e) § 2. (g) § 31, 37, 38, 39, 40, 44, 45, 46, and 7 G. 4, c. 48, § 36. (h) 5th ed. p. 29, *et seq.*

The most important points of difference between the regulations of this new act and those of the old statutes are—that it is no longer necessary to recite the certificate of registry in a *contract* for sale of the ship, and that in a bill of sale or other instrument, intended to operate as a transfer of the property, it is sufficient to recite the principal contents of the certificate; and a provision is introduced with a view to prevent the effect of certain errors in the recital: (i) that the endorsement on the certificate is to be made by the public officers instead of the party transferring: (k) that a mortgagee or trustee for payment of debts is not to be deemed an owner, (l) nor his interest to be affected by the subsequent bankruptcy of the mortgagor or assignor on the ground of reputed ownership: (m) that the specific share of any part-owner (and which is required to be one or more sixty-fourth parts) must be mentioned in the registry, except in case of partners in trade, whose interest is to be considered as partnership property: (n) that only thirty-two persons shall be entitled to be legal owners, as tenants in common, with a provision for the equitable title of minors, legatees, creditors, &c.; and a provision also for joint-stock companies: (o) that more extensive powers are given for a registry *de novo*, and that copies of affidavits and entries in the books of the custom-house are made evidence, in order to prevent the necessity of the attendance of public officers to produce the originals. (p)

(i) § 36. See *Westerdale v. Dale*, 7 Term R. 306; *Rollerston v. Smith*, 4 Ibid. 161; *Cappadoce v. Condor*, 1 Bos. & Pul. 483; *Abbott*, 51. (k) § 37. See *Moss v. Charnock*, 2 East, 399; *Moss v. Mills*, 5 East, 144; *Heath v. Hubbard*, 4 East, 110; *Bloxam v. Hubbard*, 5 East, 107; *Hubbard v. Johnston*, 3 Taunt. 177; *Hayton v. Jackson*, 8 East, 511; *Palmer v. Moxon*, 2 Maul & S. 43; *Richardson v. Campbell*, 5 Barn. & A. 196; *Hodgson v. Brown*, 2 Barn. & A. 427. How far the difficulties arising in the above cases may be removed by the new enactments, see *Abbott*, p. 51, 52. Under the old acts it was decided that the omission of the public officer did not invalidate a transfer of the property. *Ratchford v. Meadows*, 3 Esp. Ca. 69; *Heath v. Hubbard*, 4 East, 110; *Underwood v. Miller*, 1 Taunt. 387. The provisions of the old statutes were not confined to transfers of property to a stranger, but applied to a transfer by one part-owner to another. *Speldt v. Lechmere*, 13 Ves. 588; a decision which appears manifestly applicable to the new statute. *Abbott*, 52. A conformity to the old statutes was held requisite to the validity of a bill of sale, by way of mortgage or security. *Wilson v. Heather*, 5 Taunt. 642. (l) § 45. See *Abbott*, 53. (m) § 46. See *Hay v. Fairbairn*, 2 Barn. & A. 193; *Monkhouse v. Hay*, 4 B. Moo. 549. (n) § 32. (o) § 33. (p) § 43. See *Stokes v. Carne*, 2 Camp. 339; *Fraser v. Hopkins*, 2 Taunt. 5; *Tinkler v. Walpole*, 14 East, 236; and see, as to the effect of this new provision, *Abbott*, p. 66, (5th edit.)

3. As to the Laws of Quarantine.

- A notice of the laws of quarantine does not properly come under a head 4 C

[(N) Shipping and Navigation Laws. (*Quarantine.*)]

entitled "*Of the Provisions for the Encouragement of Shipping and Navigation*," though it relates to its regulation; a short notice is, however, necessary, if it were merely to refer the reader seeking for information to the statute on the subject.

By the 6 Geo. 4, c. 78, reciting the expediency of repealing the several laws relating to the performance of quarantine, and to make other provisions in lieu thereof, it is declared, in the first place, § 2, what vessels shall be liable to quarantine, and the regulations thereon.

By § 3, power is given to the privy council to order vessels, therein described, to go to certain places without being liable to quarantine.

And § 4 empowers the Lord-Lieutenant of Ireland to give directions by proclamation where vessels shall perform quarantine.

Sect. 8 specifies the signals which masters of vessels liable to quarantine, on meeting other vessels at sea, or being within two leagues of the United Kingdom, or Guernsey, &c., are, under a penalty for non-performance, to make. And § 9 specifies the signals they are to make when the plague or other infectious disease is on board.

By subsequent sections, penalties are imposed upon masters and pilots offending against the act. And § 14 enacts certain regulations for better ascertaining whether vessels be actually infected, or the persons on board liable to the orders touching quarantine.

By § 18, reciting "that disobedience or refractory behaviour in persons under quarantine, or liable to the performance of it, or in other persons who may have had any intercourse or communication with them, may be attended with very great danger to his majesty's subjects," certain regulations are enacted for punishing disobedience or refractory behaviour in persons under or liable to quarantine, or persons having intercourse with them. And § 19, after providing that persons quitting vessels liable to perform quarantine, &c. may be seized, specifies the proceedings to be had thereon. The act then goes on to make provision for the opening and airing of goods liable to perform quarantine, and to enact a variety of useful regulations ancillary to the performance of quarantine for which the reader is referred to the act itself. ||

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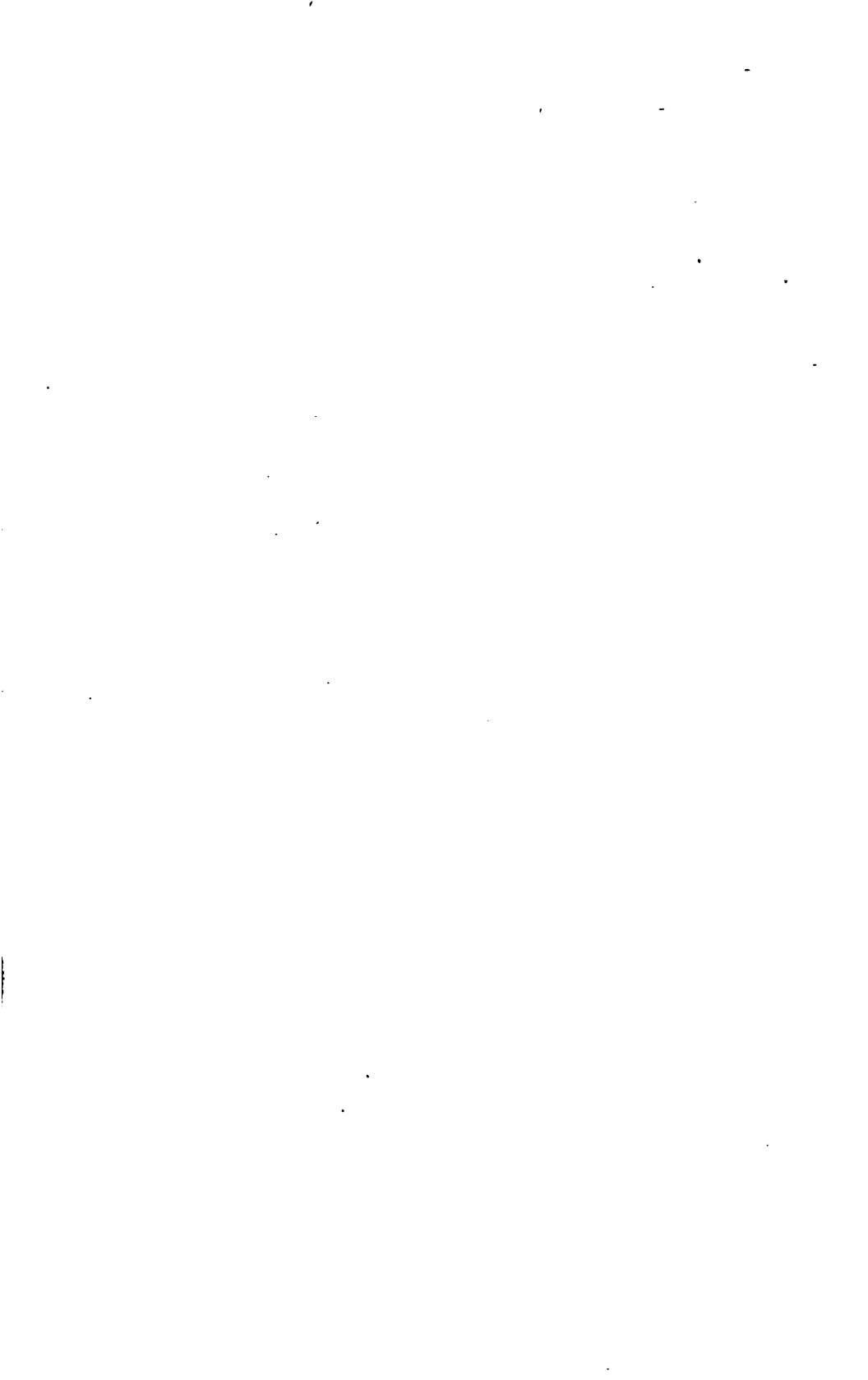
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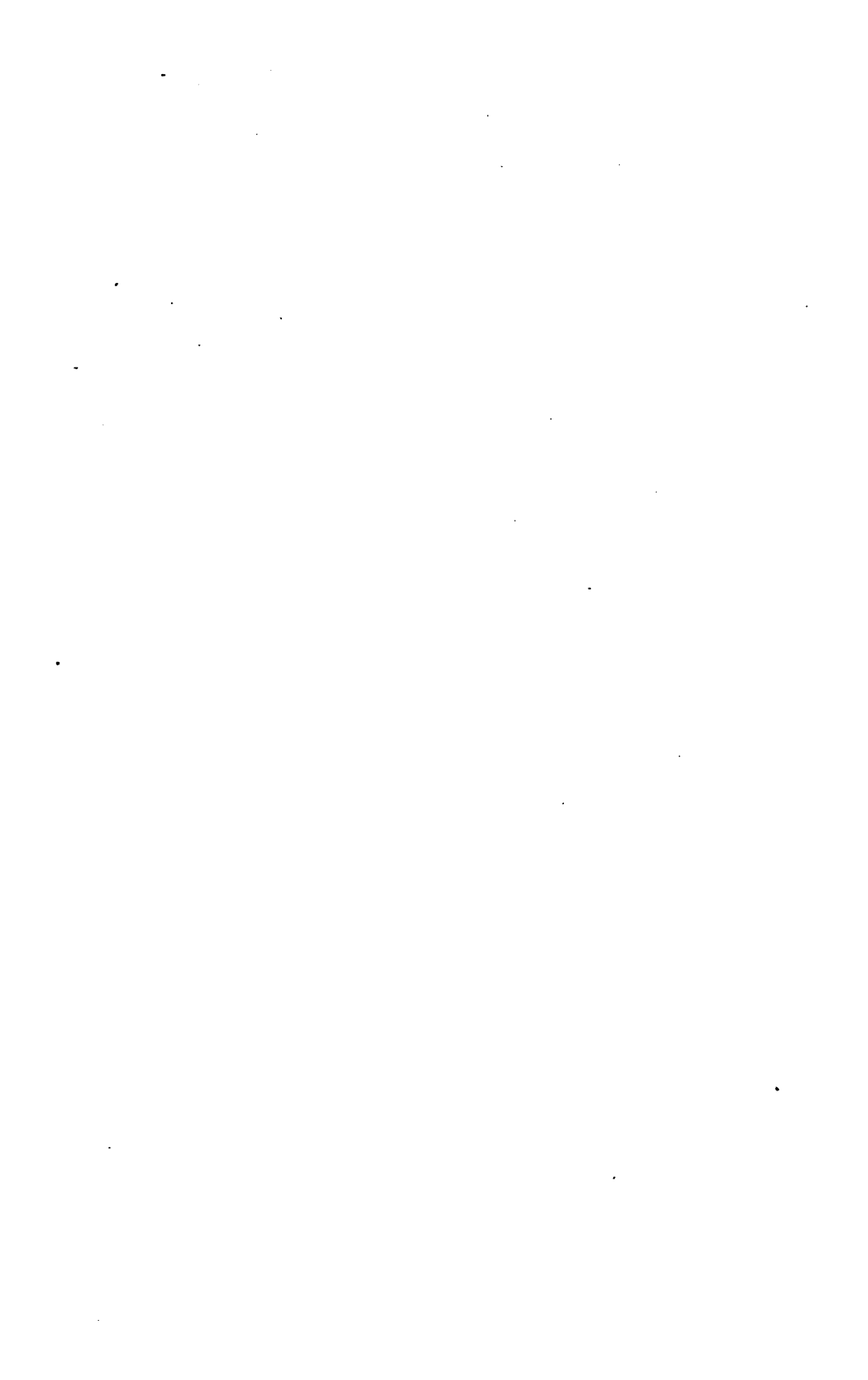
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